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An Indiana State Department of Health Employee sought advice regarding outside employment to work as a consultant with a non-profit organization to create content for their digital learning courses. The Commission finds that his prospective outside employment position would not create a conflict of interests under the Code of Ethics.

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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 State Department of Health (ISDH) seeks an opinion from the Commission on behalf the Workforce Development Coordinator for ISDH's Office of Public Health Performance Management (Employee).

In his position as the Workforce Development Coordinator, the Employee is responsible for managing ISDH's workforce development plan. He is involved in projects related to employee engagement, organizational change efforts, health equity and leadership development. He oversees ISDH's internship program as well.

The Employee also serves as the administrator of IN-Train, which is an e-learning platform that ISDH manages. He is the lead point of contact for the platform, and he assists ISDH's program areas with the technical creation of online courses for public health education and improvements. He does not assist in the creation of the content for these courses nor does he develop online courses related to organizational change management. He also does not provide this service to the public.

Additionally, the Employee is involved with a technical assistance grant (Grant) that a foundation (Foundation) provides to ISDH. The Foundation is a philanthropic organization that works to advance policies, build partnerships and strengthen public health to create communities where people can achieve their best possible health. The Foundation offers a variety of grants and technical assistance programs to governmental public health organizations.

The Grant does not provide ISDH any funds but instead offers four ISDH employees webinars and coaching related to organizational changes. The Foundation also covers the travel costs for these employees to attend two in-person meetings related to these trainings. The four employees

also serve as members of the Foundation's Cohort of Public Health Practitioners. The Employee is one of the four ISDH employees that receives training through the Grant. The Foundation does not have any other contracts or grants with ISDH or any other state agency.

The Employee is interested in seeking outside employment as a consultant with the Foundation. In his prospective position with the Foundation, he would assist in creating content for eleven short digital learning classes or "microlearns." He would help create content relating to organizational development, which is his area of expertise. Specifically, he will be providing expert content for the "microlearns", regarding using a change management strategy known as Appreciative Inquiry (AI). The Employee has studied and practiced AI as part of his master's degree studies.

According to the Employee, his work for the Foundation would not require him to disclose confidential information learned through his employment with the State. His consultation work for the Foundation would be unrelated to any certifications that ISDH requires him to obtain/maintain as a part of his state employment. The Employee plans to provide five hours of consulting work for the Foundation each week. He does not believe that his compensation from the Foundation will come from funds derived from a state contract or grant.

Aside from his work with the Foundation through the Grant, the Employee's only other interaction with the Foundation has been related to a survey the Foundation administered to assess the nation's governmental public health workforce. The Foundation solicited feedback from the Employee regarding the survey on behalf of ISDH.

On September 4, 2020, the Employee submitted ISDH Form 53182-Outside Employment Disclosure Form to the Ethics Officer to seek an ethics opinion concerning his work as a consultant for the Foundation. The Ethics Officer's opinion was that the issue warranted review through an opinion from the Office of Inspector General (OIG).

The Employee proceeded to request an informal advisory opinion from the OIG; the informal advisory opinion, which the OIG issued on September 25, 2020, recommended that the Employee seek a formal advisory opinion from the Commission.

The ISDH Ethics Officer is now seeking a formal advisory opinion from the Commission addressing whether the Employee would have any conflicts of interests under the Code if he were to accept the outside employment opportunity with the Foundation while serving as Workforce Development Coordinator for ISDH.

According to the Ethics Officer, the Employee's supervisor does not have concerns about his outside work with the Foundation, and the Employee is in good standing as an ISDH employee. The Employee understands and agrees that he may not use state time to work for the Foundation. Additionally, he is confident that he will meet the 37.5 hour work-week requirement for ISDH. The Ethics Officer provides that the Employee's outside employment activities will help maintain and build upon his professional skills, such that he may better be able to meet the essential functions of his position as the Workforce Development Coordinator, including identifying opportunities to collaborate and develop change management strategies and

initiatives with other national stakeholders that support governmental public health and workforce development.

