

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

**42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)**

**IC 4-2-6-6 Compensation resulting from confidential information**

An FSSA employee sought advice regarding whether post-employment restrictions applied to her future employment opportunity as a Regulatory Compliance Manager for a Managed Care Entity (MCE), one of four MCE's that has a contract with the State. The employee is the assigned Contract Compliance Manager for another MCE, but the employee is not involved in this process for the State's contracts with the other three MCEs, including her new employer. The employee participated in the request for proposal (RFP) processes for all four MCEs by scoring limited-portions of the RFP. SEC found that the employee's post-employment opportunity with the employer would not violate the post-employment rule's cooling off provision as she did not administer the new employer's contract and her limited participation in the scoring of the MCE RFP was not enough to constitute a discretionary decision affecting the outcome of the negotiation of the employer's contract. Further, SEC found that the employee's participation in the new employer's contract, through her participation in portions of the MCE RFP, was not personal or substantial enough to trigger the particular matter restriction in IC 4-2-6-11(b).

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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 employee serves as a Contract Compliance Manager for the Office of Medicaid Policy and Planning (OMPP) within the Indiana Family and Social Services Administration (FSSA).

The OMPP oversees the contracts for four Managed Care Entities (the MCEs): Managed Health Services (MHS), MD Wise, Anthem, and CareSource. Each of these MCEs have their own contracts with the State to provide managed care services. In addition, each MCE is assigned a separate Contract Compliance Manager.

The employee serves as the Contract Compliance Manager for MHS. The employee's responsibilities in this position include looking over data specific to MHS. The employee is responsible for assessing liquidated damages when necessary for MHS, facilitating on-site visits for MHS, and serving as the liaison for compliance issues regarding MHS. She is not involved in this process for the other MCEs.

The employee is interested in leaving state employment and accepting a position as Regulatory Compliance Manager for CareSource. The employee does not complete any compliance work for CareSource and its contract with the State. Her work as Contract Compliance Manager is limited to MHS and their contract with the State.

The employee participated in the RFP proposal for all four of the MCEs listed above, including CareSource, in early 2016. The Deputy General Counsel and Ethics Officer for FSSA provided that the RFP was a large-scale project and the employee was a member of a team consisting of 25 to 30 people working on this RFP. She participated in scoring limited sections of the RFP,

and her score was only part of the overall process and was not binding to the total scoring of each MCE. Specifically, she provided technical evaluations for seven sections of the RFP scoring for the Healthy Indiana Plan portion of the project. Her participation included sharing her thoughts regarding how each MCE would function within the Healthy Indiana Plan specifics that were assigned to her. Besides the Healthy Indiana Plan portion, there were two other portions for scoring, the Common and Hoosier Healthwise portions. In addition to these three components, the RFP scoring also involved a financial portion, other business counsels, and the OMPP executive team. The employee provided and Deputy General Counsel and Ethics Officer for FSSA confirmed that the employee's input had a very small impact on the contract awards for the MCE's and the employee was not part of the team that made the final decision to award a contract to CareSource.

The employee requested advice to determine if any post-employment restrictions would apply to her employment opportunity with CareSource.

### **ISSUE**

1. What rules in the Code apply to the employee's prospective post-employment opportunity with CareSource?
2. Would the employee be prohibited from accepting employment with CareSource immediately upon leaving state employment?
3. Would the employee be prohibited from working on CareSource's contract with FSSA on which she participated in the RFP scoring process as a state employee?

### **RELEVANT 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 4-2-6-9 (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 related 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 no 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 4-2-6-11 (42 IAC 1-5-14)**

#### **One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office**

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

(1) An application.

(2) A business transaction.

(3) A claim.

