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Deputy General Counsel for the BMV was considering part-time employment as an appointed Prosecutor for a Town. SEC found that the employee's responsibilities as Town Prosecutor would not be incompatible with her responsibilities as Deputy General Counsel for BMV and that the outside employment opportunity would not create a conflict of interests for the employee under the Code of Ethics as long as an ethics screening process was developed and utilized and all matters which could create a conflict of interest or an appearance thereof were referred to General Counsel for BMV.

August 2017
No. 17-I-11

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

An employee recently accepted the position of Deputy General Counsel for the Indiana Bureau of Motor Vehicles (BMV). The employee started working in this position on April 10, 2017. As Deputy General Counsel, the employee supervises a staff attorney, a court order specialist, and an administrative assistant. The employee's duties as Deputy General Counsel include responsibility for all forms of litigation filed by or against the BMV, including any administrative appeals taken by customers who are dissatisfied with a decision that has affected their driving privileges. She also serves as the liaison between the BMV and the Attorney General's Office on all tort claims and court orders issued that are contrary to law, responds to third party discovery requests and questions from courts, and provides legal advice to the Credentials and Records Departments. On occasion, the employee will represent the BMV in matters before an Administrative Law Judge (ALJ), although this responsibility is primarily delegated to the staff attorney she supervises.

The employee also works on a part-time basis as the Zionsville Town (the Town) Prosecutor, which is an annually appointed position she has held since 2005. Her salary is \$220 per month, and the position requires approximately three hours of work per month. As the Town Prosecutor, the employee handles all local ordinance violations, including traffic matters such as speeding and failure to stop, as well as dog bites and property related violations. She does not handle state infractions or misdemeanors. As part of her duties, she attends traffic court in the Town one night per month to conduct bench trials on citations. The employee has an InCite account that she uses to view and authorize electronic filings from her home computer. None of her duties as Prosecutor are performed while on state time, and she does not use any state property for the purposes of her work as Prosecutor.

The employee's job as Prosecutor does not require the testimony or affidavit of BMV personnel.

To date, the employee has not been involved in any decision that has affected the Town while she has been at BMV. She has not been contacted by any Town personnel, but it is possible that the Town may contact BMV with questions about licenses or other records or submit orders for interpretation. It is also possible that an individual may contact BMV with a series of issues in their driving record or ability to obtain a license, with one of the underlying convictions being a ticketed offense while driving in the Town.

BMV's Ethics Officer determined that an ethics screen is appropriate to avoid any violation of the Code of Ethics or even the appearance of any impropriety. The ethics screen was implemented by BMV on June 26, 2017 and requires the employee to refer matters she encounters at BMV that involve the Town to BMV General Counsel. When contacted by any employee or representative of the Town on any matter related to the BMV, the screen requires the employee to immediately provide that she is unable to assist them with their issue and refer them to BMV General Counsel. Further, to the extent she is contacted by an individual seeking assistance with a driving record or licensing status, whereupon it is discovered there is an underlying conviction on the person's driving record that indicates a violation of a Town driving ordinance, the employee will immediately inform all parties that she is unable to assist and will refer the matter to BMV General Counsel.

The employee requested a formal advisory opinion from the Commission to determine if her employment with the Town would create any conflicts of interests for her under the Code of Ethics.

ISSUES

- 1) Would the employee's prospective outside employment as the Town Prosecutor create any conflicts of interests for her under the Code of Ethics?
- 2) What other ethics issues, if any, arise for the employee given her position as BMV Deputy General Counsel and her simultaneous employment as the Town Prosecutor?

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 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, the employee is responsible for all forms of litigation filed by or against the BMV including any administrative appeals. As Town Prosecutor, the employee handles all local ordinance violations, as well as dog bites and property related violations. As Town Prosecutor she does not require the testimony or affidavit of BMV personnel for any of the cases she oversees. It is possible that the Town may contact BMV about licenses and records or submit orders for interpretation. It is also possible that an individual may contact BMV with a series of issues in their driving record or ability to obtain a license, with one of the underlying convictions or infractions being a ticketed offense while driving in the Town.

According to the screen provided by BMV's Ethics Officer, the employee would be required to refer any Town-related matters that may come before her as BMV Deputy General Counsel to BMV's General Counsel. Specifically, the employee would need to inform any Town employees or representatives who contact her about a BMV-related matter that she is unable to assist them and refer them to BMV General Counsel for assistance.

In addition, if the employee is contacted by any individual seeking assistance with a driving record or licensing status, whereupon it is discovered there is an underlying conviction on the person's driving record that indicates a violation of a Town ordinance, she will need to inform all parties that she is unable to assist and refer the matter to BMV General Counsel.

The Commission finds that the employee's responsibilities as Town Prosecutor do not appear to be incompatible with her responsibilities as Deputy General Counsel for BMV. It appears that the potential interactions identified in the screen would be infrequent and unlikely to require her recusal from matters so central or critical to the performance of her official duties that the ability to perform them would be materially impaired.

Further, the employee provides that her job as Town Prosecutor will not require disclosure of confidential information gained through state employment and she does not intend to use her BMV position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to individuals outside of state government.

Accordingly, the Commission finds that the employee's outside employment as Town Prosecutor would not create a conflict of interests for her under this rule as long as she complies with the BMV screen implemented by BMV's Ethics Officer.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 prohibits the employee from participating in any decision or vote, or matter relating to that decision or vote, if the employee has knowledge that any of the following has a financial interest in the outcome of the matter:

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

The definition of “financial interest” in IC 4-2-6-1(a)(11) includes, in part, “an interest arising from employment”.

The employee provided that it is possible that the Town would contact BMV about licenses and records or submit orders for interpretation. It is also possible that an individual may contact BMV with a series of issues in their driving record or ability to obtain a license, with one of the underlying convictions or infractions being a ticketed offense while driving in the Town.

Accordingly, the Commission finds that the employee would have a potential conflict of interests if she participates in any matter related to a decision or vote that could financially impact the Town. Specifically, if the Town is considered a business organization with which she is employed and it has a financial interest in any decisions or votes the employee would make or participate in as Deputy General Counsel, she could have a potential conflict of interests under this rule. Likewise, if the Town has a financial interest in a decision or vote she could make or participate in while she was negotiating employment with the Town (she is appointed on an annual basis), she would also have a potential conflict of interests under this rule.

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.

To ensure that the employee does not participate in any decisions or votes in which the Town of Zionsville would have a financial interest, BMV has developed a screening process whereby the employee is required to refer all matters she encounters at BMV that involve the Town to BMV General Counsel. When contacted by any employee or representative of the Town on any matter related to the BMV, the screen requires the employee to immediately provide that she is unable to assist them with their issue and refer them to BMV General Counsel. Further, to the extent she is contacted by an individual seeking assistance with a driving record or licensing status, whereupon it is discovered there is an underlying conviction on the person’s driving record that indicates

a violation of a Town driving ordinance, the employee will immediately provide to all parties that she is unable to assist and will refer the matter to BMV General Counsel.

In the event that the Town is a “business organization” under IC 4-2-6-9(3), the Commission finds this screening policy to be satisfactory to prevent the employee from having a conflict of interests in violation of IC 4-2-6-9.

C. 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 or an entity, such as the Town. 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 has access to such confidential information in her position as BMV’s Deputy General Counsel, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including the Town, in any manner.

D. 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 as Town Prosecutor such outside professional activity would not violate these ethics laws.

CONCLUSION

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