

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

The FSSA Secretary was offered employment with a local health network ("Network") to serve as Vice President of Government Relations. The Secretary disclosed that she had previously received informal advice pertaining to the postemployment opportunity but had later discovered additional issues involving the Network and FSSA that warranted further consideration by the SEC. SEC determined that the Secretary had not administered or negotiated the contract between the Network and FSSA for VR services, nor had she made a decision in the CMHC licensing matter that would subject her to the cooling off provision of the Postemployment rule. Further, the SEC determined the discussions the Secretary conducted with the Network on proposed legislation were excluded from the definition of "particular matter," and the Secretary had not personally and substantially participated in an appeal filed by the Network with FSSA since she had screened herself from any involvement in the matter.

September 2010
No. 10-I-14

The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics pursuant to I.C. 4-2-6-4(b)(1).

BACKGROUND

An employee has served as the Secretary of the Indiana Family and Social Services Administration (FSSA) in this capacity since January 2009. Prior to holding this position, the Secretary served as the Deputy Secretary and Chief of Staff for FSSA since January 2005.

A health network has extended an employment offer to the Secretary to serve as their Vice President of Government Relations. The Secretary's first contact with the health network relating to potential employment was in June 2010 and since then she has had no involvement at FSSA relating to health network. Her prospective position with the health network expressly excludes her from serving as an executive branch lobbyist. The prospective position relates primarily to assisting the health network with respect to future matters affecting the health network that relate to the recently enacted federal health care law changes.

The Secretary obtained an informal advisory opinion on September 20, 2010, but in performing due diligence, has found it necessary to expand upon the initial request. Specifically, the informal advisory opinion was based on information about the hospital/physician reimbursement side. The Secretary now raises the community mental health center (CMHC) and vocational rehabilitation (VR) provider aspects. The Secretary discloses that the health network has been an enrolled Medicaid provider for as long as 40 years in some locations. In addition, she discloses that FSSA has a contract with the health network for reimbursement for services rendered by a mental health center and for reimbursement for VR services rendered by the health network. The Secretary explains that the contract with the mental health center is handled by the deputy and staff of the Division of Mental Health (DMH) within FSSA. The director of the DMH provides the final signature on this contract. The mental health center has been a CMHC for approximately 35 years. The contract for VR services is handled by the Bureau of Rehabilitative Services (BRS) which is within the Division of Disability and Rehabilitative Services (DDRS) with FSSA. The Secretary explains that the director of DMH provides the final signature on this contract. The health network has been a contracted VR provider for at least 10 years. As

Secretary of FSSA, she explains that she has not been involved personally with any particular contract with any CMHC, including the mental health center nor with any particular contract with any VR provider, including the health network.

In terms of regulatory or licensing decisions, the Secretary explains that the Indiana State Department of Health, not FSSA, monitors hospitals through the licensure process. She explains that FSSA does not regulate or license the health network or a physician. She further explains that a hospital or physician wishing to receive Medicaid reimbursement must be enrolled as a Medicaid provider (Provider). Providers enroll through a vendor, Hewlett Packard (HP), and once enrolled as a Provider, may submit claims to HP for payment. The health network has provider numbers. To the extent that such a process would be considered to be a regulatory or licensing decision, the Secretary explains that she has not had any involvement in any enrollment activities for any Medicaid provider.

The Secretary discloses that the mental health center, as a CMHC, is certified as a CMHC, an Addiction Services Regular (ASR) provider, an Assertive Community Treatment (ACT) provider, and has a license for at least one Supervised Group Living (SGL) facility. The mental health center also has at least one non-certified, but approved, Transitional Residential Living (TRS) facility and Mental Health (AMH) outpatient facility. An employee with the DMH of FSSA certifies the CMHCs and enters and processes the mental health center's renewal applications, but the Secretary asserts that she has had no involvement in any certification or renewal application from any CMHC, including the mental health center.

The Secretary explains that a VR provider must be enrolled through the BRS within the DDRS of FSSA. The application must be made to the local VR field office and reviewed by BRS at the central office. The applicant must also demonstrate proof of appropriate accreditation. While the health network is an approved VR provider, the Secretary clarifies that she has had no involvement in any enrollment activities from any VR provider, including the health network.

