

**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**

IDOA and DCS sought advice to determine whether the DCS Ombudsman could accept an outside employment opportunity with a private adoption agency. SEC determined that the Ombudsman's part-time employment at the adoption agency would not create a conflict under IC 4-2-6-5.5. Specifically, the information provided indicated that the Ombudsman's outside employment would not provide her with compensation of substantial value nor would it require her recusal from matters that are critical to the performance of her state employment duties. SEC further determined that a conflict of interest could arise if the Ombudsman participated in decisions or votes involving the adoption agency. SEC found that the screening mechanism proposed by DCS and IDOA would be appropriate to prevent violation of IC 4-2-6-9, but that SEC shall be notified in writing anytime the screen is implemented.

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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 to the Commission.

**BACKGROUND**

A state employee is the General Counsel of the Indiana Department of Administration ("IDOA"), along with the Director of the Indiana Department of Child Services ("DCS") and the Commissioner of the IDOA request an advisory opinion on behalf of the Director of the DCS Ombudsman Bureau ("Bureau"). The DCS Ombudsman has been offered a supplemental employment opportunity with a private adoption agency, and DCS and IDOA wish to ensure that her acceptance of this opportunity is not contrary to any rules within the Code.

The DCS Ombudsman is appointed directly by and reports to the Governor, and DCS and IDOA have certain responsibilities and working relationships with the Bureau Director. The Ombudsman essentially is the "watchdog" of DCS and responds to complaints concerning DCS actions or omissions by providing problem resolution services and independent case reviews. The Ombudsman's main responsibilities include receiving, investigating, and attempting to resolve all complaints alleging that DCS, by an action or omission, failed to protect the physical or mental health or safety of any child or failed to follow specific laws, rules, or written policies (*see* IC 4-13-19). The Bureau also provides recommendations and works with DCS to improve agency service delivery and to promote public confidence. There are two Assistant Ombudsmen who work for the Ombudsman to assist with these responsibilities.

The Bureau is an independent entity whose budget is set by the state legislature. The Ombudsman and her staff are provided office space, computers, etc. by the IDOA. For payroll purposes the Ombudsman reports to the IDOA Commissioner, but the Commissioner has no direct oversight over the Bureau or the Ombudsman. In the spirit of cooperation, the Ombudsman meets with DCS' Deputy Director of Field Operations monthly, yet she does not need DCS' permission to have access to any DCS file (*see* IC 4-13-19-6). The Ombudsman also meets with and communicates with the IDOA Commissioner regarding budgetary matters. DCS

licenses private adoption agencies but, in the absence of allegations of abuse or neglect, has no significant or ongoing working relationship with them. Thus, subtle and factual peripheral involvement and interaction takes place between the entities.

On December 3, 2014, the Ombudsman was contacted regarding an opportunity to work part-time for a private adoption agency (“Agency”) conducting home studies and adoption progress reports for their clients who are seeking to adopt, or already have adopted, a child from a foreign country.

The Agency offers a wide variety of services and support for a family seeking foreign adoption and is paid by the adopting family. The Agency receives no state funds and does not work with children who are involved with DCS. Because DCS’ involvement with private adoption agencies is limited to licensing, absent an allegation of abuse or neglect, DCS is not involved with the children and families being served by the Agency in their international adoptions. Further, only files for families who satisfactorily passed the background check would be routed to the Ombudsman. Therefore, if a member of the family had a history with DCS such that they did not pass the background check, the file would never be seen by the Ombudsman.

According to the General Counsel of IDOA, the Ombudsman is well aware of her continued responsibility to keep the information she deals with as Director of the Bureau confidential in any work she would do for the Agency. The General Counsel does not foresee any circumstances under which any of the confidential information she has access to would be information sought by the Agency.

Further, the General Counsel advises that the Ombudsman is aware of the actions she needs to take to ensure there is no ghost employment violation as is evidenced by a communication in which she wrote:

The job will not pose a conflict with my regular work hours as meetings with families are completed during the evenings and on weekends. I would also rarely need to go into the ----- offices because work will be assigned via e-mail and fax to my personal email and home office. Certainly, any time I would take during my regularly scheduled workday would be charged as personal or vacation time.

The General Counsel has confirmed with the Director of DCS and the Commissioner of IDOA that neither agency prohibits outside employment where that supplemental employment does not pose a conflict of interest or where, with appropriate screening, conflicts and the appearance of impropriety are avoided. In addition, the General Counsel has determined that no issues or potential conflicts would prevent the Ombudsman from pursuing this opportunity. To avoid even the appearance of impropriety, however, DCS has established an internal screening process to assure that in the event a matter involving the Agency comes to the attention of DCS, the matter will not be directed to the Ombudsman and that she will be totally eliminated from any involvement in the matter. In addition, a policy will be implemented instructing the staff to immediately refer such a potential matter directly to the DCS Deputy Director of Field Operations without informing or advising the Ombudsman.

To this end, DCS and IDOA have jointly proposed the following:

In the event that the Ombudsman obtains supplemental employment with a private employer that provides or is involved with adoption services in the State of Indiana (“supplemental employer”), the following screening measures will be implemented:

- The Ombudsman will advise DCS and IDOA, in writing, of the supplemental employment, including the date on which the employment is to commence;
- IDOA or the Office of the Ombudsman will designate a staff person to be assigned to receive any complaints, inquiries or communication involving or related to that supplemental employer;
- IDOA or the Office of the Ombudsman will instruct any and all staff who receive any complaints or inquiries involving that supplemental employer to that designated staff person;
- The DCS Deputy Director of Field Operations will be the point of contact for that designated staff person;
- The IDOA General Counsel will be the point of contact for that designated IDOA staff person;
- All staff of DCS and IDOA will refrain from having any communications relating to the supplemental employer with, or in the presence of, the Ombudsman; and
- All staff of the Ombudsman will refrain from having any communications relating to the supplemental employer with, or in the presence of, the Ombudsman and shall notify the appropriate DCS or IDOA designee upon receipt of such communications.

