

**42 IAC 1-5-1 Gifts; travel expenses; waivers**  
**42 IAC 1-5-4 Political activity**  
**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**  
**42 IAC 1-5-10 Benefiting from confidential information**  
**42 IAC 1-5-11 Divulging confidential information**  
**IC 4-2-6-17 Use of state property**  
**42 IAC 1-5-13 Ghost employment**

As DCS employee sought advice regarding whether he was prohibited from working as a DCS Family Case Manager (FCM) Supervisor while simultaneously running for and/or serving as an Indiana State Representative under the Code of Ethics. SEC determined that the employee's candidacy for Indiana State Representative would not create a conflict of interests under the Code with his DCS responsibilities and were not incompatible so long as the employee does not engage in political activity while on duty or acting in his official capacity; refrains from using his official DCS title on campaign materials; does not solicit political contributions for his campaign from his direct reports or from anyone who has a business relationship with DCS; did not use his official position to secure unwarranted privileges or exemptions of substantial value; did not participate in decisions or votes in which the state legislature would have a financial interest in; did not use state property for non-official work performance during work hours; and did not benefit from or divulge confidential information. SEC further determined that the employee could accept unsolicited political contributions from those with whom DCS had a business relationship; however, SEC also recommended that the employee add a disclaimer to his campaign materials and website regarding unsolicited political contributions.

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2018-FAO-0016

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") 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 employee serves as a Family Case Manager (FCM) Supervisor for the Indiana Department of Child Services' (DCS) Floyd County office. The Ethics Officer has submitted a request for a Formal Advisory Opinion on behalf of the employee.

The employee is also a candidate for Indiana State Representative. In November of 2017, the employee reached out to the former DCS Ethics Officer to advise her that he was considering running for a political office. In February of 2018, the employee notified the Ethics Officer that he was planning to run for an Indiana State Representative seat.

The Ethics Officer advised the employee to seek an informal advisory opinion from the Office of the Inspector General (OIG). The employee requested advice regarding his ability to accept campaign contributions from companies who do business with DCS or from attorneys who have represented clients in Child in Need of Services (CHINS) proceedings in Floyd County. The employee shared the informal advisory opinion he received from the OIG with the Ethics Officer

on April 19, 2018. The employee won his district's primary on May 8, 2018, and the general election will be held on November 6, 2018.

The Ethics Officer is now requesting a Formal Advisory Opinion to determine whether the employee would have any conflicts of interests under the Code if he runs for and/or is elected as an Indiana State Representative and maintains his employment as a FCM Supervisor with DCS.

### **ISSUE**

Is the employee prohibited under the Code of Ethics from serving as both an FCM Supervisor at DCS and running for and/or serving as an Indiana State Representative?

### **RELEVANT LAW**

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

##### **Gifts; travel expenses; waivers**

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

(b) The following shall not be subject to this rule:

- (1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.
- (2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:
  - (A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;
  - (B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or
  - (C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.
- (3) Mementos or souvenirs of nominal value.
- (4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.
- (5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:

- (A) the gifts or other items of value are not deducted as a business expense; and
  - (B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.
- (6) Political contributions subject to IC 3-9-2 that are reported in accordance with applicable law.
- (7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:
- (A) has a business relationship; or
  - (B) seeks to influence official action;
- with the employee's or special state appointee's agency.
- (8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.
- (c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:
- (1) be in writing; and
  - (2) identify the following:
    - (A) The employee or special state appointee.
    - (B) The nature and value of the gift.
    - (C) The donor of the gift.
    - (D) Why acceptance of the gift is consistent with the public interest.
- (d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf of the appointing authority or state officer. The designation shall be in writing and filed with the commission.
- (e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

#### **42 IAC 1-5-4 Political activity**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 3-9-2; IC 4-2-6-1

Sec. 4. (a) A state employee or special state appointee shall not engage in political activity including solicitation of political contributions from:

- (1) another employee or special state appointee; or
- (2) any other person;

when on duty or acting in an official capacity.

(b) This section does not prohibit a state employee or special state appointee from engaging in such activity when not on duty.

