

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

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

A former employee of the Office of the Governor sought advice regarding a post-state employment opportunity as President of the Indiana Health Care Association. The Commission finds that the legislative matters, policies and related general matters identified by the employee as work in which he participated at the Office of the Governor are not “particular matters” under the Code, and he is not prohibited from representing IHCA, its member facilities or any other person on such matters.

June 9, 2022
2022-FAO-013

The Indiana State Ethics Commission (Commission) issues the following formal 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 Office of the Governor employee (Employee) served as a Senior Operations Director for the Governor from January of 2017 through February of 2021. In this role, his primary responsibility was to serve as a liaison between assigned state agencies, including the Indiana Department of Health (IDOH) and the Family and Social Services Administration (FSSA). The Employee worked with agencies and their leaders to effectively communicate the Governor’s agenda and served as the Governor’s liaison to business and community organizations as well as other public and private entities on public health matters. During the course of his state employment, he did not have contracting authority or responsibility nor did he make any regulatory or licensing decisions regarding any matters.

The Employee provides that as a state employee, he participated in discussions with members of the Governor’s Office and administration in the development of a long-term healthcare reform proposal as part of the Governor’s 2021 agenda. To effectuate this proposal, the Governor directed FSSA to begin work with impacted stakeholders, including the Indiana Health Care Association (IHCA) and its members, to develop future policy and/or legislative proposals. The first of these stakeholder meetings occurred on February 15, 2021, prior to the Employee’s separation from state employment on February 28, 2021.

Following the Employee’s departure from state government, the stakeholder group developed and issued a Request for Information (RFI) to further develop a proposal to move long-term health care coordination and reimbursement into a managed care model. A subsequent Request for Proposal (RFP) was developed.

Furthermore, the General Assembly enacted legislation in both the 2021 and 2022 sessions that have impacted the development and the timeline of the proposal. As with the RFI and RFP, these legislative actions occurred after the Employee left state employment.

The Employee has recently received an offer of employment to serve as the next president of IHCA. IHCA is Indiana’s largest trade organization and advocate representing proprietary, not-for-profit and hospital-based skilled nursing, assisted living and independent living communities. IHCA’s more than 480 member facilities care for more than 35,000 of Indiana’s

geriatric and disabled citizens, the majority of whom are low-income Medicaid recipients.

The Employee is seeking the Commission's opinion regarding the application of the Code to his post-employment opportunity with IHCA.

ISSUE

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

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

The Employee's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Confidential Information and Post-employment. The application of each provision is analyzed below.

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. So long as any compensation the Employee receives does not result from confidential information, his potential employment with IHCA 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 a former state employee from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

Because the Employee left state employment in February of 2021, the “cooling off” period has expired, and he is not prohibited under this provision from accepting the proposed position at IHCA. Furthermore, this provision does not impose any restrictions on his activities in that role.

As a former state employee, the Employee is subject to the post-employment rule’s “particular matter” prohibition. 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 statute specifically excludes “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” from the definition of particular matter. 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 Employee is prohibited from representing or assisting IHCA, its members or any other person in a particular matter in which he personally and substantially participated as a state employee.

The Employee provides that the proposed role at IHCA may require his interaction with IDOH, which is the state agency primarily responsible for long-term care facility and employee licensure. Based on the information provided, the Employee was not involved with long-term care facility or employee licensure during his state employment and has not identified any particular matters associated with his contact with IDOH.

The Employee provides that in the proposed role at IHCA, he would be responsible for the organization’s lobbying and advocacy efforts regarding current regulatory and reimbursement framework as well as the managed care model for long-term care services reform that developed from the Governor’s 2021 agenda.

The Commission finds that the Employee's participation in the proposals of legislative matters, policies and related general matters while serving in the Office of the Governor are not "particular matters" under the Code. Therefore, this provision does not prohibit the Employee from representing or assisting IHCA, its member facilities or any other person on such matters related to the policies and legislation on which he worked as a state employee.

CONCLUSION

The Commission finds that in his post-state employment, the Employee is prohibited from representing or assisting IHCA, its members or any other person in a particular matter in which he personally and substantially participated as a state employee. The legislative matters, policies and related general matters identified by the Employee as work in which he participated at the Office of the Governor are not "particular matters" under the Code, and he is not prohibited from representing IHCA, its member facilities or any other person on such matters.

Respectfully Submitted,

Sean Gorman
State Ethics Director