

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

A former FSSA employee sought advice regarding the application of the post-employment restrictions to an opportunity for employment with a computer software company who had contracts with FSSA. The former employee was the point of contact for the company at FSSA, but FSSA management was responsible for the negotiation and administration of the company's contracts with FSSA. SEC determined that the former employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and he could begin employment with the company immediately, so long as he complied with the executive branch lobbying restrictions. SEC further found that the former employee must refrain from assisting or representing the company in any particular matters he personally and substantially participated in as a state employee.

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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

A former state employee of the Indiana Family and Social Services Administration (FSSA) recently retired from his position as Database Analyst Programmer Senior on June 17, 2016. In this position the employee was responsible for extracting data from various computer applications used by FSSA employees and contractors. The General Counsel and Ethics Officer for FSSA and Senior Manager of Medicaid Applications for FSSA (the "Manager"), appeared with the employee to provide additional information regarding his former responsibilities at FSSA. The Manager served as the employee's supervisor at FSSA.

CODY Computer Services (CODY) has been a contractor of FSSA since 2009 when it entered into a QPA agreement after being selected as a vendor in 2008. The initial QPA agreement was not renewed. A contract between FSSA and CODY Computer Services was signed in the fall of 2015, which covered annual support services through June 30, 2017. FSSA still has active users of the CODY computer applications.

The employee served as the primary contact between CODY and the approximately 100 software users from FSSA and its contractor Xerox/Affiliated Computer Services. He answered questions from FSSA users regarding CODY applications and contacted CODY if he was unable to answer the users' questions. His other duties related to the CODY applications used by FSSA included changing configuration parameters when requested by FSSA management, creating new users and deactivating former users when requested by other FSSA staff, and transmitting special programming requests from FSSA users to CODY. The employee provides that the programming specifications he wrote were approved by other FSSA staff and allowed CODY to estimate the requested project. According to the employee, others in FSSA management had the responsibility to decide whether to accept this estimate and authorize the work. He also received the annual invoice for software maintenance from CODY, and he forwarded that invoice to FSSA Accounting and FSSA Purchasing for processing.

The employee notes that he did not have decision-making authority concerning choosing CODY as a vendor, any contract with CODY, or any payment to CODY. He was a member of the FSSA committee that selected CODY as a vendor in 2008, but he provides that he did not play a significant role in the selection process. Specifically, he attended meetings and participated in the scoring of vendors. He does not recall voting on a recommended vendor, only that the scoring method used by the committee indicated that one vendor was the best for the agency's needs. The Manager provided that the employee would not have had authority to make a decision regarding the negotiation of this contract as these decisions are made by FSSA management.

In terms of CODY's 2015 contract, FSSA Purchasing determined that the contract was needed and then handled all negotiations with CODY to finalize the agreement. He does not recall if he was approached for recommendations by those at FSSA who oversaw these negotiations, but he was asked to make contact with CODY to indicate that FSSA was interested in pursuing a contract based on their current needs. He also received communications about this contract from CODY and forwarded them to FSSA purchasing. FSSA still has active users (approximately 100) of the CODY computer applications.

The Manager confirmed the employee's understanding that FSSA Accounting, FSSA Purchasing and the executives of the sponsoring units, Division of Family Resources (FSSA DFR), and FSSA Division's Chief of Investigations, possessed the authority to make decisions regarding this contract and how it was fulfilled. The Manager provided that the employee ensured the CODY contract was up to date, because FSSA does not have a system to alert management when a contract is up for renewal. The Manager explained that the employee was responsible for ensuring that services did not lapse and to inform his managers that a new contract would be needed. It was then management's decision to renew the contract or to look for another application system. The Manager provided that the employee was not asked to provide an opinion or recommendation regarding whether FSSA should enter into or renew a contract with CODY.

The Manager further explained that the employee was not responsible for the administration or management of the CODY contract. According to the Manager, the employee was considered more of a "super user" who assisted other people with the CODY software applications themselves and did not make decisions regarding the administration of the contract.

In August of 2016, CODY contacted the employee about a potential employment position. In this position he would be a contractor responsible for software analysis, software implementation, user support and user training. He provides that his potential work with CODY would not involve using any information of a confidential nature from FSSA.

The employee is seeking advice to determine if he would be subject to the one-year cooling off requirement under IC 4-2-6-11(b) of the post-employment rule.

ISSUE

What rules in the Code apply to the employee's prospective post-employment opportunity with CODY?

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 provides that his potential future work with CODY would not involve using any confidential information from FSSA. So long as any compensation he receives

does not result from confidential information, his potential employment with CODY would not violate IC 4-2-6-6.

