

**42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**  
**42 IAC 1-5-7 Prohibition against financial interest in contract; exceptions (IC 4-2-6-10.5)**  
**42 IAC 1-5-12 Use of state property**  
**42 IAC 1-5-13 Ghost employment**

FSSA's Ethics Officer sought advice to determine whether the FSSA Secretary could maintain her outside employment in the emergency room of a hospital. SEC determined that the Secretary's employment at the hospital would not create a conflict under IC 4-2-6-5.5. Specifically, the FSSA Ethics Officer indicated that the Secretary's outside employment responsibilities would not conflict with her responsibilities as the Secretary of FSSA nor would they require her recusal from matters that are critical to the performance of her state duties or require her to disclose confidential information. SEC further determined that the Secretary would not have a conflict of interests under IC 4-2-6-9 so long as she follows the screening mechanisms proposed by the Ethics Officer and does not participate in decisions or votes, or matters related to such votes and decisions, in which the hospital would have a unique financial interest in the outcome. In addition, the Secretary would not have a financial interest in a contract with a state agency, because the hospital has indicated that none of the consulting fees they will pay to the Secretary are derived from state contract funds.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

**BACKGROUND**

The Ethics Officer for the Indiana Family and Social Services Administration ("FSSA") is requesting an advisory opinion on behalf of an employee, the newly appointed Secretary of FSSA. Specifically, the Ethics Officer is requesting an opinion from the Commission to ensure that the employee's outside employment at Riley Hospital for Children ("Riley") would be permissible under the Code of Ethics.

The employee joins FSSA after serving as the Deputy Health Commissioner for the Indiana State Department of Health for two and a half years. She was also the Division Chief at Riley for four years, and prior to that she served as the Residency Program Director of Riley for nine years. She has over sixteen years of clinical experience and maintains Board Certification in Pediatrics and Emergency Medicine. She also has a Master's Degree in Public Health.

The employee would like to work a weekly shift in the pediatric emergency room at Riley while she is serving as the Secretary of FSSA in order to maintain her clinical certification and continue her personal and professional mission of providing compassionate services to children.

The employee proposes to work a weekly shift in the Riley emergency room on a consistent but alternating schedule. For example, during week one she will work in the emergency room from 10 a.m. to 7 p.m. on Tuesday. During week two, she will work from 3 p.m. to midnight on Tuesday. During week three she would be back to a shift from 10 a.m. to 7 p.m. on Tuesday,

and the pattern continues. This schedule will allow her to spend a few hours at the FSSA office on the days where her shift begins at 10 a.m., but will allow her to spend almost a full day at the FSSA office on the Tuesdays when her shift starts at 3 p.m. As an employee of the State, she will pay for her own medical malpractice insurance, licensing fees and certifications.

Riley first opened in 1924 and is the State's first hospital exclusively for children. Riley is nationally-ranked and has Indiana's only Level I Pediatric Trauma Center, Pediatric Burn Unit and Pediatric Dialysis Program. In her consulting role with Riley, the employee will not serve in a supervisory or leadership role with the hospital. Instead, the employee will serve as an independent contractor to Riley and will be paid by Riley on an hourly basis. The employee will not charge patients nor will she bill insurance. The very nature of emergency room medicine is that the patients come to you, and the receiving physicians treat patients without regard to insurance, income or even the ability to pay. The Ethics Officer believes this fact in and of itself solidifies her opinion that the employee's work in the emergency room is not inherently incompatible, and does not conflict in any relevant way, with her duties as Secretary.

The employee understands and agrees that she may not use State time to work at Riley or see patients. She anticipates easily meeting the 37.5 hour work-week requirement despite time spent seeing patients. During emergency room shifts she will be available remotely by phone and email. The Riley campus is in very close proximity to the FSSA office.

FSSA has no direct contracts with Riley. However, Riley is a related entity of Indiana University (IU) Health, and FSSA's various divisions have about 29 contracts with IU Health and related entities. One grant from FSSA's Division of Mental Health and Addiction to IU totals \$339,000 over a two-year period and is for the operation of Riley's dual diagnosis clinic for adolescents. The Ethics Officer points out that these 29 contracts are all at the division level, meaning that the Division Directors are the owners of the contracts – the employee will not be in a position to sign or negotiate these contracts. In order to avoid violating the State's ethics laws and to avoid a potential conflict under IC 35-44.1-1-4, Riley has agreed that neither State funds from these contracts nor funds from FSSA facilitated programs like Medicaid, will be used to pay the employee's consulting fees. The Ethics Officer believes that this separation, coupled with the fact that the employee has no leadership role with Riley and is simply staffing the emergency room once a week, should ensure that there is not even the appearance that the employee is deriving a profit from, or has pecuniary interest in, any of the IU Health contracts with the State.

