

**IC 4-2-6-6 Compensation resulting from confidential information
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 rule to a potential temporary, part-time contract position with an FSSA contractor. SEC determined the Post-Employment Restrictions would not apply under IC 4-2-6-11 and the employee could accept the position immediately.

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2019-FAO-023

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 Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of a former Financial Analyst in the Bureau of Childcare/Office of Early Childcare and Out-of-School Learning (Bureau) within FSSA (Former Employee).

The Former Employee left state employment on June 26, 2019. Prior to leaving state employment, the Former Employee had held a variety of positions with FSSA. She started with FSSA as a Human Services Consultant in 2013 and then transitioned to a Program Director in 2017. In 2018, she transitioned to the role of a Financial Analyst. The Former Employee is currently employed as a Volunteer Manager at Outreach Indiana, an organization that assists homeless youth.

The Former Employee is interested in pursuing a temporary, part-time contract position with The Consultant Consortium, Inc. (TCC), a contractor with FSSA. In the position with TCC, the Former Employee would provide training to TCC employees on how to input data into TCC's software systems. She would work two hours a week for five days to provide such training for a total of 10 hours. Although the Former Employee would be teaching the TCC employees how to use software she used while employed by FSSA, she would not be required to work on any matters that she worked on while with FSSA.

TCC is a software solutions company that currently has two contracts with FSSA. TCC is an Indiana company that provides information technology consulting services nationwide. During her employment with FSSA, the Former Employee was responsible for performing the administrative function of preparing and submitting the Request for Contract Preparation (RCP) for TCC contracts to FSSA's contracting team. This included incorporating information she received from FSSA's Division of Family Resources, Bureau of Childcare Operations Director regarding the terms of the contract negotiated and approved by the Bureau. The Former Employee was responsible for creating RCPs once FSSA's Division of Family Resources, Bureau of Childcare negotiated and approved a contract's specifics, such as the rate, term, line items, scope of work, etc.

The Ethics Officer provides that the Former Employee was not involved in the contract negotiation. Rather, she would make sure that the content of the RCP matched the budget and dates that the Bureau Director previously had approved before she sent the RCP to FSSA's contracting team to begin the process of creating the contract. If in completing the RCP, the Former Employee noticed a discrepancy, she would notify the Operations Director of her findings, and the Operations Director and Bureau Director would decide the appropriate course of action. If there were any changes to the RCP or contract documents, the Operations Director and Bureau Director made those decisions. In completing the RCP, the Former Employee would occasionally contact TCC to relay information. Once she completed the RCP, the Operations Director reviewed the RCP and documentation before the Former Employee sent the form and any additional information to the contracting team.

The Former Employee recalls that in or around 2016-2017, she worked with two or three colleagues to review claims submitted by TCC on two or three occasions. Such reviews included: (1) requesting information to conduct an initial desk review; (2) reviewing at least ten claims submitted by TCC; and (3) conducting an on-site review at TCC's place of business. During the onsite review, she would ensure that TCC was maintaining and exchanging documentation securely. She also reviewed the documentation to see if TCC was submitting claims in accordance with the contract terms. She would collect the data and submit it to the Operations Director who would review the data and issue a letter either requesting clarification and/or additional information or noting the completion of the review. The Former Employee performed these tasks until she transitioned to the role of a Financial Analyst in 2018. As a Financial Analyst she was no longer responsible for preparing RCPs for the Bureau. The Former Employee did not make any licensing or regulatory decisions regarding TCC in any of her positions with FSSA.

The Ethics Officer provides that the Former Employee knows and understands that Indiana's ethics laws will continue to apply to her as a private sector employee. She understands and agrees not to divulge confidential information of FSSA during her post-employment endeavors. Furthermore, the Former Employee understands and agrees to abide by the one-year restriction regarding registering as an executive branch lobbyist.

FSSA is seeking the Commission's opinion regarding the application of any of the rules in the Code to the Former Employee's post-employment opportunity with TCC.

ISSUE

What rules in the Code apply to the Former Employee's post-employment opportunity with TCC?

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 Former 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. So long as any compensation the Former Employee receives does not result from confidential information, her potential employment with TCC 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 Former Employee from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the Former 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 Ethics Officer provides that the Former Employee would not be required to engage in any lobbying activities in her prospective employment with TCC. To the extent that the Former Employee does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that her intended employment with TCC would not violate this provision of the post-employment rule.

Second, the Former 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.

As it relates to TCC's contracts with FSSA, the Former Employee was responsible for performing the administrative function of preparing and submitting the RCPs. She prepared these RCPs for FSSA's contracting team so that they could begin the process of creating the contract. The Former Employee also worked with colleagues to review claims by TCC on two to three occasions to ensure that TCC was maintaining and exchanging documentation securely and submitting claims in accordance with the contract terms.

The Ethics Officer provides that the Former Employee created the RCPs after the Bureau negotiated and approved the contract's specifics, such as the rate, term, line items, scope of work, etc. According to the Ethics Officer, the Former Employee did not make any decisions or make any recommendations as to what information was included in the RCP; rather the Operations Director for the Bureau and the Bureau Director provided all of the information and made the decisions on any needed changes to the RCP or related contract documents. The Operations Director also reviewed the RCP and related documents before the Former Employee sent the form and any additional information to the contracting team.

In terms of her participation on the team that reviewed TCC's claims, the Former Employee submitted the data she collected during these reviews to the Operations Director. The Former Employee and the Ethics Officer provide that there was no subjectivity required in this process. The Former Employee did not have to use any discretion nor did she make any recommendations during this process. She was one of a group of individuals who collected specified data and passed it along to the Operations Director for any further review or action required.

The Commission finds that the Former Employee was involved in aspects of the negotiation and administration of TCC's contracts with FSSA; however, she was not in a position to make any discretionary decisions affecting the outcome of the negotiation or nature of the administration of these contracts. Accordingly, the Commission finds that

the Former Employee would not be subject to the cooling off restriction for her role in interacting with TCC as a FSSA employee, and she may accept employment with TCC immediately.

Third, the Former 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.

The Ethics Officer provides that the Former Employee did not make any regulatory or licensing decisions in her positions with FSSA that directly applied to TCC. Accordingly, the Commission finds that the Former Employee has never made any regulatory or licensing decisions that applied to TCC as a state employee, and she is not prohibited under this provision from accepting employment with TCC immediately.

Fourth, the Former 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 Former Employee has already left state employment. Accordingly, the Commission finds that this restriction would not apply to her intended employment opportunity with TCC.

Finally, the Former 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.

In this instance, the Former Employee would be prohibited from representing or assisting TCC, as well as any other person, in a particular matter in which she personally and substantially participated as a state employee.

The Ethics Officer provides that the Former Employee would be teaching TCC employees how to use software she used while employed by FSSA, she would not be required to work on any matters that she worked on as a state employee.

The Commission finds that the Former Employee must ensure compliance with the particular matter restrictions and refrain from assisting or representing any person on any other particular matters that she may have been personally and substantially involved in during her state employment.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Former Employee's post-employment opportunity with TCC would not violate the post-employment restrictions found in IC 4-2-6-11.