

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 DCS employee was considering an employment offer with a DCS vendor. The employee's job responsibilities included interactions with the vendor. The employee had also been part of a team that reviewed an RFP submitted by the vendor. SEC found that the employee's interactions with the vendor, including the RFP review, may have amounted to negotiation or administration of the vendor's contract, but that she did not have the authority to make discretionary decisions affecting the outcome of the negotiation or administration of the contract; therefore, she was not subject to the post-employment rule's cooling off requirement and could immediately accept employment with the vendor upon leaving state employment. SEC further found the employee's participation in the vendor's contract was not substantial and personal and thus did not trigger the particular matter restriction in IC 4-2-6-11(c). SEC found that the former employee must refrain from assisting or representing the vendor in any particular matters she personally and substantially participated in as a state employee.

November 2015

No. 15-I-21

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 state employee is a Senior Manager for the Child Support Bureau (CSB) at the Indiana Department of Child Services (DCS). The Senior Manager is considering accepting a position with a DCS vendor where she will work as the Payment Processing Manager for the Indiana State Central Collection Unit (INSCCU), for which she has received a verbal offer of employment.

As the Senior Manager for CSB, the state employee answered questions or solved issues that the State's contract manager brought to her attention. The Senior Manager also received emails and phone calls from the vendor. Although she had these interactions with the vendor, she provides that she is not in a position to make decisions regarding the vendor's performance. She states that the contract manager and the Assistant Deputy Director of CSB, to whom the contract manager reports, would be the individuals with decision-making authority over the vendor's performance.

She was also part of a team of six CSB and other local DCS staff who reviewed proposals received from vendors under RFP #14-098 (which is the contract for the INSCCU). The vendor the Senior Manager wants to work for submitted a response to the RFP. She states that she did not have substantial decision-making authority in this process and that her scores were similar to the scores given by other members of the team. Once the group scored responses, the Project Manager collected the scores and submitted them to the Indiana Department of Administration. This RFP scoring process concluded in 2014, and an employment offer from the vendor was not extended to the Senior Manager until October of 2015.

In her prospective position with the vendor as the Payment Processing Manager for the INSCCU, The Senior Manager would complete the required Report of Collection (ROC) document. The ROC is the accounting document that the vendor produces on a daily basis, which matches the child support payments deposited with the money reconciled in the State's child support system

of record (referred to as the ISETS system). Based on the ROC, deposits and transfers to other accounts are made to the Treasurer of State.

Her other duties would include processing adjustments on misapplied payments so that they go to the correct case. She would also process foreign payment adjustments, make both manual daily deposits and deposits through an Image Cash Letter, perform quality assurance on the State's annual support fee, monitor return deposit instruments, add or remove special processing indicators, pull checks that need additional research, complete the Key Performance Indicator, and work on other payment processing assignments as necessary.

In this prospective position, she would have daily contact with the CSB by working with the state's contract manager over the INSCCU, as well as contact with some individuals in CSB's adjustment unit and DCS' cash management unit.

ISSUE

What rules apply to Senior Manager's prospective post-employment opportunity as the Payment Processing Manager for the INSCCU with this vendor?

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 4-2-6-9 (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 related 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 no 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 (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.

ANALYSIS

A. Confidential Information

IC 4-2-6-6 prohibits the Senior Manager 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. Based on the information provided, it does not appear that the Senior Manager would utilize confidential information in her potential employment with the vendor. Accordingly, so long as any compensation the Senior Manager receives does not result from confidential information, the Commission finds that the Senior Manager's employment with the vendor does not violate IC 4-2-6-6.

B. Conflict of Interest

IC 4-2-6-9(a)(1) prohibits the Senior Manager from participating in any decision or vote, or matter related 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 her from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom she is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

In this case, employment negotiations have already begun as the Senior Manager indicated that the vendor has verbally offered her the position. Accordingly, she would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which she, by virtue of her employment negotiations with the vendor, or the vendor itself would have a financial interest in the outcome of the matter.

The Senior Manager's normal job responsibilities do not appear to require her to participate in decisions or votes, or matters related to such decisions or votes, in which the vendor would have a financial interest in the outcome of the matter. To the extent that the Senior Manager fully complies with this provision and abstains from participating in any decision or vote, or matter related to any such decision or vote, in which she or the vendor has a financial interest in the outcome of the matter for the remainder of her state employment, and ensures compliance with IC 4-2-6-9(b) if a potential conflict of interest arises, she would not be in violation of IC 4-2-6-9.

C. 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 Senior Manager from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the Senior Manager 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. The information provided by the Senior Manager indicates that her intended work for the vendor would not require her to engage in lobbying activities or register as an executive branch lobbyist. So long as this is correct, her intended employment with the vendor would not violate this provision of the post-employment rule.

Second, the Senior Manager 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 circumstance, the Commission finds that this restriction would not apply to the Senior Manager's intended employment. Specifically, regarding negotiations of the contract with the vendor, the Commission finds that while the Senior Manager's participation in the RFP review process could have amounted to negotiations, the cooling-off restriction would not apply because she was not in a position to make a discretionary decision affecting the outcome of the negotiation of the contract.

Further, regarding administration, the Senior Manager's interactions with the vendor, including fielding phone calls and emails regarding questions from the vendor, did not amount to administering the contract or making discretionary decisions affecting the outcome of the administration of the vendor's contract with DCS. The Senior Manager indicated that the contract manager and the Assistant Deputy Director of CSB, to whom the contract manager reports, were responsible for the administration of the contract and all decisions related to the administration of the contract. Consequently, the Senior Manager is not prohibited under this provision from working for the vendor immediately upon leaving state employment.

Third, the Senior Manager 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. Nothing in the information provided indicates that the Senior Manager ever made any regulatory or licensing decisions that directly applied to the vendor at any time during her state employment. This provision does not apply to the Senior Manager as she did not have the authority to make regulatory or licensing decisions that would affect the vendor.

Fourth, the Senior Manager 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 Senior Manager provides that the vendor did not approach her regarding this position and that she submitted an application. The information that the Senior Manager provided to the Commission does not suggest

that the vendor offered the Senior Manager employment in an attempt to influence her in her capacity as a state employee.

Finally, the Senior Manager 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.

The Commission finds the INSCCU contract between the vendor and the State to be a particular matter but further finds that the Senior Manager's participation in this matter was not personal and substantial enough that she would be prohibited from assisting or representing the vendor in this matter. Specifically, the Senior Manager's responsibilities with the CSB regarding the INSCCU were focused on the work involved in processing child support payments and not with the contract with the vendor itself.

However, the Senior Manager should keep in mind that she is prohibited from assisting the vendor or any other person on any of the particular matters listed above that she may have personally and substantially worked on during her state employment, regardless of whether it involves the vendor, for the life of these matters.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Senior Manager's acceptance of an employment offer by the vendor would not violate the post-employment restrictions found in IC 4-2-6-11 so long as she refrains from assisting or representing the vendor in any particular matter(s) she personally and substantially participated in as a state employee.