

42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-12 Use of state property

42 IAC 1-5-13 Ghost employment

FSSA sought advice to determine whether the Secretary of the FSSA could maintain his outside employment as a Psychiatrist and Behavioral Health Consultant with a community health center. SEC determined that the Secretary's employment at the health center would not create a conflict under IC 4-2-6-5.5. Specifically, the information provided by the FSSA Ethics Officer indicated that the Secretary's outside employment does not provide him with compensation of substantial value nor would it require his recusal from matters that are critical to the performance of his state employment duties. SEC further determined that while it is unlikely that the Secretary would be required to participate in any decisions or votes concerning the health center, the proposed screening mechanism, that includes notification of the Secretary's appointing authority, would be appropriate and should be implemented by FSSA if a potential of conflict were to arise under IC 4-2-6-9(b).

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No. 14-I-14

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The Ethics Officer for the Indiana Family and Social Services Administration ("FSSA") requested an advisory opinion on behalf of the Secretary of the FSSA, to ensure that his outside employment as a Psychiatrist and Behavioral Health Consultant with a Community Health Center does not run afoul of the Code of Ethics ("Code").

The Secretary is the first medical doctor to serve as Secretary in the history of FSSA. He is a Board Certified Psychiatrist who has twenty-five years of clinical experience working with Medicaid patients and the uninsured. To maintain his medical credentials and specialty certification, the Secretary must maintain patient contact. The Secretary would like to meet this requirement by working at the Community Health Center from noon to 5:00 p.m. every Thursday. He has provided psychiatric medical services to patients at the Community Health Center for the last four years. The Secretary currently pays for his own medical malpractice insurance, licensing fees, and certifications.

Community Health Center is a full service center and in a high-needs area. In 2013, 90% of all Community Health Center patients were below 200% of the Federal Poverty Level and 30% were uninsured. The Community Health Center serves many patients on Medicaid. The Secretary provides much needed psychiatric medical services to patients at the Community Health Center, many of whom have been without psychiatric services in the past. Although the Secretary provides medical services at the clinic, he does not serve as a medical director or serve on the Board at the Community Health Center. The Secretary is employed by the Community

Health Center directly as an independent contractor and is paid by the Community Health Center on an hourly basis. The Secretary does not charge patients nor does he bill insurance.

The Secretary would not use state time or resources to work at the Community Health Center or see patients. He anticipates easily meeting the thirty-seven-and-a-half-hour work week, even without the five hours each week he will be working at the Community Health Center. He also anticipates that his work with the Community Health Center will not cut into his service to the State. During the five hour period, he will be available remotely by phone and by email.

The Community Health Center currently has no direct contracts with the State of Indiana. IC 12-8-1.5-10.5 designates the Office of the FSSA Secretary as the single state agency to administer the Medicaid program. In this role, FSSA may make decisions that affect Medicaid providers; however, most, if not all, decisions the Secretary or his Office makes regarding Medicaid providers would apply to all providers uniformly. For example, any changes FSSA makes to the Medicaid fee schedule would apply to all Medicaid providers equally. Furthermore, although the Community Health Center serves Medicaid patients, it has little, if any, direct interaction with FSSA. It is not likely that FSSA would make a decision that would have a unique impact on the Community Health Center; however, if such an issue were to arise, the Secretary would screen himself from participating from any such decisions by providing Deputy Secretary full authority to handle such matters independently.

The Ethics Officer asserts that the Secretary's outside employment as described would not violate any agency rule or regulation. Moreover, his outside employment does not appear to present a conflict of interest or otherwise be incompatible with his official duties as Secretary of FSSA.

ISSUE

What ethics issues, if any, arise for the Secretary given his position as Secretary of FSSA and his simultaneous employment with the Community Health Center?

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 shall not knowingly:

(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; or

(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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

42 I.A.C. 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 I.A.C. 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.

42 IAC 1-5-12

Use of state property

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment 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.

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 interest 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 appointing authority or ethics officer regarding outside employment opportunities since these individuals are in a better position to determine whether a conflict of interest might exist between an employee's state duties and an outside employment opportunity. Based on the information provided by the Ethics Officer, it does not appear that the Secretary's employment at the Community Health Center would create a conflict under this provision. Specifically, the information provided does not suggest that the Secretary receives "compensation of substantial value or would require his recusal from matters that are critical to the performance of his state employment duties." Moreover, while he is an independent contractor of the Community Health Center, nothing presented would suggest that the Secretary would be required to disclose confidential information that he may have access to by virtue of his state employment. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

B. Conflict of interests

IC 4-2-6-9 (a)(1) prohibits the Secretary from participating in any 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 Secretary from participating in any decision or vote if a business organization which employs him has a financial interest in the matter.

The employee is the Secretary of FSSA. He is also employed by the Community Health Center, a facility that serves Medicaid patients. FSSA is the state institution responsible for administering the Medicaid program. Medicaid claims submitted by the Community Health Center might be matters that are unique to the Community Health Center. However, Medicaid claims are not processed by FSSA. Instead, they are processed by a third party vendor contracted by FSSA specifically to perform this service.

While it is unlikely that the Secretary would be in a position to participate in a decision or vote in which he or the Community Health Center, uniquely, would have a financial interest, FSSA is prepared to screen the Secretary from such matter(s) by delegating them to the Deputy Secretary. The Secretary must ensure that his appointing authority is notified every time the screen is implemented.

C. Confidential information

The Secretary 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 Secretary 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, such as the Community Health Center. 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 Secretary is exposed to or has access to such confidential information in his position as FSSA Secretary, he would be prohibited not only from divulging that information but from ever using it to benefit anyone in any manner.

D. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Secretary 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 Secretary 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 Secretary observes these provisions regarding his employment with the Community Health Center, such outside professional activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis and the implementation of the screening procedures established by FSSA when necessary, the Secretary's continued outside employment with the Community Health Center would not be contrary to the Code.