The Secretary further indicates that she met with the health network on a couple of different occasions, primarily during the legislative sessions in 2009 and 2010, regarding proposed legislation.

Finally, the Secretary discloses that the health network filed an appeal with FSSA in July for a classification of one of their hospitals. She explains that the appeal has been assigned to the Office of Medicaid Policy & Planning. She further explains that FSSA contracts with an accounting firm because issues of classification are extremely technical and indicates that the accounting firm would then handle the appeal. She indicates that she has walled herself off of this matter.

ISSUE

What rules in the Code of Ethics would apply to the Secretary's employment opportunity with the health network, and would her acceptance of the offered position subject her to any post-employment restrictions under I.C. 4-2-6-11?

RELEVANT LAW

I.C. 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.

I.C. 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

I.C. 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions

Sec. 11. (a) As used in this section, "particular matter" means:

(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 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) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. 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 his or her 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) representation by; or
- (3) 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 a special state appointee who serves only as a member of an advisory body.

(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. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

ANALYSIS

The Secretary's intended employment with the health network invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Secretary is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Secretary from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. Based on the information provided, the Commission finds that the health network's offer of employment did not result from information of a confidential nature. Accordingly, the Secretary's acceptance of the health network's employment offer would not be in violation of I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Secretary from participating in any decision or vote if she has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the Secretary has an arrangement for prospective employment with the health network. The Secretary explains that her first contact with the health network relating to potential employment was in June 2010. She also explains that since then, she has had no involvement at FSSA relating to the health network. To the extent that the Secretary has complied with this provision, specifically since June 2010, and continues to abstain from participation in any decision or vote in which the health network has a financial interest in the outcome of the matter for the remainder of her state employment, the Commission finds that the Secretary would not be in violation of I.C. 4-2-6-9.

C. Post-Employment

I.C. 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 period, would prevent the Secretary from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Secretary is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Based on the information provided, the Commission finds that this provision would not apply to the Secretary's intended employment position with the health network. Specifically, she indicates—and her employment offer letter states—that

the position with the health network does not involve employment as an executive branch lobbyist.

Second, the Secretary 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. In this case, the Secretary disclosed that she has never negotiated nor administered a contract with the health network on behalf of FSSA during her tenure as Secretary. Specifically, while the mental health center may have a contract with FSSA, she has neither participated in the negotiation nor administration of such contract. Instead, other FSSA staff has been responsible for such actions. Because she did not negotiate or administer a contract with the health network during her entire tenure with the State, the Commission finds that this one year restriction would not apply to the Secretary.

Third, the Secretary 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 Commission finds that this one year restriction would not apply to the Secretary's intended employment with the health network because she did not make regulatory or licensing decisions with respect to the health network at any time during her entire tenure with the State.

Fourth, the Secretary 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 health network's offer of employment was extended to the Secretary in an attempt to influence her in her capacity as the Secretary of FSSA. Accordingly, the Commission finds that this restriction would not apply to the Secretary's intended employment with the health network.

Finally, the Secretary may be subject to the post-employment rule's "particular matter" prohibition in her potential employment. This restriction prevents her from working 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 case, the Secretary indicates that she met with the health network on a couple of different occasions, primarily during the legislative sessions in 2009 and 2010 regarding proposed legislation. I.C. 4-2-6-11(a) provides that the term "particular matter" does not include the proposal or consideration of a legislative matter. Accordingly, the Commission finds that the "particular matter" prohibition does not apply to the

Secretary's participation in the legislative matters she met with the health network during the 2009 and 2010 legislative sessions.

In addition, the Secretary indicates that the health network filed an appeal with FSSA in July for a classification of one of their hospitals. While the Secretary was aware that the appeal had been filed because it was filed through the Secretary's office, she walled herself off from the matter. The appeal was assigned to be handled by the Medicaid area. Because the Secretary was screened from this matter, the Commission finds that she did not personally and substantially participate in the appeal. Accordingly, the Commission finds that the "particular matter" restriction does not apply to the Secretary's work on the appeal.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Secretary's intended employment opportunity with the health network would not violate I.C. 4-2-6-6, I.C. 4-2-6-9 or I.C. 4-2-6-11.