In terms of her daily duties at FSSA, IC 12-8-1.5-10.5 designates the Office of FSSA Secretary as the single state agency to administer the Medicaid program. In this role, the FSSA Secretary may make decisions affecting Medicaid providers; however, most if not all decisions of the Secretary or her office makes regarding Medicaid providers would apply to all providers (or groups of providers) uniformly. For example, any changes FSSA makes to the Medicaid fee schedule would apply to all Medicaid providers equally. Furthermore, although Riley serves Medicaid patients, it has little, if any, direct interaction with FSSA. Accordingly, it is unlikely that FSSA would make a decision that would have a unique impact on Riley or IU Health or related entities. However, if the situation presented itself, FSSA will screen the employee from participating in any such decision by providing the FSSA Deputy Secretary full authority to

handle such matters independently. The employee successfully utilized a similar screen during her work with the Indiana State Department of Health.

On February 1, 2017, the employee filed a Conflict of Interests – Decisions and Voting Ethics Disclosure Statement with the Office of Inspector General describing the potential conflict of interests she would have if she were to participate in votes or decisions regarding Medicaid providers. The Statement also describes the screen the Ethics Officer has established to ensure that the employee will not participate in any Medicaid decisions that would uniquely affect Riley. If any such matters come before the Office of the FSSA Secretary, they will be handled independently by the FSSA Deputy Secretary.

The Ethics Officer believes that the employee's outside employment would not violate any agency rule or regulation. The Ethics Officer's opinion is that this screen and the confirmation that IU will not pay the employee with any state funds, should provide the proper assurance that her outside employment will not affect the integrity of her services to the State.

### **ISSUE**

What ethics issues, if any, arise for the employee given her position as Secretary of FSSA and her simultaneous employment with Riley?

### **RELEVANT LAW**

#### **IC 4-2-6-5.5 (42 IAC 1-5-5)**

#### **Conflict of interest; advisory opinion by commission**

Sec. 5.5. (a) A current state officer, employee, or special state appointee may not knowingly do any of the following:

- (1) Accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired.
- (2) Accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment.
- (3) Use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:
  - (A) of substantial value; and
  - (B) not properly available to similarly situated individuals outside state government.

(b) A written advisory opinion issued by the commission stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

**IC 4-2-6-9 (42 IAC 1-5-6)**

**Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that decision or vote, if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a member, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer in writing and do either of the following:

(1) Seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

- (A) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or
- (B) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(2) File a written disclosure statement with the commission that:

- (A) details the conflict of interest;
- (B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

- (i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and
- (ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(1)(B) shall be filed with the appointing authority.

#### **IC 4-2-6-10.5 (42 IAC 1-5-7)**

##### **Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement**

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to a state officer, an employee, or a special state appointee who:

(1) does not participate in or have contracting responsibility for the contracting agency; and

(2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.

(c) A statement filed under subsection (b)(2) must include the following for each contract:

(1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.

(2) An affirmation that the contract: (A) was made after public notice and, if applicable, through competitive bidding; or (B) was not subject to notice and bidding requirements and the basis for that conclusion.

(3) A statement making full disclosure of all related financial interests in the contract.

(4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.

(5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.

(d) A state officer, employee, or special state appointee who:

(1) fails to file a statement required by rule or this section; or

(2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

#### **42 IAC 1-5-10**

##### **Benefiting from confidential information**

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

#### **42 IAC 1-5-11**

##### **Divulging confidential information**

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

#### **IC 4-2-6-6**

## **Present or former state officers, employees, and special state appointees; compensation resulting from confidential information**

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

### **IC 4-2-6-17**

#### **Use of state property for other than official business; exceptions; Violations**

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

### **42 IAC 1-5-13**

#### **Ghost employment**

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

## **ANALYSIS**

### *A. Outside employment*

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of her official duties that her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

Based on the information provided by the Ethics Officer, the employee's employment at Riley would not create a conflict of interests for her under this provision. Specifically, the Ethics Officer provides that the employee would be practicing emergency pediatric medicine once a week, during a well-defined shift for Riley. She would not serve in a supervisory or leadership role with the hospital. She would be an independent contractor and will be paid on an hourly basis. According to the Ethics Officer, the employee's

responsibilities in treating patients during the weekly shift would not conflict with her responsibilities as the Secretary of FSSA, and the Riley shift would not require her to recuse herself from matters that are critical to the performance of her duties as Secretary of FSSA.

