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The Opioid Treatment Manager for the Indiana Family Social Services Administration's Division of Mental Health and Addiction sought advice regarding outside employment for a part-time position at an outpatient opioid treatment facility. The Commission finds that his prospective outside employment position would not be contrary to the Code of Ethics.

January 21, 2021
2021-FAO-003

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) is requesting an advisory opinion on behalf of the Opioid Treatment Program (OTP) Manager (Employee) for FSSA's Division of Mental Health and Addiction (DMHA).

The Ethics Officer is requesting an opinion from the Commission addressing whether it would be a conflict of interests for the Employee to accept outside employment with Valle Vista Health Systems (Valle Vista) while employed at FSSA.

The Employee commenced working for the State of Indiana in February 1994 as an administrative assistant. Through the years, he has served as a Provider and Community Liaison to Community Mental Health Centers and Managed Care Providers; Consumer Service Review Coordinator; Quality Assurance Coordinator; Certification and Licensure Analyst; and Medication Assistant Treatment – Prescription Drug and Opioid Addiction Grant Coordinator. In February 2017, he transitioned to the role of OTP Manager. In his current role, his responsibilities include providing regulatory oversight and ensuring the availability of quality opioid addiction treatment services in Indiana. This includes overseeing the annual quality review of OTPs and any corrective action resulting from an annual review or complaints received regarding an OTP.

Recently, the Employee received an offer of employment from Valle Vista to work part time on an as needed basis as a Chemical Dependency/Intensive Outpatient Therapist (CD/IOP). Valle Vista is certified by DMHA to provide mental health and addiction treatment services. They are also licensed by the Indiana Department of Health and accredited by the Joint Commission. As a certified provider of mental health services, Valle

Vista is subject to oversight by the DMHA quality assurance and license and certification team.

Valle Vista operates two different types of facilities. One of these facilities is New Vista Outpatient Recovery Center (New Vista), which is an OTP certified by DMHA and subject to oversight by DMHA.

If permitted to accept employment with Valle Vista as a CD/IOP Therapist, the Employee's responsibilities would include providing intensive group therapy for assigned patients according to their individual needs. He would also be responsible for conducting individual assessments and assigning treatment goals in accordance with Valle Vista's outpatient program. Additionally, he would be responsible for completing all necessary paperwork, consulting with other treatment providers and serving as a support and resource for the inpatient hospital as needed. Per Valle Vista, he would not have any responsibilities in the Valle Vista Health System/New Vista's OTP. Valle Vista has provided the Employee with a conflict of interests waiver to document the terms of employment.

Valle Vista would pay the Employee on an hourly basis, and the Employee would not serve in a supervisory or leadership role for Valle Vista. He would not charge patients nor would he bill insurance. Rather, Valle Vista would bill insurance and Medicaid. The Employee would not be compensated from any funds derived from any state contract or grant.

The Employee is interested in this outside employment opportunity because he is pursuing licensure as a Licensed Social Worker and Licensed Addiction Counselor. To be eligible to sit for his exams, the Manager must satisfy certain employment and supervision requirements. Unfortunately, he is unable to obtain this experience through his responsibilities in his current FSSA position because he does not have direct contact with patients or clinical supervision from a qualified supervisor.

Given that the Employee is responsible for the direct oversight of OTPs, FSSA has implemented a screen to ensure that he does not participate in any votes, decisions or other matters in which Valle Vista or New Vista would have any financial interest. If he is permitted to pursue this employment opportunity, the screen will continue.

The screen provides that matters regarding Valle Vista or New Vista that come before DMHA are referred to the Employee's manager or another staff member who would not involve the Employee in any decisions or votes or any other matter involving Valle Vista or New Vista. They understand that no emails concerning Valle Vista/New Vista should be sent to his attention, and they are not to consult him on any matters concerning Valle Vista/New Vista

The Ethics Officer provides that the screen would not require the Employee to recuse himself from a large number of matters or prevent him from performing any of his critical responsibilities as OTP Manager. New Vista is one of twenty-two (soon to be twenty-seven) OTPs operating in the State, and the Employee would still have broad oversight on policies or initiatives that would apply to all OTPs; however, he would not have direct involvement in any matters specifically involving Valle Vista/New Vista.

DMHA reviews OTPs on an annual basis, so the screen would likely be implemented once a year. The screen would ensure that the Employee does not have any involvement in the review of New Vista or any follow up actions related to the review. These would be handled by other staff members.

