

**IC 4-2-6-5.5 (42 IAC 1-5-5) Conflict of interests; outside employment**

**IC 4-2-6-9 (42 IAC 1-5-6) Conflict of interests; decisions and votes**

**IC 4-2-6-10.5 (42 IAC 1-5-7) Conflict of interests; contracts**

**IC 4-2-6-17 Use of state property**

**42 IAC 1-5-13 Ghost employment**

An FSSA employee sought advice regarding whether she was permitted to work for a company that has a contract with a different division of FSSA. SEC determined that the employee's outside employment would create a conflict of interests for her under IC 4-2-6-10.5 as she would have a financial interest in the company's contract with FSSA and she was not able to fulfill all of the requirements needed to meet the exception to the rule.

March 14, 2019

2019-FAO-005

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 ethics officer for the Indiana Family and Social Services Administration (FSSA) requested an advisory opinion on behalf of a FSSA employee. The employee works within FSSA's Bureau of Rehabilitation Services (BRS), which is within FSSA's Division of Developmental Rehabilitation Services (DDRS), as a Vocational Rehabilitation Services (VR) case coordinator.

The employee is also the guardian of an adult child who receives services through FSSA through the Division of Rehabilitative Services (DRS) Family Support Waiver. The employee is interested in pursuing outside employment with Forte Residential, Inc. (Forte), a company that provides in-home support for individuals receiving Medicaid Home and Community Based Services.

The employee joined FSSA as a contractor in January 2012 and has held various positions as an employee and contractor. Since 2017, she has been employed as a VR case coordinator for the VR Program. VR provides a wide range of services to individuals with disabilities and provides support needed to help them prepare for, secure, retain, advance in, or regain employment. VR partners with vendors, who may be individuals or businesses, across the State to deliver these services.

The VR program is housed within FSSA's BRS, which is one of the four bureaus within DDRS. The other three bureaus are the Bureau of Quality Improvement Services (BQIS), Bureau of Developmental Disabilities Services (BDDS), and the Bureau of Child Developmental Services (BCDS). BRS oversees the planning and operation of FSSA's vocational rehabilitation programs and services. BQIS monitors BDDS providers of Medicaid in-home waivers services and assists other bureaus in DDRS with quality improvement activities. BQIS also conducts oversight

activities for reporting instances of abuse, neglect, and exploitation, and ensures compliance with FSSA's state waiver requirements. BDDS provides and coordinates services for individuals with developmental disabilities receiving Medicaid waiver services.

As a VR case coordinator, the employee is responsible for processing referrals, scheduling appointments, assisting two VR counselors in their case management, and paying invoices. The VR counselors whom she supports make the decisions regarding when to create, renew, or cancel authorization. The employee performs the supportive administrative functions at the direction of the VR counselor. If an individual is referred for VR services, the employee gathers the demographic information from the individuals, assigns a VR counselor, and schedules the individual for an intake appointment. The referrals she processes come from a variety of sources, including the individuals themselves, employment agencies, medical providers, case managers, and family members. If it is a referral for a service, the VR counselor makes the decision regarding the vendor and then the employee creates the authorization per the VR counselor's request.

VR counselors also have the decision making authority over which invoices to pay. If the employee notices a discrepancy between an authorization and an invoice, she notifies the VR counselor. The VR counselor then makes the decision whether to pay the invoice and provides direction to the employee.

As a VR Case Coordinator, the employee is not responsible for the negotiation or administration of any contracts for FSSA. In addition, the employee is not responsible for making any licensing and regulatory decisions; her role is strictly administrative in nature.

On February 12, 2019, the ethics officer met with the employee to discuss whether it would be a conflict of interests for her to obtain outside employment with Forte. Prior to inquiring about conflicts of interests, the employee met with a representative of Forte on February 7, 2019. The employee has not had any further meetings or discussion with Forte since that date. The employee decided to pursue a formal advisory opinion regarding outside employment with Forte before applying or interviewing for a position with Forte.

The employee is interested in pursuing part-time employment as direct care staff with Forte so that she can be compensated for providing Participant Assistance Care services to her adult child. As direct care staff for Forte, she would be responsible for providing care, companionship, and support to her child and possibly other children and adults with developmental disabilities in a variety of home and community settings. She would be paid \$10.00 per hour by Forte for hours worked and compensated for her mileage. The employee would work evenings and weekends outside of her state work hours.

As a Medicaid waiver provider, Forte's business relationship with FSSA is governed by a BDDS provider agreement and the Indiana Health Coverage Programs (IHCP) Rendering Provider Agreement and Attestation Form. Neither provider agreement is signed by a representative from FSSA. Forte is the only signor on the agreements. Under both provider agreements, Forte agrees to provide services to Medicaid waiver recipients, such as the employee's adult child, and to submit claims for reimbursement for services rendered by the company or its employees to

FSSA. The services Forte and its employees provide are those that are outlined on a waiver recipient's individualized support plan developed by their support team.

As a guardian for her adult child, the employee is a member of her child's support team. The support team is responsible for assisting with the development of her child's individualized support plan. Under 460 IAC 6-3-32, the individualized support plan is designed and agreed upon by an individual's support team. The individualized support plan sets forth the paid and unpaid supports and strategies that will be used to help an individual accomplish their short and long term goals. In addition to the employee, her child's support team currently consists of her child's case manager and recreational therapist. As the guardian, the employee makes decisions regarding what is added to or removed from her child's individualized support plan.

