

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

The Chief of Staff with FSSA's Division of Family Resources was offered an employment opportunity to serve the Chief Financial Officer for a local software company. SEC determined the Chief of Staff had not administered or negotiated a contract with the company, nor had she made a decision that would subject her to the cooling off provision of the Postemployment rule. Further, the SEC determined the single occasion on which the Chief of Staff had been contacted by the company to look into the status of a payment did not rise to the level of personal and substantial participation required to implicate the particular matter restriction in the Postemployment rule.

November 2011
No. 11-I-17

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 currently serves as Chief of Staff and the Appointing Authority for the Division of Family Resources ("DFR") of the Indiana Family and Social Services Administration ("FSSA"). She has been employed at FSSA since April of 2007 and was employed at the Indiana State Budget Agency prior to that. Most recently, Chief of Staff was appointed Interim Executive Director of the Hoosier Lottery on October 18, 2011.

A local software solutions company has extended an employment offer to the Chief of Staff to serve as the company's Chief Financial Officer. The Chief of Staff's duties with the local software solutions company would include overall financial management, management of project teams, and some sales opportunities.

The local software solutions company first contract with FSSA was in July 1998. Most recently, the local software solutions company entered into a contract with the DFR-Bureau of Child Care to provide business and automation services that will enable the Bureau of Child Care to comply with federal regulations. The contract is for January 1, 2011 through December 31, 2013. The Chief of Staff did not participate in the negotiation or administration of this or any other contract between the local software solutions company and the State. The Chief of Staff contact with the local software solutions company was limited to an inquiry on the status of a payment owed to the local software solutions company in October 2010. In addition, the Chief of Staff worked on the ICMS project ("Project"). Request for Proposal ("RFP") responses for the Project were returned to FSSA at the end of September. The local software solutions company was listed as a subcontractor for one of the companies responding to the RFP. The Chief of Staff immediately withdrew from the Project and has had no involvement with the Project since that time.

ISSUE

What rules in the Code of Ethics would apply to the Chief of Staff's employment opportunity with the local software solutions company, 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 Chief of Staff intended employment with the local software solutions company 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 Chief of Staff is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Chief of Staff 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, it does not appear that the local software solutions company offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Chief of Staff acceptance of the local software solutions company'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 Chief of Staff 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 Chief of Staff has an arrangement for prospective employment with the local software solutions company. The Chief of Staff explains that her first contact with the local software solutions company relating to potential employment was in September 2011. She also explains that she has had no involvement at FSSA relating to the local software solutions company since that time. Specifically, she withdrew from all involvement in the Project upon learning that the local software solutions company was listed as a subcontractor to a company that had responded to the RFP issued by FSSA. To the extent that the Chief of Staff has complied with this provision, specifically since September 2011, and continues to abstain from participation in any decision or vote in which the local software solutions company has a financial interest in the outcome of the matter for the remainder of her state employment, the Commission finds that the Chief of Staff 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 Chief of Staff from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Chief of Staff is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. In this case, the Chief of Staff’s duties at the local software solutions company would include financial management and sales. These duties may require her to interact with executive branch agencies, but would not require her to engage in executive branch lobbying. The Commission finds that the Chief of Staff’s intended employment with the local software solutions company would not violate this restriction so long as she does not engage in executive branch lobbying for the entirety of the cooling off period.

Second, the Chief of Staff 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, it does not appear that the Chief of Staff has ever negotiated or administered a contract with the local software solutions company on behalf of the State. While she may have been contacted on one occasion in October 2010 to inquire about the status of a payment owed to the local software solutions company, such conduct would not appear to constitute the negotiation or administration of a contract. In addition, the Chief of Staff withdrew from the Project upon identifying the local software solutions company as a subcontractor to a company who responded to FSSA’s RFP. Accordingly, the Commission finds that this restriction would not apply to the Chief of Staff’s intended employment with the local software solutions company.

Third, the Chief of Staff 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. This restriction would not apply to the Chief of Staff’s intended employment with the local software solutions company because she did not make regulatory or licensing decisions affecting the local software solutions company at any time during her entire tenure with the State.

Fourth, the Chief of Staff 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 local software solutions company’s offer of employment was extended to the Chief of Staff in an attempt to influence her in her capacity as a state employee. Accordingly, this restriction would not apply to the Chief of Staff’s intended employment with the local software solutions company.

Finally, the Chief of Staff is 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 Chief of Staff was contacted on one occasion in October 2010 to inquire about the status of a payment owed to the local software solutions company. While it is the opinion of the Commission that this interaction does not rise to the level of "personal and substantial" involvement, the matter is moot since this contract has expired.

CONCLUSION

The Commission finds that the Chief of Staff's intended employment with the local software solutions company does not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the Chief of Staff's intended employment with the local software solutions company does not violate I.C. 4-2-6-11.