

**42 IAC 1-5-6 Conflicts of Interests (IC 4-2-6-9)**  
**42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)**  
**42 IAC 1-5-10 Benefiting from confidential information**  
**42 IAC 1-5-11 Divulging confidential information**  
**IC 4-2-6-6 Compensation resulting from confidential information**

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) sought advice on behalf of the Director of Pharmacy for FSSA's Office of Medicaid Policy and Planning regarding a post-employment opportunity with a company that contracts with FSSA. The Commission finds that the post-employment opportunity would violate the 365-day "cooling off" post-employment restriction.

August 8, 2024  
2024-FAO-004

The Indiana State Ethics Commission (Commission) issues the following Formal Advisory Opinion (FAO) 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, an agency Ethics Officer, and the state employee whose post-employment opportunity serves as the basis for this request.

**BACKGROUND**

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) is requesting the Commission's FAO on behalf of the Director of Pharmacy (Director) for FSSA's Office of Medicaid Policy and Planning (OMPP). Specifically, the Ethics Officer is requesting an opinion from the Commission regarding the Director's proposed post-state employment opportunity with Mercer Health and Benefits, LLC (Mercer).

The Director of Pharmacy's duties include overseeing both Fee-For-Service (FFS) and Managed Care Entities (MCEs) administration of the Medicaid Pharmacy Benefit; setting policy for all matters regarding the drug benefit; and overseeing and administering OMPP Boards and Committees.

Mercer has offered the Director a position as a consultant in Mercer's Government Division. In this role, the Director would assist other states in the administration of their pharmacy benefit program and would develop and write white papers on topics of note to Medicaid. The role would not intersect with Indiana in any way for at least one year, and her work would not involve lobbying.

On July 11, 2024, FSSA filed an Ethics Disclosure Statement for Conflicts of Interests – Decisions and Voting with the Commission on the Director's behalf because she was engaged in employment discussions with Mercer. The Disclosure Statement includes a screen that prohibits the Director from participating in decisions or votes or related matters in which Mercer has a financial interest. The screen further prohibits the Director from assisting any future employers, including Mercer, with any matter she personally and substantially participated in while employed by FSSA and OMPP. The screen additionally the Director from disclosing or otherwise relying on any confidential information.

In her role as Director of Pharmacy, she interacted with Mercer on two specific projects. First, she participated in the MCE Pharmacy Benefit Gap Analysis that began on September 1, 2021, and was scheduled to end January 1, 2022. OMPP renewed the contract for an additional year, so that the contract expired on January 31, 2023. Second, she participated in obtaining Mercer's assistance and project management of a conversion of the State Uniform Preferred Drug List (SUPDL). OMPP obtained the contract by special procurement. The contract began August 26, 2022, and ended June 30, 2024. There has been no work completed on this contract since September 2023, and OMPP did not renew or extend the contract.

The Director was the signatory on both contracts. The Ethics Officer writes that the Director did not negotiate the contracts, as OMPP created them both by special procurement and not through the traditional Request for Proposal process. Further, Mercer only offered a straight rate for their services and did not allow the State to negotiate a different rate. The Director initiated the special procurement and justification for the contracts. Mercer set the contract terms for both projects including scope of work and deliverables. Mercer provided a PowerPoint presentation for the purpose of the MCE Pharmacy Benefit Gap Analysis contract, and Mercer was in an advisory capacity on the SUPDL contract and kept meeting minutes as project manager.

As Director of Pharmacy, she monitored Mercer's performance on both contracts. The Director could have recommended amendments, modifications, sanctions or termination, but only other FSSA employees had the authority to take such action as the Director did not have the authority to make any unilateral decisions.

On behalf of the Director, the Ethics Officer is seeking the Commission's FAO regarding the application of any of the rules in the Code to the Director's proposed post-employment opportunity with Mercer.

### **ISSUES**

What ethics issues, if any, arise for the Director if she accepts a post-employment position with Mercer?

### **RELEVANT LAW**

#### **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 relating 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 not 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 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.

#### **42 IAC 1-5-10 Benefiting from confidential information**

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

#### **42 IAC 1-5-11**

##### **Divulging confidential information**

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by 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.

#### **ANALYSIS**

The Ethics Officer's request for a FAO invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Post-employment and Benefiting from and Divulging Confidential Information. The application of each provision to the Director's situation is analyzed below.