- (4) A contract.
- (5) A determination.
- (6) An enforcement proceeding.
- (7) An investigation.
- (8) A judicial proceeding.
- (9) A lawsuit.
- (10) A license.
- (11) An economic development project.
- (12) A public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
  - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
  - (B) in a position to make a discretionary decision affecting the:
    - (i) outcome of the negotiation; or
    - (ii) nature of the administration; or

(3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;  
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of the individual's duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) consultation by;
- (3) representation by; or
- (4) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
  - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
  - (B) any contract that:
    - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
    - (ii) is no longer active.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
  - (A) state officer or appointing authority authorizing the waiver; and
  - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
  - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
  - (B) The nature of the duties to be performed by the employee for the prospective employer.
  - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
  - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
  - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

(1) be signed by the former state officer, employee, or special state appointee;

(2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and

(3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

## ANALYSIS

### *A. Confidential Information*

IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction, or investment that was entered into or made as a result of material information of a confidential nature. The employee confirmed that she would not be required to utilize any confidential information in her prospective employment with CareSource. So long as any compensation the employee receives does not result from confidential information, her potential employment with CareSource would not appear to violate IC 4-2-6-6.

### *B. Conflict of Interests*

IC 4-2-6-9(a)(1) prohibits the employee from participating in any decision or vote, or matter related to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits her from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom she is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In this case, employment negotiations have already begun. Accordingly, the employee would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which she, by virtue of her employment negotiations with CareSource or CareSource itself would have a financial interest in the outcome of the matter.

The employee has indicated that she does not currently participate in any compliance-related activities with CareSource. She is only responsible for working with MHS. Therefore, her current position does not require her to participate in decisions or votes, or

matters related to such decisions or votes, in matters in which CareSource has a financial interest.

The employee must ensure she does not participate in any decisions or votes, or matters relating to any such decisions or votes, in which she or CareSource has a financial interest in the outcome of the matter for the remainder of her state employment. Further, if she identifies a potential conflict of interests, she must follow the steps prescribed in IC 4-2-6-9(b) to avoid violating this rule.

### *C. Post-Employment*

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first prohibition, commonly referred to as the cooling off or revolving door period, prevents the employee from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the employee is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration.

The employee provided that she does not anticipate engaging in any lobbying activities in her prospective employment with CareSource. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with CareSource would not violate this provision of the post-employment rule.

Second, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she engaged in the negotiation or administration of a contract on behalf of a state agency **and** 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

The employee did not participate in the administration of CareSource’s individual contract with FSSA that resulted from the MCE RFP. The employee’s contract compliance work was limited to the MHS contract only. The employee did participate in the RFP process for all four of the MCEs as part of a team that scored technical sections of the Healthy Indiana Plan portion of the RFP for all four of the MCE contracts. The RFP process is part of contract negotiations that eventually led to CareSource’s contract with FSSA.

The Commission finds that the employee’s limited participation in the scoring of this RFP is not enough to constitute a discretionary decision affecting the outcome of the negotiation of a contract. Accordingly, the Commission finds that the employee would

not be subject to the cooling off restriction for her role in this RFP process and she may accept employment with CareSource immediately upon leaving state employment.

Third, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. Nothing in the information provided indicates that the employee ever made any regulatory or licensing decisions that directly applied to CareSource at any time during her state employment.

The Commission finds that this provision does not apply to the employee because she has not made any regulatory or licensing decisions that applied to CareSource as a state employee. Consequently, she is not prohibited under this provision from accepting employment with CareSource immediately upon leaving state employment.

Fourth, the employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The information presented to the Commission does not suggest that CareSource has extended an offer of employment to the employee in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to her intended employment opportunity with CareSource.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents her from representing or assisting a person on any of the following twelve matters if she personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

Deputy General Counsel and Ethics Officer for FSSA stated that the employee was a member of a team of 25-30 people involved in scoring portions of the RFP that led to the MCE contracts. CareSource was awarded one of these contracts. The employee provides that her participation in the scoring process was limited to the technical sections of one portion of the RFP. Deputy General Counsel and Ethics Officer for FSSA provided that the RFP was a large-scale project and the employee had a very limited role in the overall process. Deputy General Counsel and Ethics Officer for FSSA advised that the employee was not involved in any final decisions regarding any of the MCE contracts, including CareSource's contract.

The Commission finds that the employee's participation in CareSource's contract, through her participation in portions of the MCE RFP, was not personal or substantial. Accordingly, the particular matter restriction would not apply to the CareSource contract.



and the employee would be able to assist CareSource with this contract, including serving as a liaison between CareSource and the State regarding services under the contract.

### **CONCLUSION**

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the employee's post-employment opportunity with CareSource would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director