B. 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 he left state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation. Therefore this restriction includes a client or customer of a self-employed individual.

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 (IDOA).

The employee provided that he did not anticipate engaging in any lobbying activities in his prospective employment with CODY. To the extent that he does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with CODY 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 his state employment from an employer with whom 1) he 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.

CODY has had a contract with FSSA since 2009. The employee indicates that he was part of the selection committee that chose CODY as a vendor in 2008, which led to a Quantity Purchase Agreement (QPA) contract in 2009. A QPA is a contract between the State and vendor where the vendor provides an estimated quantity of goods and services at a stated unit price guaranteed for a specific time frame. As part of this selection committee, he attended meetings and he participated in the scoring of vendors. He does not recall voting to recommend a particular vendor.

The employee provided that the Project Manager, Keith Harden, and IDOA officials handled all negotiations for the QPA between FSSA and CODY. The Manager confirmed that based on his knowledge of the employee’s job responsibilities, the employee did not have the authority to make a decision to award the contract to CODY or otherwise negotiate this contract. Therefore, it does not appear that the employee was in a position to negotiate or make a discretionary decision regarding the outcome of the negotiation of this contract.

CODY's QPA contract expired and was not renewed; however, CODY entered into a contract with FSSA in the fall of 2015, and this contract is still in effect until June 30, 2017. Based on the information provided by the employee and the Manager, this contract between FSSA and CODY covered annual support services, and FSSA Purchasing determined that the contract was needed and then handled all negotiations with CODY to finalize the agreement. The Manager confirmed that the employee only informed FSSA management of the need for this contract based on the expiration of the support services provided by CODY and that he was not asked for a recommendation or opinion regarding CODY's services and whether FSSA should enter into this contract. Therefore, it does not appear that the employee negotiated this contract nor was he in a position to make a discretionary decision regarding the outcome of the negotiation of this contract.

Regarding administration of the CODY contracts, the employee provided that although he was the point of contact between CODY and FSSA and FSSA contractor users, his role was related to the use of the CODY software applications, and he was not in a position to make decisions concerning the contract itself. He advised that FSSA management made the requests for any configuration parameters he changed for the CODY software applications. He also provided that the requests to activate new users and inactivate former users came from FSSA management. Further, he advised that the programming specifications that they wrote when transmitting programming requests from FSSA users to CODY also had to be approved by other FSSA staff. In addition, he provided that FSSA management had the responsibility to decide whether to accept the estimate and authorize the work associated with the programming requests.

According to the Manager, the employee's interactions with CODY concerning the CODY software applications, including submitting questions from users, changing configuration parameters, creating new users and deactivating former users, transmitting special programming requests from FSSA users to CODY, and forwarding the annual software maintenance invoice to FSSA Accounting and FSSA Purchasing for processing; did not constitute administering a contract between CODY and FSSA. The Manager provided that the employee was a "super user" of the CODY applications and that the administration of the contract was carried out by FSSA management.

Based on this information, it does not appear that the employee was in a position to make discretionary decisions affecting the nature of the administration of CODY's contracts with the State.

Accordingly the Commission finds that this provision of the cooling off restriction would not prohibit the employee from pursuing employment with CODY immediately.

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

The Commission finds that this provision does not apply to the employee as he has not made a licensing or regulatory decision that applied to CODY or any of its subsidiaries or during the course of his state employment. Consequently, he is not prohibited under this provision from accepting employment with CODY immediately.

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 him in his official capacity as a state employee. The information presented to the Commission does not suggest that CODY extended an offer of employment to him in an attempt to influence him in his capacity as a state employee. Further, he has been retired from state employment since June 17, 2016, and CODY first approached him about the potential employment opportunity in August of 2016. Accordingly, the Commission finds that this restriction does not apply to his intended employment opportunity with CODY.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he 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.

As Database Analyst Programmer Senior for FSSA, the employee's responsibilities included various tasks associated with the CODY computer applications used by FSSA. The Commission has previously determined computer applications are not particular matters for purposes of the post-employment rule. Therefore, he would not be prohibited under this rule from working on the CODY computer applications if he accepts employment with this company.

The employee also served as the primary contact between CODY and approximately 100 software users at FSSA and its contractor Xerox/Affiliated Computer Services. CODY provided its applications and services under its contract with FSSA. Although this contract would be considered a particular matter, the Commission finds that his participation in this contract as an FSSA employee was not personal and substantial. Accordingly, he would not be prohibited from assisting or representing CODY, or any other person, on this contract.

The Commission further finds that the employee must ensure compliance with the particular matter restriction and refrain from assisting or representing CODY, or any other person, on any of the particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves CODY.

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 CODY would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

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