(c) A state employee or special state appointee shall not solicit political contributions at any time from:

- (1) persons whom the employee or special state appointee knows to have a business relationship with the employee's or the special state appointee's agency; or
  - (2) state employees or special state appointees directly supervised by the employee or the special state appointee.
- (d) The appointing authority of an agency and all employees or special state appointees with purchasing or procurement authority on behalf of the state shall not solicit political contributions on behalf of any candidate for public office, unless that individual is a candidate for public office himself or herself.

#### **42 IAC 1-5-5 Outside Employment**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-5.5; IC 4-2-7

Sec. 5. Outside employment restrictions are set forth in IC 4-2-6-5.5.

#### **IC 4-2-6-5.5 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).

#### **42 IAC 1-5-6 Conflicts of interest; decisions and voting**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

#### **IC 4-2-6-9**

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

##### **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**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

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.

#### **42 IAC 1-5-10 Benefiting from confidential information**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

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**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

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.

### **ANALYSIS**

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Political Activity, Gifts, Conflict of Interests, Use of State Property, Ghost Employment, and Benefiting from and Divulging Confidential Information. The application of each provision to the employee is analyzed below.

The Commission does not have jurisdiction to interpret or address concerns regarding the dual office holding prohibition in the Indiana State Constitution or the federal Hatch Act. The employee should review the federal Hatch Act as well as consult the Indiana Office of the Attorney General's [Dual Office Holding Guide](#) and their recent [opinion](#) regarding state employees holding political office.

#### *A. Political Activity*

The political activity rule prohibits the employee from engaging in political activity, including solicitation of political contributions from anyone, when he is on duty or while acting in an official capacity for the State. This rule also prohibits the employee from soliciting political contributions at any time, whether on duty or not, from persons with whom DCS has a business relationship or from state employees or special state appointees he directly supervises. So long as the employee is soliciting contributions for his own campaign, it makes no difference if he has purchasing or procurement authority.

The Commission finds that the employee is permitted to engage in political activity when he is not on duty or acting in his official capacity. On duty and acting in his official capacity means during his normal work hours when he is actively performing work for DCS. He also cannot actively solicit political contributions any time that he is scheduled to be on call and/or expected to respond to calls. The Commission further finds that the employee would be prohibited from using his official DCS title on any campaign materials.

The Commission further finds that the employee may solicit political contributions for his own campaign as a candidate from anyone other than his direct reports and those with a business relationship with DCS, as an agency, and not just those with a business relationship with his local DCS office/region.

In addition, the Commission finds that the employee may *accept* unsolicited political contributions from persons with whom DCS has a business relationship so long as he is not soliciting or asking others to solicit these individuals on his behalf. The Commission recommends that the employee have a disclaimer on his website and on any campaign materials that are intended to solicit political contributions, including invitations to events where funds will be solicited, in order to make it clear that he cannot solicit funds from any person who has a business relationship with DCS. The disclaimer should include a reference to the political activity rule and the definition of business relationship found in IC 4-2-6-1(a)(5).

So long as the employee adheres to the above restrictions, his political campaign and subsequent service as an Indiana State Representative would not be contrary to the political activity rule.

The gift rule (42 IAC 1-5-1) also prohibits state employees from accepting a gift from a person who has a business relationship with the employee's state agency; however, it exempts political contributions subject to IC 3-9-2 from the prohibition. Therefore, so long as any unsolicited contributions comply with IC 3-9-2, the gift rule would permit the employee to accept campaign contributions from persons who have a business relationship with DCS. The gift rule would not apply to donations, either solicited or unsolicited, from persons who do not have a business relationship with DCS.

Finally, the Commission notes that DCS Policy Number HR 3-3 provides further rules and procedures for DCS employees seeking political office and further restrictions on political activity with which the employee will need to ensure he complies as he continues to seek and/or is elected to public office. These restrictions include a prohibition on soliciting

political contributions from other employees. The policy restrictions also prohibit directly or indirectly requesting that subordinates assist, in any way, with a campaign for a political party or candidate.

