

**42 IAC 1-5-5 Conflict of interest; advisory opinion by commission (IC 4-2-6-5.5)**

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

**42 IAC 1-5-7 Prohibition against financial interest in contract (IC 4-2-6-10.5)**

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

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

An ISDH employee sought advice regarding whether working as an OB-GYN at a hospital in her private capacity while concurrently serving as the ISDH State Health Commissioner. As ISDH State Health Commissioner, the employee assisted in establishing policies and strategies for the ISDH and serving as a non-voting secretary of the ISDH Executive Board. Previously, the ISDH had contracts and/or grants with the hospital. SEC determined that the employee's outside employment with the hospital would not violate any ethics rules as long as the employee followed the presented screen to avoid involvement with regulatory issues and with the execution and/or negotiation of any contracts and/or grants with the hospital.

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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) requested an opinion from the Commission on behalf of the State Health Commissioner (the employee). The employee began her employment with the ISDH on October 16, 2017.

Prior to becoming the ISDH Commissioner, the employee served as an Obstetrician-Gynecologist (OB-GYN) at Community Hospital. The employee has worked in the Community Health Network as an OB-GYN for over thirty years. The employee plans to continue working in this role in addition to her state employment. Under IC 16-19-4-4, the employee may "in an individual capacity as a licensed physician and not in the official capacity as state health commissioner, engage in the practice of medicine if the practice of medicine does not interfere with the performance of the state health commissioner's duties as state health commissioner."

The Ethics Officer provides that even though IC 16-19-4-4 governs the employee's ability to practice as an OB-GYN outside of her current state position, and the employee does not anticipate her outside employment will interfere with her performance as State Health Commissioner, she wants to ensure she follows the letter and spirit of the provisions in the Code. Two additional matters of importance are confidentiality and salary. As to 42 IAC 1-5-10, "Benefitting from Confidential Information," and 42 IAC 1-5-11, "Divulging Confidential Information," the ISDH will put screening in place to avoid any issues with these rule sections. Lastly, the employee has informed the Ethics Officer that her outside salary is not tied to any contract or grant with the ISDH or the State.

As the State Health Commissioner, the employee has general supervision for all of the ISDH. By statute (IC 16-19-4-1), the State Health Commissioner will serve as secretary, a non-voting member position, of the ISDH Executive Board. She will serve on any state board prescribed by state law. She will establish effective policy and strategy for the ISDH after consulting with staff and the Executive Board. Her work requires contact with a wide variety of entities, from hospitals to nursing homes, whether private, public, or non-profit. These are just some of the duties she will perform.

The employee is employed at Community Physician Network. Community Physician Network is a part of the Community Health Network, which operates Community Hospital. The ISDH deals directly with Community Hospital. In the past, the ISDH has had contracts and/or grants with Community Hospital. The employee has already been advised not to sign or negotiate any contracts involving Community Hospital, and she has been advised not to be involved in any regulatory matters involving Community Hospital. However, to address any issues that may arise due to the employee's affiliation with this entity, and to comply with the conflict of interests laws, the ISDH has established the following procedures to screen the employee from all involvement with any contract or regulatory issues relating to Community Hospital:

1. Any and all contracts involving Community Hospital shall be assigned and/or negotiated by the ISDH's Chief of Staff. If he is not available, the contract shall be assigned to one of the approved agency signatories.
2. Any and all regulatory matters involving Community Hospital shall be handled by the Deputy State Health Commissioner or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
3. Any and all documents that require a licensed physician's signature, including isolation orders, quarantine orders, and any medical directives involving or related to Community Hospital shall be signed by the Deputy State Health Commissioner, the ISDH's Chief Medical Consultant, or the ISDH's Medical Director.
4. While this screen should prevent the Commissioner from having access to any confidential information involving Community Hospital, the Commissioner shall not benefit from or divulge such information.
5. Any other miscellaneous matters involving Community Hospital shall be handled by the Deputy State Health Commissioner or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
6. The Commissioner will contact the agency ethics officer if there are any changes in her association with Community Hospital or any other entity which has a business relationship with or is regulated by the ISDH.

**ISSUE**

What ethics issues, if any, arise for the employee given her position as the ISDH Commissioner and her simultaneous employment with Community Physician Network?

### **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 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 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 provided by the Ethics Officer, the Commission finds that the employee's outside employment position would not create a conflict of interests for her under this provision. Specifically, the responsibilities of the two positions would not overlap in any meaningful way. The employee would not have to disclose confidential information she gained from her state employment in her work as an OB-GYN, and the employee was already employed in her outside position prior to becoming the ISDH Commissioner. Moreover, the statutory provision creating the position contemplates and allows the ISDH Commissioner to engage in outside employment as a licensed physician.

### *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 in which she is serving as an employee has a financial interest in the matter.

The employee is the Commissioner for the ISDH. She is also employed by Community Physicians Network, a related entity of the Community Health Network, which operates Community Hospital. The ISDH has ties, including contractual ties, with Community Hospital. Accordingly, the employee would have a potential conflict of interests if she participates in decisions or votes, or matters related to such decisions or votes, in which she or Community Hospital 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.

The Ethics Officer and the employee have requested this formal advisory opinion, and the Ethics Officer has proposed the following procedures to screen the employee from all involvement with regulatory issues relating to Community Hospital:

1. Any and all contracts involving Community Hospital shall be assigned and/or negotiated by the ISDH's Chief of Staff. If he is not available, the contract shall be assigned to one of the approved agency signatories.
2. Any and all regulatory matters involving Community Hospital shall be handled by the Deputy State Health Commissioner or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
3. Any and all documents that require a licensed physician's signature, including isolation orders, quarantine orders, and any medical directives involving or related to Community Hospital shall be signed by the Deputy State Health Commissioner, the ISDH's Chief Medical Consultant, or the ISDH's Medical Director.
4. While this screen should prevent the Commissioner from having access to any confidential information involving Community Hospital, the Commissioner shall not benefit from or divulge such information.
5. Any other miscellaneous matters involving Community Hospital shall be handled by the Deputy State Health Commissioner or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
6. The Commissioner will contact the agency ethics officer if there are any changes in her association with Community Hospital or any other entity which has a business relationship with or is regulated by the ISDH.

The Commission finds that the employee's adherence to the proposed screen would prevent her from having a conflict of interests under IC 4-2-6-9 if any potential conflicts of interests arise. This screen should remain in place for the duration of her tenure as the State Health Commissioner. Should a potential conflict of interests arise for her under IC 4-2-6-9, the employee must still follow the requirements in IC 4-2-6-9(b) and notify her appointing authority and file an ethics disclosure statement.

#### *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. Because the Ethics Officer provides that the employee's

outside salary is not tied to any contract or grant with the ISDH or the State, she would not have a prohibited financial interest. Accordingly, the Commission finds that the employee would not have a financial interest in a state contract through her position at Community Physician Network and would not be in violation of this rule.

*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 as the ISDH Commissioner, 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 that the employee observes these provisions in her employment with Community Physician Network, 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 the ISDH, the employee’s continued employment with Community Physician Network would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director