

42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)
IC 4-2-6-6 Compensation resulting from confidential information

A former FCM Supervisor for DCS sought advice regarding whether her prior involvement with the referral process for a DCS Provider would prohibit her from accepting employment with that same Provider due to post-employment restrictions. While she was an FCM Supervisor for DCS, she reviewed referrals for approval or denial based only on the presence of grammatical errors, the correctness of the contact information, and the completeness of the description of services to be provided. SEC found that the employee's post-employment opportunity with the Provider would not violate the post-employment rule's cooling off provision found in IC 4-2-6-11, because her referral approvals did not amount to the administration of a contract with the Provider. SEC further found that the employee must comply with the post-employment rule's particular matter restriction by refraining from working on matters which she personally and substantially worked on during her time as an FCM Supervisor for DCS.

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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 Department of Child Services (DCS) left her position as Family Case Manager (FCM) Supervisor on April 28, 2017.

The employee is seeking employment with a DCS provider (the Provider). As an FCM Supervisor, the employee was not involved in approving contracts for any providers and was not a voting member at the Regional Services Council Meetings where service needs in the community were identified and potential providers were discussed. The employee provides that her only interactions with the Provider was through the approval of referrals sent to her by other FCMs.

As part of the provider referral process, an FCM chooses what services a family involved with DCS needs. The FCM then drafts a referral outlining their recommendations regarding what provider should be working with the family and what services are needed. The FCM then sends this referral to their supervisor for review and approval. As an FCM Supervisor, the employee reviewed these referrals to ensure that the document did not contain any grammatical errors, that the FCM provided the contact information for the family, and that the FCM included enough information in the referral so the selected provider would know exactly what services to provide to the family. If the referral met these standards, the employee would approve the referral. If these standards were not met, she did not approve it. According to the employee, her approval or denial was not based on any other factors.

The employee requested advice from the Commission to determine if her involvement in the provider referral process would trigger post-employment restrictions that would prohibit her from accepting employment with the Provider. Chief Counsel for Legal and Internal Affairs and Ethics Officer for DCS, attended the Commission's meeting with the employee and provided additional information on the Provider's contract with DCS.

ISSUE

1. What rules in the Code apply to the employee's prospective post-employment opportunity with the Provider?
2. Would the employee be prohibited from accepting employment with the Provider immediately?

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 4-2-6-11 (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 the Provider. So long as any compensation the employee receives does not result from confidential information, her potential employment with the Provider 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 she 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 she does not anticipate engaging in any lobbying activities in her prospective employment with the Provider. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with the Provider 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 indicates that she was not a voting member at the Regional Services Council meetings and she did not approve any contracts awarded to the Provider. Accordingly, the Commission finds that the employee was not involved in the negotiation of the Provider’s contract with the State.

The Commission further finds that the employee’s role in the approval of referrals to the Provider does not amount to making a discretionary decision that affected the administration of the Provider’s contract with DCS.

The employee approved DCS referrals to the Provider after reviewing these referrals for grammar and completeness. Chief Counsel for Legal and Internal Affairs and Ethics

Officer for DCS advised that these approvals may have some impact on the Provider's contract as the FCMs would not be able to send DCS children and families to the Provider for services without the employee's approval of the referrals. However, the employee also advised that all DCS provider contracts are negotiated and administered through the DCS Central Office and not at the local level. According to Chief Counsel for Legal and Internal Affairs and Ethics Officer for DCS, decisions regarding the administration of the Provider's contracts are made by Deputy Directors at the DCS Central Office. There is some input at the local level and Family Case Manager Supervisors, Local Office Directors, and Regional Managers may provide local feedback on a provider's contract, but the ultimate decision-making on all contracts is done through the Central Office. Accordingly, the Commission finds that the employee is not prohibited under this provision from accepting employment with the Provider immediately.

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 the Provider 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 the Provider as a DCS employee. Consequently, she is not prohibited under this provision from accepting employment with the Provider 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 her in her official capacity as a state employee. The information presented to the Commission does not suggest that the Provider has extended an offer of employment to the employee in an attempt to influence her in her capacity as a state employee, because the employee has already left state employment. Accordingly, the Commission finds that this restriction would not apply to her intended employment opportunity with the Provider.

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.

The employee indicated that the Provider would ensure that she is not assigned to or involved in cases involving families that she referred to the Provider or worked with

while at DCS. Accordingly she does not anticipate working on any particular matters that she participated in as a state employee, but understands that she could work on new matters involving DCS clients.

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

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

Respectfully Submitted,

Jennifer Cooper
Ethics Director