

**IC 4-2-6-6 Compensation resulting from confidential information  
42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-9)  
42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)**

The Chief Medical Officer for two Indiana Family Social Services Administration organizations sought advice regarding post-employment to work as Medical Director of a private healthcare facility. The Commission finds that the Chief Medical Officer's post-employment opportunity would not violate the post-employment restrictions found in IC 4-2-6-11.

January 21, 2021  
2021-FAO-002

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 the Superintendent and Chief Medical Officer of the NeuroDiagnostic Institute (NDI) and Chief Medical Officer of the Indiana State Psychiatric Hospital Network (Chief Medical Officer).

The Chief Medical Officer's role with the State of Indiana began in 2016 as FSSA's Chief Medical Officer, and it primarily focused on design, construction and activation of the NDI with a secondary focus on State Psychiatric Hospital Network integration as chair of the medical directors committee. The Chief Medical Officer is also the executive sponsor of the Cerner electronic medical record project for the State psychiatric hospitals. In July of 2019, the Chief Medical Officer's primary role expanded to Superintendent and Chief Medical Officer of NDI.

The Chief Medical Officer recently interviewed for and was offered the position of Medical Director for USHealthVest's new free-standing psychiatric hospital in Plainfield, Indiana. USHealthVest is a behavioral healthcare company headquartered in New York. The company also has psychiatric hospitals in Chicago, Atlanta and Seattle. The hospital's Indiana licensure application is currently pending with FSSA's Division of Mental Health and Addiction (DMHA).

The Chief Medical Officer's role as Medical Director with USHealthVest would include direct psychiatric services to patients, supervision of various nurse practitioners, preparation and monitoring of compliance with Joint Commission and Centers for Medicare and Medicaid Services regulations and external relationship building within the healthcare environment.

The Chief Medical Officer advised the Ethics Officer that there are no particular matters that he substantially or personally participated in during his tenure at FSSA that would preclude him from providing services to USHealthVest after leaving state employment. Furthermore, the Chief Medical Officer has not had any interactions with USHealthVest in his official

capacity at FSSA. The Chief Medical Officer has not engaged in the negotiation or administration of any contract between the State and USHealthVest, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with USHealthVest. If he is permitted to pursue this employment opportunity, he does not plan to take part in any discussions or negotiations between FSSA/DMHA and USHealthVest. The Chief Medical Officer's only function would be as a care provider.

The Chief Medical Officer knows and understands that Indiana's ethics laws will continue to apply to him as a private sector employee. He understands and agrees not to divulge confidential FSSA information during his post-employment endeavors. Furthermore, the Chief Medical Officer understands and agrees to abide by the one-year cooling off 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 Chief Medical Officer's post-employment opportunity with USHealthVest.

### **ISSUE**

What rules in the Code apply to the Chief Medical Officer's post-employment opportunity with USHealthVest?

### **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

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Confidential Information, Conflicts of Interests, and Post-employment. The application of each provision to the Chief Medical Officer is analyzed below.

### *A. Confidential Information*

IC 4-2-6-6 prohibits the Chief Medical Officer 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 Chief Medical Officer receives does not result from confidential information, his potential employment with USHealthVest would not violate IC 4-2-6-6.

### *B. Conflict of Interests*

IC 4-2-6-9(a)(1) prohibits the Chief Medical Officer from participating in any decision or vote, or matter related to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits him from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom he 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."

IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify his agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the Office of Inspector General.

Based on the information provided, the Chief Medical Officer has interviewed for and been offered a position with USHealthVest. Accordingly, employment negotiations have begun, and the Chief Medical Officer is prohibited from participating in any decision or vote, or matter related to a decision or vote, in which he, by virtue of his employment negotiations with USHealthVest, would have a financial interest in the outcome of the matter.

The Ethics Officer provides that the Chief Medical Officer has not had any interactions with USHealthVest in his official state capacity and has never been involved in any contracting or regulatory/licensing decisions involving USHealthVest.

Accordingly, the Commission finds that the Chief Medical Officer does not have an identified potential conflict of interests at this time. However, if a potential conflict of

interests is identified during the remainder of his state employment, the Chief Medical Officer must meet all of the disclosure and notification requirements in IC 4-2-6-9(b). Mere recusal from matters that could create a potential conflict of interests would not be enough to satisfy the requirements.

### *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 Chief Medical Officer from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the Chief Medical Officer 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 Chief Medical Officer understands he is prohibited from engaging in any lobbying activities in his prospective employment with USHealthVest. To the extent that the Chief Medical Officer does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that his intended employment with USHealthVest would not violate this provision of the post-employment rule.

Second, the Chief Medical Officer 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.

According to the Ethics Officer, the Chief Medical Officer has not engaged in the negotiation or administration of any contract between the State and USHealthVest, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with USHealthVest.

Accordingly, the Commission finds that this provision of the cooling off restriction would not apply, and he is not prohibited under this provision from accepting employment with USHealthVest immediately upon leaving state employment.

Third, the Chief Medical Officer 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.

The Ethics Officer provides that the Chief Medical Officer does not make any regulatory or licensing decisions in his position with FSSA that directly apply to USHealthVest. Accordingly, the Commission finds that the Chief Medical Officer has never made any regulatory or licensing decisions that applied to USHealthVest as a state employee, and he is not prohibited under this provision from accepting employment with USHealthVest immediately upon leaving state employment.

Fourth, the Chief Medical Officer 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 USHealthVest has extended an offer of employment to the Chief Medical Officer in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to his intended employment opportunity with USHealthVest.

Finally, the Chief Medical Officer 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.

In this instance, the Chief Medical Officer would be prohibited from representing or assisting USHealthVest, as well as any other person, in a particular matter in which he personally and substantially participated as a state employee.

The Ethics Officer provides that the Chief Medical Officer has not identified any particular matters in which he personally and substantially participated and in which he expects to be involved at USHealthVest. The Commission finds that the Chief Medical Officer must ensure compliance with the particular matter restrictions and refrain from assisting or representing any person on any other particular matters that he may have been personally and substantially involved in during his state employment.



## **CONCLUSION**

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

Respectfully Submitted,

Jennifer Cooper  
Ethics Director