Moreover, the Ethics Officer confirmed that the employee would not be required to disclose confidential information that she may have access to by virtue of her state employment. Similarly, nothing in the information presented suggests that she would use or attempt to use her state position for any unwarranted privileges or exemptions. The employee worked at Riley prior to becoming Secretary of FSSA and will not charge patients or bill insurance for her services.

Accordingly, the Commission finds that the employee's outside employment with Riley would not violate IC 4-2-6-5.5.

*B. Conflict of interests - decisions and votes*

IC 4-2-6-9 (a)(1) prohibits the employee from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the employee from participating in any decision or vote, or matter relating to that decision or vote, if she or a business organization which employs her has a financial interest in the matter.

The employee will be serving as the Secretary of FSSA and will also be employed as an independent contractor by Riley. Riley is a related entity of IU Health. Accordingly, the employee would have a potential conflict of interests if she participates in decisions or votes, or matters related to such decisions or votes, in which she, Riley, or IU Health would have a financial interest in the outcome.

Riley does not have any direct contracts with FSSA, but it receives funding from an FSSA contract with IU Health. In addition, IU Health has 20 contracts with FSSA. The Ethics Officer advises that the employee is not in a position to negotiate or sign contracts because the contracts are handled at the Division level. Accordingly, it is unlikely she would ever be required to participate in decisions regarding these contracts. The Ethics Officer offered that FSSA would inform the Division leaders to not send any contracts pertaining to Riley or IU Health to the employee in order to ensure that she will not participate in any of these contracts.

In addition, FSSA is the state agency responsible for administering the Medicaid program. Riley and other IU Health-affiliated facilities serve Medicaid patients. The Ethics Officer provided that any decisions that the employee would make regarding Medicaid would be broad in scope and would affect all Medicaid providers uniformly. The Ethics Officer does not anticipate that the employee would ever be in a position to participate in a decision or vote in which Riley or IU Health would have a unique financial interest.

However, to ensure that the employee does not participate in any decisions or votes in which Riley or IU Health would have a financial interest, FSSA has developed a screening process whereby any matters in which a decision could uniquely affect Riley, IU Health, or IU Health-related entities would be delegated to the Deputy Secretary. Further, any contracts involving Riley, IU Health or IU Health-related entities and the Office will be assigned to and/or negotiated by the Deputy Secretary.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify their Ethics Officer and Appointing Authority and seek an advisory opinion from the Commission or file a written disclosure statement. In addition to this request for a formal advisory opinion, the employee has filed a Conflict of Interests –Decisions and Voting Ethics Disclosure Statement with the Office of Inspector General. The disclosure statement identifies the potential conflict of interest, describes the screen established by the Ethics Officer and includes her notification to her appointing authority, all in accordance with the requirements in IC 4-2-6-9(b).

The Commission finds that the employee would have a potential conflict of interests if she were to participate in decisions or votes, or matters related to such decisions or votes, that would uniquely affect Riley or IU Health. The Commission is satisfied with the employee's disclosure of the potential conflict of interests, through the Conflict of Interests –Decisions and Voting Ethics Disclosure Statement filed with the Office of Inspector General, and the screen developed by FSSA to ensure she does not violate this rule.

#### *C. Conflict of interests – contracts*

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by an agency. This prohibition however does not apply to an employee that does not participate in or have official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met. The term "official responsibility" has been interpreted by the Commission as contracting responsibilities.

The Ethics Officer provides that Riley does not have any direct contracts with FSSA, but IU Health has about 29 contracts with FSSA, one of which provides funding to Riley. However, the Ethics Officer has affirmed that the employee would not have a financial interest in any of these contracts or any other state contracts. Specifically, Riley has agreed that neither state funds from any of its contracts nor funds from FSSA facilitated programs like Medicaid, will be used to pay the employee's consulting fees. Accordingly, the Commission finds that the employee would not have a financial interest in a state contract through her position at Riley and would not be in violation of this rule.

#### *D. Confidential information*



The employee is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from, or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction, or investment which is entered into or made as a result of material information of a confidential nature. The term “person” is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as Riley. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent the employee is exposed to or has access to such confidential information in her position as Secretary of FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including Riley, in any manner.

*E. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the employee from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the Commission. Likewise, 42 IAC 1-5-13 prohibits the employee from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

To the extent that the employee observes these provisions regarding her employment with Riley, such outside professional activity would not violate these ethics laws.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the employee’s intended outside employment with Riley would not create a conflict of interests for her under the Code of Ethics.