The Employee would complete all his work for Valle Vista outside of his 37.5 state working hours each week. Additionally, the Employee understands that he is not to use his FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government. He also understands and agrees to abide by the Code's rules governing conflicts of interests, ghost employment, use of state property and confidential information.

ISSUE

1. Would the Employee's outside employment opportunity with Valle Vista create any conflict of interests for him under the Code?
2. What other ethics issues, if any, would arise for the Employee given his position at FSSA and his prospective simultaneous outside position with Valle Vista?

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

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential Information. The application of each provision to the Employee is analyzed below.

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 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 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.

The Commission generally defers to an agency's Ethics Officer regarding outside employment 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.

Based on the information and opinion provided by the Ethics Officer, the Employee's employment at Valle Vista would not create a conflict under this provision. The Employee's role and responsibilities at Valle Vista as a CD/IOP therapist would be very different from his role as OTP Manager. The Employee plans to see patients as a therapist, for a few hours a week for Valle Vista. Per Valle Vista, he would not have any responsibilities in the Valle Vista Health System/New Vista's OTP, and he would not be in a supervisory or leadership role. Accordingly, the Employee's responsibilities with Valle Vista do not appear to be inherently incompatible with his FSSA responsibilities.

Because the Employee is responsible for the direct oversight of OTPs, FSSA has implemented a screen to ensure that he does not participate in any votes, decisions or other matters in which Valle Vista or New Vista would have any financial interest to ensure he does not have a conflict of interests under IC 4-2-6-9 (see Section B).

The Ethics Officer provides that DMHA reviews OTPs on an annual basis, so the screen would likely be implemented once a year. Further, New Vista is one of twenty-two (soon to be twenty-seven) OTPs operating in the State. Accordingly, the Commission finds that this screen would not require the Employee to recuse himself from matters central or critical to the performance of his official duties that his ability to perform them would be materially impaired.

Further, the Commission confirmed that the Employee would not be required to disclose confidential information to which he may have access by virtue of his state employment in his outside position with Valle Vista.

Nothing in the information presented suggests that the Employee would use or attempt to use his state position for any unwarranted privileges or exemptions. the Employee must continue to ensure he does not use or attempt to use his official FSSA position for any unwarranted privileges or exemptions.

The Commission finds that the Employee's outside employment opportunity with Valle Vista would not create a conflict of interests for him under IC 4-2-6-5.5.

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 decisions or votes, or matters related to such decisions or votes, in which Valle Vista would have a financial interest in the outcome.

IC 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interests shall notify the person's appointing authority and seek an advisory opinion from the Commission or file a written disclosure statement with the OIG.

Valle Vista, the Employee's prospective outside employer, also operates New Vista, which is an OTP. The Ethics Officer provides that the Employee is responsible for the direct oversight of OTPs and therefore has an identified potential conflict of interests. FSSA has implemented a screen to ensure that he does not participate in any votes, decisions or other matters in which Valle Vista or New Vista would have any financial interest in the outcome.

The screen provides that matters regarding Valle Vista or New Vista that come before DMHA are referred to the Employee's manager or another staff member who would not involve the Employee in any decisions or votes or any other matter involving Valle Vista or New Vista. They understand that no emails concerning Valle Vista/New Vista should be sent to the Employee and that they are not to consult him on any matters concerning Valle Vista/New Vista

DMHA reviews OTPs on an annual basis, so the screen would likely be implemented once a year. The screen would ensure that the Employee does not have any involvement in the review of New Vista or any follow up actions related to the review. Other staff members would handle these reviews.

The Commission finds that FSSA's screen is adequate to ensure that the Employee does not participate in matters in which Valle Vista/New Vista would have a financial interest, including the annual review his department conducts and any related follow up actions. Accordingly, so long as the screen is followed, the Employee would not have a 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 an agency. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between the State 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 Ethics Provider provides that the Employee would be paid on an hourly basis for his work in seeing patients for Valle Vista and that he would not be compensated from any funds derived from any state contract or grant.

Accordingly, the Commission finds that the Employee would not have a financial interest in a state contract.

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, such as Valle Vista. 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 with FSSA, he is prohibited not only from divulging that information but from ever using it to benefit any person, including his outside employer, in any manner.

E. 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 his outside employment activities, his outside position with Valle Vista would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Employee’s outside employment with Valle Vista would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director