*B. Outside Employment/Professional Activity*

IC 4-2-6-5.5 prohibits the employee from 1) accepting other employment involving compensation of substantial value if those responsibilities are inherently incompatible with his responsibilities in his state employment or would require his recusal from matters so central or critical to the performance of his duties with the State that his ability to perform them would be materially impaired; 2) accepting employment or engaging in business or professional activity that would require him to disclose confidential information that was gained in the course of his employment with the State; and 3) using or attempting to use his position with the State to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government.

The employee has notified both the former and the current DCS Ethics Officer to ensure he is following all of the applicable rules and procedures. The Ethics Officer confirmed that he has been very transparent about his intentions to run for political office and has been in constant communication with DCS staff as needed.

Based on the information provided by the employee and the Ethics Officer, the Commission finds that the employee's activities as a candidate for Indiana State Representative would not create a conflict of interests for him under IC 4-2-6-5.5. Specifically, the employee's responsibilities as a candidate would not be inherently incompatible with his DCS responsibilities, nor would they require his recusal from matters that are central or critical to the performance of his state duties.

In addition, the employee would not be required to disclose confidential information he gained through his state employment as part of his candidacy for political office. He must also ensure that he does not use his official position during his campaign to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situation individuals outside state government.

The Commission did not analyze whether the employee would be able to continue serving as a DCS FCM Supervisor if he were to win the election and take the office of Indiana State Representative because the Ethics Officer pointed out that, under IC 4-15-2.2-45(b), a "classified" employee who is elected to a federal or state public office is considered to have resigned from state service on the date the person takes office. The Ethics Officer informed the Commission that the employee is considered a classified employee and that she informed him before the meeting that he would need to resign his position as Family Case Manager Supervisor before taking office if he is elected to Indiana State Representative. While the Commission does not have jurisdiction to interpret this statute, the Commission recognizes that the employee would need to follow this statute and resign from his current DCS position if he is elected and takes the office of Indiana State Representative.

### C. *Conflict of Interests*

IC 4-2-6-9(a) prohibits a state employee from participating in any decision or vote, or matter relating to that decision or vote, if he has knowledge that various persons may have a “financial interest” in the outcome of the matter, including himself or a business organization in which he is serving as an employee or member. The term financial interest, as defined in IC 4-2-6-1(a)(11), includes an interest involving property or services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

Based on the information provided, the Commission finds that the employee would not be required to participate in decisions or votes, or related matters, as a FCM Supervisor in which the State legislature would have a financial interest in the outcome. So long as no such decisions or votes, or matters related to such decisions or votes, come before the employee in his position at DCS, he would not be in violation of this rule. In the event he would otherwise participate in any such matters during the course of his state employment, he should follow the procedure set forth in IC 4-2-6-9 (b) to disclose the conflict.

### D. *Use of State Property*

The use of state property rule prohibits a state employee from using state property for purposes other than official state business absent a written policy allowing for such use that has been approved by the Commission. The Commission confirmed that the employee understands that he cannot use state property for any political purpose. This means he must refrain from using his state phone, computer, email account, etc. for any political purpose, even if the use is *de minimis*.

To the extent that the employee refrains from using state property for duties related to his candidacy for Indiana State Representative, he would not be in violation of this rule.

### E. *Ghost Employment*

The ghost employment rule prohibits a state employee from engaging in or directing others to engage in work other than the performance of official duties during working hours absent a written agency policy allowing it. The employee must ensure that he refrains from working on any campaign or State Representative-related matters during his state working hours and when he is on duty as an FCM Supervisor. As noted earlier in the opinion, the Commission also determined when he is scheduled to be on-call and/or expected to respond to calls, the employee must refrain from actively soliciting political contributions. In other words he cannot attend a fundraiser or other campaign event during his on-call hours.

To the extent that the employee refrains from engaging or directing others to engage in work other than official state duties during his working hours, he would not be in violation of this rule.

F. *Confidential Information*

42 IAC 1-5-10 and 42 IAC 1-5-11 prohibit a state employee from benefitting from or divulging confidential information.

To the extent that the employee complies with these restrictions, he would not be in violation of these rules.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the employee's candidacy for the office of Indiana State Representative would not create a conflict of interests under the Code of Ethics. Further, the employee can engage in political activity, including the solicitation of political contributions from persons who do not have a business relationship with DCS, so long as he engages in this activity only when he is not on duty and he does not use his official title.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director