##### *A. Conflict of interests - decisions and votes*

IC 4-2-6-9(a)(1) prohibits the Director from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the Director from participating in any decision or vote, or matter relating to that decision or vote, if the business organization with whom she is negotiating or has an arrangement concerning prospective employment has a financial interest in the matter.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority in writing and either seek an advisory opinion from the Commission or file a written disclosure statement.

FSSA filed an Ethics Disclosure Statement for Conflicts of Interests – Decisions and Voting on the Director’s behalf. The Disclosure Statement includes a screen that prohibits the Director from participating in decisions or votes or related matters in which Mercer has a financial interest. The screen further prohibits the Director from assisting any future employers, including Mercer, with any matter she personally and substantially participated in while employed by FSSA and OMPP. The screen additionally prohibits the Director from disclosing or otherwise relying on any confidential information. As such, she has complied with the requirements in IC 4-2-6-9 for any potential conflict of interests that exists between her FSSA employment and her employment negotiations and arrangement concerning prospective employment with Mercer.

*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 Director from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the Director 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. Based on the information provided, the Director would not be engaging in any lobbying activities in her position at Mercer, and her role would not intersect with Indiana for at least one year. Thus, the Director’s post-employment opportunity at Mercer would not violate this provision of the post-employment rule.

Second, the Director 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. Based on the information presented to the Commission, it does not appear that the Director has not made a regulatory or licensing decision that directly applied to Mercer or its parent or subsidiary, therefore this prohibition would not apply.

Third, the Director 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 Mercer has extended an offer for the Director’s prospective new role in an attempt to influence the Director in her capacity as a state employee.

Fourth, the Director 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 Director interacted with Mercer on two specific contracts. She was the signatory on both contracts, and she initiated the special procurements and the justifications. Additionally, she monitored Mercer's performance on both contracts and could have recommended amendments, modifications, sanctions or termination; however, only other FSSA employees would have had the authority to take any such action.

The Commission has found, in the past, that a state employee administered a contract when she worked directly, along with other members of her agency, with the contractor to fulfill the contractor's duties and deliverables set forth in the contract. See [13-I-37](#). The Commission further found that the same state employee was in a position of authority to make discretionary decisions when she could escalate matters to the Agency Head, who was the ultimate decision-maker for the contract. *Id.*

Similarly, the Commission finds the Director (1) engaged in the negotiation or administration of a contract on behalf of FSSA 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 Commission finds that even though FSSA created the contract through a special procurement, the Director engaged in the negotiation of the contract with Mercer, and her position allowed her to make decisions affecting the outcome of the negotiation. Therefore, the post-employment rule's cooling off period would apply to the Director's intended employment opportunity with Mercer, and she may not begin such employment for 365 days after her separation from state employment.

Finally, the Director 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 Director would be prohibited from representing or assisting Mercer, or any other person in a particular matter in which she personally and substantially participated as a state employee. The Director understands that both contracts would qualify as particular matters, and that she may never represent or assist a person in those matters as she personally and substantially participated in both matters.

Therefore, the Commission finds the two contracts to be "particular matters" on which the Director may never represent or assist any person for the life of those contracts.

### *C. Confidential information*

The Director is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the Director from



accepting any compensation from any employment, transaction or investment that is entered into or made as a result of material information of a confidential nature. The term “person” is defined in IC 4-2-6-1(a)(13) to encompass both an individual and an organization, such as Mercer. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent the Director has acquired or maintains access to such confidential information obtained in her role at FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including Mercer or its clients, in any manner.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Director’s proposed consultant role for Mercer would violate the post-employment rule’s cooling-off restrictions found in IC 4-2-6-11(b). The Commission further finds that the two contracts with Mercer on which the Director was a signatory in her role at FSSA are particular matters that the Director personally and substantially participated in as a state employee; therefore, so long as the Director does not participate in those two matters, the Director’s post-employment opportunity with Mercer would not violate the post-employment rule’s particular matter provision found in IC 4-2-6-11(c). Based on the information provided, the Commission finds that the Code requires the Director to wait 365 days after leaving state employment or obtain a post-employment waiver before she begins her consultant role with Mercer.

Respectfully Submitted,



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