

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

A Deputy Director for FSSA's Division of Aging sought advice on how the Code of Ethics would apply to two prospective postemployment opportunities. SEC found the rule on Postemployment restrictions would not prohibit the Deputy Director from accepting employment with a technology firm since, although he spoke highly of the firm while at FSSA, he was not in a position to impact the awarding of a contract to the firm or influence the agency's decision-makers. Since the Deputy Director was no longer pursuing the other position, the SEC opted not to address that opportunity.

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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**

A state employee serves as Deputy Director for the Division of Aging ("Division") with the Family & Social Services Administration ("FSSA"). Part of his duties in this position includes oversight and management of technology matters for the Division. The Deputy Director also serves on a case management system Steering Committee ("Committee") which is responsible for ensuring the Division is implementing the technology appropriately and meeting its goals for the system. In his capacity as a member of the Committee, the Deputy Director was exposed to several vendors, including a consulting service; however, he was not part of the decision-making process for determining who the vendor should be, nor was he involved in the administration of the contract. The consulting service has also requested to provide contract services for Independent Verification and Validation ("IV&V") of the case management system vendor and the vendor's related work. The Deputy Director does note that he was so impressed with the consulting service's work that he shared his opinion with the FSSA Chief of Staff who was responsible for selecting the contractor and that these conversations with the Chief of Staff coincided with the time he was discussing job opportunities with the consulting service.

The Deputy Director has been presented with two potential post-employment opportunities which he brings to the Commission for review. The first offer the Deputy Director has received is from the consulting service. This employment opportunity with the consulting service would not involve matters before FSSA but would include matters involving another state agency. The Deputy Director referred this employment opportunity to the FSSA Ethics Officer at which time the Ethics Officer raised a concern about the possibility of a perceived conflict. Specifically, the Deputy Director appeared to be expressing his high opinion of the consulting service to FSSA's Chief of Staff at the same time he was discussing prospective employment with the consulting service. As a result, the Ethics Officer concluded that a reasonable person could believe the job opportunity was being discussed in exchange for influence in violation of I.C. 4-2-6-11(d). The Deputy Director is no longer pursuing a position with the consulting service due to this perceived conflict but is still interested in a ruling from the Commission on the appropriateness of accepting employment there.

The second employment offer the Deputy Director has received is from a technology firm to become their Chief Operating Officer ("COO"). The technology firm is currently doing business

with FSSA. The Deputy Director again notes that he has spoken highly of the technology firm to FSSA staff but does not know who the decision-makers are on the technology firm's contract and would not administer that contract or have influence over it. When the Deputy Director referred this employment offer to the Ethics Officer, the Ethics Officer did not raise any concerns about similar perceived conflicts, particularly because the Deputy Director does not have the same level of knowledge of the technology firm contract with FSSA, nor does he even know who is responsible for the administration of that contract. Consequently, the Deputy Director has remained in contact with the technology firm and anticipates accepting a position with them, contingent upon a favorable ruling by the Commission.

In seeking prospective employment with the technology firm, the Deputy Director raises a secondary issue, specifically, whether he could be employed by the technology firm and be able to work on contracts that the technology firm has with FSSA—both currently and in the future. The Deputy Director notes that although this is not the plan he discussed with the technology firm, he believes it could be beneficial for FSSA for him to perform such work based on his past experience with FSSA.

### **ISSUE**

What rules in the Code of Ethics would apply to the Deputy Director's prospective post-employment opportunities?

### **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 Deputy Director's prospective employment with the technology firm 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 Deputy Director is analyzed below.

Since the Deputy Director has indicated he is no longer pursuing employment with the consulting service, the Commission declines to address that opportunity in this opinion.

### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the Deputy Director 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 the Deputy Director provided in his request for an advisory opinion and his testimony, the

Commission finds that the technology firm's offer of employment did not result from information of a confidential nature. Accordingly, the Commission finds that the Deputy Director would not violate I.C. 4-2-6-6 by accepting the technology firm's offer of employment.

*B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Deputy Director from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including both the employee and a potential employer. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes the interest an employee has that arises from employment or prospective employment for which negotiations have begun. In this case, the Deputy Director appears to have an arrangement for prospective employment with the technology firm. Accordingly, the Deputy Director is prohibited from participating in any decision or vote during the remainder of his state employment in which he or the technology firm has a financial interest in the outcome of the matter. To the extent that the Deputy Director has and will continue to observe this provision and abstains from participating in any decision or vote affecting the technology firm, he 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 revolving door restriction, prevents the Deputy Director from accepting employment for 365 days from the date he leaves state government under various circumstances.

First, the Deputy Director would be prohibited from accepting employment as an executive branch lobbyist pursuant to I.C. 4-2-7-1(5) for the entirety of the cooling off period. The Deputy Director indicated in his testimony that his potential employment as the COO of the technology firm would not require him to register as an executive branch lobbyist before the elapse of 365 days from when he leaves state employment.

Second, the Deputy Director would be prohibited from accepting employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of his 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, it does not appear that the Deputy Director was involved in the negotiation or administration of any contracts with the technology firm on behalf of the State. Specifically, the Deputy Director's job duties with the State do not put him in a position to make a discretionary decision on the technology firm's contract. Accordingly, the Commission finds the 365-day restriction set forth in I.C. 4-2-6-11(b)(2) would not apply to the Deputy Director.

Third, the Post-employment rule prohibits the Deputy Director from accepting 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 Commission finds that

this provision does not apply in this case since the Deputy Director has not made any regulatory or licensing decisions that applied to the technology firm.

Fourth, the Deputy Director is also 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. Although the Deputy Director discloses that he spoke highly of the technology firm to staff at FSSA, the Commission finds there is nothing to indicate he was familiar enough with the technology firm's contract or the FSSA staff who were responsible for administering that contract that the technology firm's offer of employment was extended in an attempt to influence him in his position with FSSA.

Finally, the Deputy Director may be subject to the post-employment rule's "particular matter" prohibition in his potential post-employment. This restriction prevents him from working on any of the following twelve matters for an employer 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 case, the Deputy Director explains that the technology firm has a contract with FSSA which would qualify as a particular matter.

In opinion 06-I-17, the Commission issued an advisory opinion to a former state employee. In that opinion, the Commission opined that "[a]bsent an individual's disclosure to the Commission that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the Commission will make a case-by-case determination as to whether an individual would be subject to the particular matter restriction set forth in I.C. 4-2-6-11(c)." Based on the information provided, it appears the Deputy Director had little to no involvement in the technology firm's contract with FSSA. The Commission finds that the Deputy Director's involvement with the contract does not rise to the level of "personal and substantial" and accordingly determines that he would not be prohibited from working on this matter in his employment with the technology firm. The Commission further finds that the Deputy Director would not be prohibited from working on matters involving FSSA in his employment with the technology firm as long as his participation would not violate I.C. 4-2-6-11(c).

### **CONCLUSION**

The Commission finds that the Deputy Director's intended employment with the technology firm would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the Deputy Director's intended employment with the technology firm would not violate I.C. 4-2-6-11.