

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

A former DCS employee was interested in becoming a foster parent for a child who was part of her caseload as an FCM. SEC determined that the post-employment rule, IC 4-2-6-11, would not prohibit the former employee from serving as a foster parent to the child. SEC found the relationship between a child and an FCM in and of itself is not a particular matter under IC 4-2-6-11(c) but that the former employee must refrain from assisting or representing the child in any particular matters she personally and substantially participated in as a state employee.

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The Indiana State Ethics Commission (“Commission”) issues the following 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 state employee of the Indiana Department of Child Services (“DCS”) served as a Family Case Manager (“FCM”) in Madison County from May 14, 2012 to July 31, 2015. She left her position with DCS in good standing.

As an FCM, the former state employee’s core job responsibilities included attending court hearings, completing court reports, completing monthly face-to-face visits with the children on her caseload, conducting child and family team meetings, and obtaining permanency for every child on her caseload. In addition she worked to uphold the mission, vision and values of DCS. On a regular basis she participated in teaming, engaging, planning and intervening with children and families on her assigned caseload.

During her time as an FCM, DCS assigned the former state employee to work on the cases of many children and families. In particular she was assigned the case of “Anna” (**please note:** the child’s real name has been changed to protect confidentiality) in 2013. As Anna’s FCM, the former state employee worked to fulfill her core job responsibilities as outlined above under the supervision of a Family Case Manager Supervisor and DCS Local Director. The former state employee was the assigned FCM to Anna from 2013- July 31, 2015. During that time she ensured that Anna’s safety, well-being, stability and permanency were maintained.

Since leaving her position with DCS, the former state employee has obtained a foster care license through the State of Indiana. She has maintained phone contact with Anna with permission from the local DCS office. Anna has requested that the former state employee be allowed to take placement of her in her home as her foster parent. Anna is currently placed in a residential setting for mental health. She does not have any family or support outside of DCS. Anna will be ready to discharge from her residential setting within the next month. DCS policy is to place a child in the least restrictive placement that is available. Outside of the former state employee there are no other prospective foster parents and Anna would most likely be placed in a group home. The former state employee would like to open her home as her least restrictive placement option and give her a chance to be a "regular" child.

The former state employee sought advice from the DCS’s Chief Counsel for Legal and Internal Affairs, and received an informal advisory opinion from the Ethics Director for the Office of Inspector General. The

Chief Counsel and the Ethics Director advised the former state employee to seek a formal advisory opinion from the Commission to determine if serving as Anna's foster parent after serving as her FCM through DCS would be contrary to any rules in the Code.

ISSUE

Does the particular matter restriction set forth in IC 4-2-6-11(c) prohibit the former state employee from serving as a foster parent to a child who was part of her DCS caseload?

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.

IC 4-2-6-1

Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

....

(13) "Person" means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.

ANALYSIS

Although the Commission cannot make any determinations as to whether Anna should be placed with the former state employee as a foster parent, as DCS is the state agency designated with the authority to make determinations concerning a child's welfare and placement, the Commission can determine whether any restrictions under the Code of Ethics would apply to the former state employee's circumstances.

The former state employee's post-employment opportunity to serve as a foster parent to Anna implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the former state employee's post-employment opportunity is analyzed below.

A. Confidential information

IC 4-2-6-6 prohibits the former state 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. The former state employee has indicated that she would not use confidential information she had access to as a DCS employee in serving as a foster parent for Anna. Accordingly, so long as any compensation the former state employee receives as a foster parent does not result from confidential information, her service as a foster parent to Anna would not appear to violate IC 4-2-6-6.

B. Post-employment

IC 4-2-6-11 is the ethics rule that governs post-employment for members of the executive branch of state government. This rule outlines various restrictions that apply to a former state employee that may limit the type of work the former state employee may engage in after leaving his or her employment with the State. Generally, IC 4-2-6-11 provides for a one-year "cooling-off" period before the former state employee may perform certain work. The waiting period may be longer in cases that involve a "particular matter" as defined by the statute.

In this case, the former state employee's intended service as a foster parent invokes consideration of IC 4-2-6-11(b)(2) and IC 4-2-6-11(c). IC 4-2-6-11(b)(2) sets forth the one-year "cooling off" period requirement for state officers wishing to engage in certain types of work. This cooling off restriction would not apply to the former state employee because serving as a foster parent is not considered employment. Any compensation she would receive from the State as a foster parent would be provided for her service in fostering a child and not for employment purposes.

The restriction set forth in IC 4-2-6-11(c) is separate and applies to a "particular matter." This prohibition generally lasts for the life of the particular matter involved, which could be greater than or less than 365 days. The particular matters subject to this restriction are as follows: 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.

If applicable, the restriction in IC 4-2-6-11(c) would prohibit the former state employee from representing or assisting a person in a particular matter involving the State if the state employee personally and substantially participated in the matter as a state employee, even if the individual was to receive no compensation for the representation or assistance. DCS would not be considered a “person” (see Formal Advisory Opinion 10-I-2, in which the Commission determined that an executive branch agency in state government was not a “person” for purposes of this rule).

Though the relationship between a child and an FCM in and of itself is not a particular matter, the former state employee’s position as an FCM required her to attend court hearings and complete court reports involving the children in her caseload. The Commission finds that the former state employee has participated in investigations and judicial proceedings, both particular matters under IC 4-2-6-11(c).

The former state employee was not certain if her participation in the identified matters was personal and substantial. However, she has indicated that she does not intend to participate in these particular matters while serving as a foster parent to Anna. Instead, she would allow the child’s current FCM to handle any of these matters that she was involved in at DCS. Accordingly, the Commission advises that the former state employee refrain from assisting or representing Anna in any of these identified matters in order to avoid a violation or a perceived violation of the particular matters provision of the post-employment rule.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the former state employee’s service as a foster parent would not violate the post-employment restrictions found in IC 4-2-6-11.