

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
42 IAC 1-6-1 Other sources**

An ISDH employee was interested in engaging in outside employment in which he would consult with a company by assisting with testing, training, and technical documentation related to the company's ePOC program. The employee sought approval for this employment and received a memo from the agency's ethics officer denying the proposed employment based on ISDH's internal policy on Outside Activities. SEC concluded that the employee's proposed employment would not violate the ethics rule on Outside employment; however, ISDH was permitted under the Code of Ethics to implement a more restrictive policy and require the employee to abide by those terms.

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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).

BACKGROUND

A state employee is employed as the Applications Systems Analyst for the Divisions of Long Term Care ("LTC") and Acute Care ("AC") of the Indiana State Department of Health ("ISDH"). The state employee would like to engage in outside employment. Specifically, he would like to be employed as a consultant for a company that is developing and marketing an electronic plan of correction ("ePOC") program. The state employee would have the opportunity to possibly become a partner in the company at a later time. His primary duties as a consultant for the new company would be to "learn and master all of the applications and assist with testing, training and technical documentation."

The ePOC project is mandated by the Affordable Care Act. The state survey agencies are required to come up with a system by which health facilities can submit their plans of correction for the survey reports (CMS Form 2567) via the internet. At least one state has invested a lot of money to have an outside contractor develop a system. The ISDH developed its system in-house using civil money penalty funds. The ISDH has packaged its system and is offering it to other states free of charge. At least one state is currently using the ISDH's ePOC program and another is considering it.

While the state employee is not a computer programmer and did not develop the system or write the computer code for the design of the ISDH's ePOC system, he was the Project Manager for its development. As Project Manager, he attended design meetings for ePOC, worked with the customers to define their needs, identified how the Indiana Office of Technology could meet those needs and tested the ePOC system after it was developed to see if it met those needs. He also prepared the documentation for training people on how to use the ePOC system, trained people on how to use the system and provided technical support for the ePOC system.

The state employee requested approval for his intended outside employment from his agency ethics officer. On April 4, 2012, he received a memorandum from his agency's ethics officer indicating that his intended outside employment opportunity had not been approved. Specifically, it stated that while the proposed opportunity would not appear to violate the ethics

rule on outside employment, it appeared to violate the agency's Outside Activities policy. The state employee subsequently submitted his request for a formal advisory opinion from the Commission.

ISSUE

Does the state employee's intended outside employment to be a consultant for a company that is developing and marketing an ePOC program create a conflict of interest under the Code of Ethics?

RELEVANT LAW

IC 4-2-6-5.5

Conflict of interest; advisory opinion by inspector general

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

(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; or

(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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

42 IAC 1-6-1 Other sources

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

Affected: IC 4-2-6-4

Sec. 1. An appointing authority of an agency or a state officer may adopt policies, rules, or regulations concerning the subject matter of this rule provided that the policies, rules, or regulations are at least as strict as this rule. All such policies, rules, or regulations shall be filed with the commission, but failure to file does not affect the validity of such policies, rules, or regulations as applied to the agency's or state officer's employees or special state appointees. (Office of the Inspector General; 42 IAC 1-6-1; filed Dec 7, 2005, 2:45 p.m.: 29 IR 1211)

ANALYSIS

In this case, the state employee's outside employment would create a conflict of interest according to IC 4-2-6-5.5 if his intended employment would trigger subsection (1), (2) and/or (3) of the statute. The restriction in subsection (1) prohibits a state employee from accepting 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. In this case, the ISDH's ethics officer indicates that the state employee's intended outside employment would not be inherently incompatible with his public responsibilities. Specifically, while the activities he would be performing in his outside employment would be similar to what he does at the ISDH, such activities would not appear to impact his work at the agency. Moreover, while the program developed by his intended employer would be in competition with the ISDH's program, the ISDH is not marketing its ePOC program. Instead, it is offering it free of charge to other states.

In addition, subsection (2) prevents a state employee from engaging in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment. While there is a concern that the state employee would be using information that he developed and/or gained while doing his state job on state time, this would not appear to rise to the level of disclosing confidential information because the ISDH is giving its ePOC system away for free to the same entities that his intended employer intends to market its system to.

The restriction in subsection (3) above prohibits an employee from using or attempting to use the individual's official position to secure unwarranted privileges or exemptions that are both of substantial value and not properly available to similarly situated individuals outside state government. The facts presented in this case would not appear to trigger the application of this provision.

Despite the fact that the state employee's intended outside employment does not currently appear to create a conflict of interest according to IC 4-2-6-5.5, it appears that it would be contrary to an internal policy of the ISDH. 42 IAC 1-6-1 allows the appointing authority of an agency to adopt policies, rules or regulations concerning the subject matter of the Code of Ethics provided that such policies, rules or regulations are at least as strict as the rule. In this case, the ISDH has adopted internal agency policy ISDH-COMM-002-07 that prohibits ISDH employees from receiving compensation from outside employment if the activity involves a public service provided free of charge by that employee's division or section. The policy further states that employees shall not receive compensation for outside employment if any information could be used that is not available to the general public and could lead a reasonable person to perceive the employee as utilizing "inside information." The ISDH, in interpreting its internal policy, has denied approval for the state employee's intended outside employment.

CONCLUSION

The Commission finds that the state employee's intended outside employment would not create a conflict of interest under the Code of Ethics. However, the Commission acknowledges that it is in the discretion of the ISDH to prohibit the state employee from engaging in his intended outside employment to serve as a consultant for a company that is developing and marketing an ePOC program pursuant to the agency's internal policy.