Should any complaint or matter involving that supplemental employer be brought to, or come to the attention of the Office of the Ombudsman:

- The Ombudsman staff designated by IDOA to receive such matters shall immediately forward the matter to the DCS Deputy Director of Field Operations;
- The DCS Deputy Director of Field Operations will work with the designated staff person in the same manner as she would the Ombudsman to respond to, or resolve, the matter; and
- All staff of DCS and the Ombudsman will take all reasonable measures to prevent the Ombudsman from receiving, seeing, or hearing any communications relating to the matter.

The above screening measures shall remain in effect for so long as the Ombudsman holds her supplemental employment. Upon termination of that supplemental employment, Ombudsman shall apprise both DCS and IDOA of the termination of that employment relationship in writing; however, the above screening measures shall remain in full force and effect for any matter that involves the period of time in which the Ombudsman held that supplemental employment.

DCS and IDOA request a formal advisory opinion from the Commission to confirm that the Ombudsman may accept the part-time position with the Agency and that the proposed screening measures are satisfactory to prevent any potential conflict of interests from arising for her.

### ISSUE

What ethics issues, if any, arise for the Ombudsman given her position as Director of the DCS Ombudsman Bureau and her simultaneous prospective part-time employment with the Agency?

### 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 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 her official duties that 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 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 appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best 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 IDOA General Counsel, the DCS Director, and the IDOA Commissioner, it does not appear that the Ombudsman's part-time employment at the Agency would create a conflict under this provision. Specifically, the information provided does not suggest that the Ombudsman would receive compensation of substantial value or be required to recuse herself from matters that are critical to the performance of her state employment duties if she were to accept this part-time position. Moreover, the information presented does not suggest that the Ombudsman would be required to disclose confidential information that she may have access to by virtue of her state employment. Similarly, nothing presented suggests that she would use or attempt to use her state position for any unwarranted privileges or exemptions.

#### *B. Conflict of interests*

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

In addition to her state duties in serving as the Director of the DCS Ombudsman Bureau, the Ombudsman is interested in accepting a part-time position with the Agency. DCS licenses private adoption agencies but, in the absence of allegations of abuse or neglect, has no significant or ongoing working relationship with them.

The Agency receives no state funds and does not work with children who are involved with DCS, and the Ombudsman's state duties do not include making licensing or other decisions directly impacting private adoption agencies such as the Agency. Furthermore, the Agency's clients are not eligible for adoption subsidies provided by DCS.

However, there is a slight chance that a client of the Agency for whom the Ombudsman had conducted a home study could come before the Ombudsman's office as part of a DCS-related matter. Therefore, though no potential conflict of interest has been identified at this time, in order to avoid even the appearance of impropriety, IDOA and DCS have proposed a screen to ensure that the Ombudsman does not participate in any matter involving the Agency in her position.

The proposed screen would be implemented when the Ombudsman commences her part-time employment with the Agency and would require the following:

- The Ombudsman will advise DCS and IDOA, in writing, of the supplemental employment, including the date on which the employment is to commence;
- IDOA or the Office of the Ombudsman will designate a staff person to be assigned to receive any complaints, inquiries or communication involving or related to that supplemental employer;
- IDOA or the Office of the Ombudsman will instruct any and all staff who receive any complaints or inquiries involving that supplemental employer to that designated staff person;
- The DCS Deputy Director of Field Operations will be the point of contact for that designated staff person;
- The IDOA General Counsel will be the point of contact for that designated IDOA staff person;
- All staff of DCS and IDOA will refrain from having any communications relating to the supplemental employer with, or in the presence of, the Ombudsman; and
- All staff of the Ombudsman will refrain from having any communications relating to the supplemental employer with, or in the presence of, the Ombudsman and shall notify the appropriate DCS or IDOA designee upon receipt of such communications.

Should any complaint or matter involving that supplemental employer be brought to, or come to the attention of the Office of the Ombudsman:

- The Ombudsman staff designated by IDOA to receive such matters shall immediately forward the matter to the DCS Deputy Director of Field Operations;
- The DCS Deputy Director of Field Operations will work with the designated staff person in the same manner as she would the Ombudsman to respond to, or resolve, the matter; and
- All staff of DCS and the Ombudsman will take all reasonable measures to prevent the Ombudsman from receiving, seeing, or hearing any communications relating to the matter.

### *C. Confidential information*

The Ombudsman 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 Ombudsman 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 business organization, such as the Agency. 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 Ombudsman is exposed to or has access to such confidential information in her position as DCS Ombudsman, she 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 Ombudsman 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 Ombudsman 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 Ombudsman has expressed that her part-time work with the Agency would be completed during evenings and weekends and that any time she would take to work on Agency matters during her regularly scheduled workday would be charged as personal or vacation time. In addition, she must ensure that she does not use state resources to complete her Agency duties. To the extent that the Ombudsman observes these provisions regarding her part-time employment with the agency, such outside employment would not violate these ethics laws.

**CONCLUSION**

Subject to the foregoing analysis and the implementation of the screening procedures established by IDOA and DCS, the DCS Ombudsman's outside employment with the Agency would not be contrary to the Code. The Commission must be notified in writing anytime that the screen is implemented.