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An Indiana Department of Education Pre-K Expansion Specialist sought advice regarding outside employment and political activity for potentially running for a position on the school board in her home county in the Fall 2020 election. SEC outside employment/professional activity in running for a position on the board would not create any conflicts of interests so long as (1) IDOE has a screen in place to prevent her from participating in any grants/related matters in which HSES may have a financial interest; and (2) the IDOE employee confirms that any compensation she would receive for her service on the board would not be derived from any state contract(s). Further, the SEC would like the employee to report any political contributions she receives to IDOE in order to ensure she is not soliciting any such contributions from any person who has a business relationship with IDOE.

May 14, 2020
2020-FAO-006

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

A Pre-K Expansion Specialist with the Indiana Department of Education (IDOE) is considering running for a position on the school board in her home district of Hamilton Southeastern Schools (HSES) in Hamilton County, Fishers, Indiana. In her role as Pre-K Expansion Specialist, she helps schools understand the benefits of Pre-K and how to fund it in their building or district.

The Employee would be running in the fall 2020 election. The board position receives compensation (per diem) for certain meetings and events. In her role with IDOE, the Employee has a professional relationship with the Preschool Director for HSES. The Employee has communicated with the HSES Preschool Director in the past to ask for her feedback on resources she created. The Preschool Director has asked the Employee and her early learning colleagues to present at a conference HSES co-sponsored with the Indiana Division of Early Childhood.

The Employee’s position at IDOE does not involve awarding grants or overseeing funding offered to school districts. She makes all districts and non-public schools aware of possible funding streams to support preschool programs. On occasion, she assists other specialists with grant approval, specifically the Early Intervention Grant that supports literacy programs in K-3 sites; however, in those grant reviews, IDOE approves all complete applications. For all

incomplete applications, IDOE asks the school districts to resubmit them and then IDOE approves the applications. According to the Employee, it is entirely within the control of the other specialists to decide whether to send a grant from HSES to her for approval and she can specifically request them not to send her HSES grants for review or approval.

The Employee provides that should she be elected, the school board position would not interfere with her IDOE duties, as the school board position is only part-time. She understands that she would not be permitted to campaign on state government time or to state government employees. In addition, she understands that she must not disclose any confidential information she has by virtue of her IDOE position for the purposes of benefiting HSES or use any such information in any decisions she makes in her position with the school board.

The Employee has made both her supervisor, IDOE's Chief Academic Officer, and IDOE's Ethics Officer aware of her intent to pursue a school board position. She understands that she should be screened from any matters related to HSES. IDOE's Ethics Officer, on behalf of IDOE, does not have any specific concerns regarding the Employee's pursuit of the HSES school board position.

The Employee is now requesting a formal advisory opinion regarding whether she can pursue the opportunity to run for and serve on the HSES school board while maintaining her position as Pre-K Expansion Specialist for IDOE.

ISSUE

- 1) Would the Employee's outside employment/professional activity in running for and serving as a member of the HSES school board create any conflicts of interests for her under the Code?

- 2) What other ethics issues, if any, arise for the Employee given her position at IDOE and her simultaneous outside employment/professional activity as a HSES school board candidate and member?

RELEVANT LAW

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 4-2-6-10.5 (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).

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 Employee's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Political Activity, Conflicts 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.

A. Political Activity

The political activity rule prohibits the Employee from engaging in political activity, including solicitation of political contributions from anyone when she 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 IDOE has a business relationship or from state employees or special state appointees she directly supervises. Additional restrictions apply if the Employee has purchasing or procurement authority for the State.

The Employee is permitted to seek political contributions for her own campaign as a candidate from anyone other than her direct reports and those with a business relationship with IDOE when not on duty or acting in her official capacity.

The IDOE Ethics Officer provided that IDOE has a political activity policy that he has reviewed with the Employee. She is running and plans to serve on the board in her personal capacity and not as an IDOE employee. The IDOE Ethics Officer has no concerns with the Employee's ability to fully comply with the political activity rule and the IDOE policy.

The Commission finds that the Employee would not violate this rule so long as she refrains from engaging in political activity while on duty or while acting in her official capacity for IDOE and does not solicit political contributions from anyone who has a business relationship with IDOE.