### **ISSUE**

What ethics issues, if any, arise for the Employee given his position as the Workforce Development Coordinator for ISDH and his simultaneous outside employment opportunity with the Foundation?

### **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 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 official duties that his 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 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).

The Commission generally defers to an agency's ethics officer regarding outside employment opportunities as these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment/professional activity opportunity.

Based on the information provided by the Ethics Officer, the Employee's prospective outside position as a consultant for the Foundation does not appear to be incompatible with his ISDH responsibilities as Workforce Development Coordinator. In his ISDH position, the Employee is responsible for managing ISDH's workforce development plan and is involved in projects related to employee engagement, organizational change

efforts, health equity and leadership development. He is also the administrator of IN-Train, an e-learning platform ISDH manages, and assists with the technical (but not content) creation of online courses related to organizational change management. The Employee is also one of four employees at ISDH who receive coaching and training through the Grant from the Foundation. He does not, however, work on projects for or with the Foundation through his state position.

His outside employment as a consultant for the Foundation would involve creating content for short digital learning classes, or “microlearns”. Though the creation of these “microlearns” would draw upon his expertise in the area of AI and e-learning, it does not appear that the work would conflict with or require his recusal from any of his state responsibilities. The work he would perform for the Foundation would be different from any learning he is involved with at ISDH and would also not be related to the Grant.

As for subsection (a)(2), the Employee provides that he will not be required to and will not disclose any confidential ISDH information through his outside work with the Foundation. Accordingly, the Employee would not violate subsection (2) of this rule.

So long as the Employee does not use his official ISDH position to secure unwarranted privileges or exemptions for the Foundation or its customers/clients that are not available to similarly situated businesses or individuals outside of state government, he would not violate subsection (3) of this rule.

Accordingly, the Commission finds that IC 4-2-6-5.5 does not prohibit the Employee from working as a consultant for the Foundation while also working for ISDH.

#### *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 he 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 in which he is serving as an officer, a director, a member, a trustee, a partner or an employee has a financial interest in the matter.

The Code defines “financial interest” in IC 4-2-6-1(a)(11) to include “an interest . . . in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or . . . involving property or services. . .”

A potential conflict of interests would arise for the Employee if he participates in any matter related to a decision or vote for ISDH in which the Foundation would have a financial interest in the outcome of the matter. This restriction goes beyond the actual decision or vote and prohibits his participation in any matter related to the decision or vote.

As discussed above, the Employee receives coaching and training from the Foundation, but he does not provide work for or work on any projects involving the Foundation for ISDH. Besides the coaching and training he receives from the Foundation, the only other interaction he has had with the Foundation was related to providing feedback on a survey the Foundation administered to assess the nation's governmental public health workforce.

Accordingly, the Commission finds that the Employee is currently not in a position with ISDH in which he participates in decisions or votes, or matters related to such decisions or votes, in which the Foundation would have a financial interest in the outcome.

If, however, the Employee's circumstances change and a potential conflict of interests is identified in the future, he must follow the disclosure requirements in IC 4-2-6-9(b), including notifying his agency's ethics officer and appointing authority in writing and either (1) seeking a formal advisory opinion from the Commission; or (2) filing a written disclosure form with the OIG.

#### *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. The Code defines "financial interest" to include 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 participate in or have contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The Employee states that the Grant that the Foundation provides to ISDH does not involve any money but rather provides trainings to four ISDH employees. The Ethics Officer confirmed this and added that she did not find any other state contracts held by the Foundation. In addition, to the best of the Employee's knowledge, the Foundation does not have any other contracts or grants with ISDH or any other state agencies.

Accordingly, the Commission finds that the Employee would not have a financial interest in a state contract if he were to accept the consultant position with the Foundation.

#### *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 that 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 his position at ISDH, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including the Foundation, 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 that the Employee observes these provisions, his outside employment would not violate these ethics laws.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Employee's outside employment opportunity with the Foundation would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director