The employee's position with FSSA does not include any involvement with the BDDS waiver program or Forte. The prospective employment with Forte would be of a different nature than her duties for FSSA, and she does not anticipate that working for Forte would require her recusal from her official responsibilities to the extent that her ability to perform them would be materially impaired. Furthermore, the employee has confirmed that she would not be required to use any confidential information in her prospective employment with Forte. Additionally, she understands that she is prohibited from using her FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside of state government.

The employee is not in a position to participate in any decisions or votes or other matters related to a decision in which Forte would have a financial interest in the outcome. The employee has informed the ethics officer that she understands and agrees to abide by the ethics rules governing conflicts of interests, ghost employment, use of state property and confidential information.

### **ISSUES**

- 1) Would the employee's prospective outside employment with Forte 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 a VR Case Coordinator and her prospective, simultaneous employment with Forte?

### **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(a) if it results in the employee: 1) receiving compensation of substantial value when 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 his or her official duties that his or 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 his or her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

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).

Based on the information provided, the employee's duties in her position at Forte would be very different from her state responsibilities with FSSA and she does not anticipate that she would have to recuse herself from her official state duties to avoid any conflicts of interests. The agency's ethics officer testified that FSSA did not foresee any reason why the employee would have to recuse herself, and felt that she could perform this outside work without materially impairing her ability to perform her full time state job. Further, the employee has confirmed that she will not be required to use any confidential information in her prospective employment with Forte. In addition, she understands that she is not to use her FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly made available to similarly situated individuals outside state government.

The Commission finds that the employee would not have a conflict of interests under this particular rule as her two positions at FSSA would not overlap. However, the Commission is not able to formally approve this outside position because of conflict of interests concerns under IC 4-2-6-10.5 (see analysis below).

#### *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 a business organization with whom she is serving as an employee or is negotiating employment has a financial interest in the matter.

The employee currently works as a VR case coordinator for FSSA and is seeking outside employment with Forte. As she is negotiating employment and if she begins working for Forte, she would be prohibited from participating in any decisions or votes, or matter relating to those decisions or votes, in which Forte would have a financial interest in the outcome.

Based on the information provided, the employee is not in a position at FSSA to participate in any decisions or votes, or other matters related to such decisions or votes, in

which Forte would have a financial interest in the outcome. Accordingly, the Commission finds that the employee does not have a potential conflict of interests under 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 any state agency. The definition of “financial interest” in IC 4-2-6-1(a)(11) includes, in part, “an interest arising from employment”. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. This prohibition, however, does not apply to an employee that does not have contracting responsibility for the contracting agency, provided certain statutory criteria are met.

Forte is a Medicaid waiver provider, and its relationship with FSSA is governed by a BDDS Medicaid provider agreement and the Indiana Health Coverage Programs Rendering Provider Agreement and Attestation Form. Under both provider agreements, Forte is attesting that it agrees to provide services to Medicaid waiver recipients and follow FSSA rules to submit claims for and to receive reimbursement. Neither of these agreements is signed by a representative of FSSA.

If the employee accepts the prospective position, she would be employed directly by Forte and her wages would be paid by Forte. For providing these services under the Medicaid waiver, Forte would seek reimbursement from FSSA per the provider agreements.

The ethics officer confirmed at the Commission’s public meeting that this agreement between FSSA and Forte for the reimbursement for services provided to Medicaid waiver recipients is a contract. Accordingly, the Commission finds that the employee would have a financial interest in a state contract, which is prohibited under IC 4-2-6-10.5, if she were to accept the position at Forte.

Further, although the employee does not have contracting authority for FSSA, she is unable to meet all of the disclosure requirements in IC 4-2-6-10.5(b). Specifically, she would not be able to meet the requirement in IC 4-2-6-10.5 (b)(2) of filing a written statement with the inspector general *before* she executes the contract with the state agency.<sup>1</sup> The Commission found that because this contract between Forte and FSSA is already in place, the employee cannot meet this requirement.

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<sup>1</sup> It is not disputed that the employee is not executing any contract with FSSA. Nevertheless, the statute provides only one exception from the conflicts of interest prohibition. The exception requires the employee to have no contracting authority for the contracting agency, and to file a written statement “with the inspector general before the ... employee ... executes the contract with the state agency.” The statutory exception does not contemplate an employee executing a statement before accepting employment with a contractor.



In addition, there could be implications beyond the Code of Ethics if the employee accepts this position with Forte. Specifically, IC 35-44.1-1-4 is the criminal statute that prohibits any public servant from knowingly or intentionally having a pecuniary interest in or deriving a profit from a contract/purchase connected with an action by the agency served by the public servant. The statute contains certain exceptions in subsection (c). One of these exceptions applies to an individual who obtains written approval from the Commission that the individual will not or does not have a conflict of interests in connection with a contract or purchase under IC 4-2-6 and IC 35-44.1-1-4.

The Commission is unable to provide this written approval due to its finding that the employee would have a financial interest in a contract and cannot meet the exceptions to avoid a conflict of interests under IC 4-2-6-10.5.

#### *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. 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 with FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including her outside employer, in any manner.

#### *E. Use of state property and Ghost employment*

IC 4-2-6-17 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. 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 the employee observes these provisions in any outside employment opportunity she may engage in, such outside professional activity would not violate the use of state property or ghost employment laws.

## **CONCLUSION**

The Commission is unable to approve the employee's outside employment opportunity with Forte. Forte's contract with FSSA would create a conflict of interests for the employee under IC 4-2-6-10.5 as she would have a financial interest in Forte's contact with FSSA if she were to accept this outside employment opportunity.

Respectfully Submitted,

Jennifer Cooper  
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