The IDOE Ethics Officer provided that he can assist the Employee in ensuring she is not soliciting political contributions from any person who has a business relationship with IDOE, but that she is aware that it is her responsibility to ensure that she is not soliciting contributions from any person with whom IDOE has a business relationship. He further provided that she can run any possible solicitations through IDOE's financial team to confirm the absence of a business relationship with IDOE. The Commission requested, as an added precaution, that the Employee report her political contributions to IDOE to ensure she is not soliciting contributions from any person who has a business relationship with IDOE.

B. Outside Employment/Professional Activity

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.

The Commission generally defers to an agency's Ethics Officer regarding outside employment/professional activity opportunities since it views them as being in the best position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment opportunity. The IDOE Ethics Officer has not identified any concerns that IDOE has with the Employee running for or holding a position on the HSES school board. The IDOE Ethics Officer further provided that IDOE has an outside employment policy and the Employee would be in full compliance with this policy if she holds the HSES school board position.

Based on the information provided, the Commission finds that subsection (1) would not prohibit the employee from serving on the HSES school board. Although she would receive some compensation for serving in the position, her IDOE position has no authority over funding offered to school districts. For the grant approvals with which the Employee occasionally assists, the IDOE Ethics Officer confirmed that she would be screened from any involvement in any HSES grants. In regards to subsection (2), nothing in the information she provided indicates that serving on the school board would require the Employee to disclose confidential information; therefore, she would not be violating this subsection by running for or holding a position on the school board. So long as she does not use her official IDOE position to secure unwarranted privileges or exemptions that subsection (3) prohibits, IC 4-2-6-5.5 does not prohibit the Employee from serving on the HSES board while also working for IDOE.

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).

C. 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 in which she 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 . . . (A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or . . . (B) involving property or services."

A potential conflict of interests would arise for the Employee if she participates in any matter related to a decision/vote in which HSES has a financial interest in the outcome. This restriction goes beyond the actual decision/vote and prohibits her participation in any matter related to the decision/vote. The rule also requires a state employee who identifies a potential conflict of interests to notify her agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure statement with the OIG.

The IDOE Ethics Officer provides that the Employee does not make discretionary decisions regarding grants and contracts in her position at IDOE and that she does not have any oversight or discretion over funding to school districts. She does occasionally assist other specialists with grant approvals when needed, but this is a rare occurrence. the Employee estimated she is asked to do this once a quarter.

The Commission finds that the Employee would have a potential conflict of interests if she participated in decisions related to grants or other matters in which HSES would have a financial interest in the outcome. The Commission further finds that IDOE must have a screen in place to prevent the Employee from having a conflict of interests.

The IDOE Ethics Officer provides that IDOE will screen the Employee from participation in any matters in which HSES would have a financial interest. The IDOE Ethics Officer further provides that the Employee's direct supervisors are aware of the situation and they will continue to ensure that she is screened from HSES-related matters while she is running for and if she is elected to and serves on the HSES board. To this end, the Employee can continue to provide assistance with grants as needed, but she will not participate in this process if HSES would have any financial interest in the grant.

D. 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 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 provides that she will be compensated for her services to the HSES board. The IDOE Ethics Officer provided that he believes the funding would come from HSES' general operating budget and not from any state grants, but he and the Employee will confirm this is the case. The Commission finds that so long as her compensation for serving on the HSES board will not be derived from any state contracts/grants, the Employee would not have a financial interest in a state contract and would not be in violation of this rule.

E. 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 her position with IDOE, she would be prohibited from divulging that information or ever using it to benefit any person, including HSES, in any manner.

F. 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.

The Commission confirmed that the Employee understands that that she must take particular care not to use her state computer, state email account or calendar, or state phone for activities related to running for or serving on the HSES board. All such activities must be done using her own resources and on her own time, such as after work or on the weekends. In addition, although most agencies, including IDOE, have policies regarding minimal personal use of state property, these policies strictly prohibit using state property for a political purpose.

To the extent that the Employee observes these provisions in her outside work with HSES, the Commission finds that such outside employment activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Employee's outside employment/professional activity in running for a position on the HSES board would not create any conflicts of interests so long as (1) IDOE has a screen in place to prevent her from participating in any grants/related matters in which HSES may have a financial interest; and (2) the Employee confirms that any compensation she would receive for her service on the board would not be derived from any state contract(s).

Further, the Commission would like the Employee to report any political contributions she receives to IDOE in order to ensure she is not soliciting any such contributions from any person who has a business relationship with IDOE.

Respectfully Submitted,

Jennifer Cooper
Ethics Director