

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

A former FSSA employee sought advice regarding the application of the post-employment restrictions to an opportunity for future employment with a company who has a contract with FSSA. The former employee was not directly involved with any matters, including contracts or regulatory decisions, related to the company during her tenure at FSSA. SEC determined that the former employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and she could begin employment with the company immediately, so long as she complied with the executive branch lobbying restrictions. SEC further found that the former employee must refrain from assisting or representing the company or its clients 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 was the Director of the Bureau of Child Development Services, First Steps Director, within the Division of Disability and Rehabilitative Services (DDRS) of the Family and Social Services Administration (FSSA).

In this position, the former Director was responsible for the overall operation of the State's early intervention program, which serves approximately 22,000 children and families statewide. She also served as the key spokesperson for the system. Prior to this position, she was the Chief of Staff for DDRS. Between the two positions, she worked in DDRS for approximately 12 years, with a total of 21 years' service with the State of Indiana. The former Director left employment with FSSA in good standing on August 26, 2016.

The former Director is now considering accepting a position with an employer, TCC Software Solutions (TCC), which currently does business with the State. While she is aware of the work and reputation of TCC, she has not contributed or participated in any procurement activity or distribution of funds related to TCC, nor has she participated in any projects in which they have also contributed or been involved.

TCC currently holds contracts with FSSA's Office of Early Childhood and Out of School Learning (OECOSL) to maintain and enhance their current child care licensing, eligibility, and quality rating systems. TCC is also a subcontractor with Deloitte in FSSA's Division of Family Resources to develop and implement the IEDSS system. TCC is also a subcontractor of Hewlett Packard (HP) to develop and implement FSSA's Medicaid billing system, and they have some staffing positions within the Bureau of Developmental Disabilities within FSSA. TCC also has state contracts with the Department of Natural Resources and the Office of the Utility Consumer

Counselor and has a subcontract with BCForward at the Indiana Prosecuting Attorneys Council. The former Director has no current or previous involvement with any of these projects or companies that TCC is involved with.

The former Director has also learned that it is TCC's intent to submit two additional procurement bids with the State: 1) RFP 17-023 VR Case management system;

2) RFP 17-010 VR Claims payment system. Both of the RFPs are located in the FSSA/DDRS, however, not within the business unit in which the former Director most recently worked. She was not involved in the project in any way nor did she have any knowledge of either RFP prior to collecting information needed for her request.

The position the former Director is seeking with TCC is as Project Manager, Level 2. The Project Manager will be working in collaboration with FSSA's OECOSL. The project to which the former Director is hoping to be assigned is new to OECOSL. She has not been previously involved in or even aware of the project prior to the job inquiry, nor has she ever been an employee of OECOSL.

The former Director provides that she has not been involved in any aspect of negotiations (including RFPs, procurement or approval) of any contracts and that she has not administered any contracts as a state employee. She also indicates that she has not been involved in any decision making or other aspects of TCC's contracts with the State or related projects with FSSA at any point during her employment with the State. She has also never been involved in any regulatory or licensing decisions that applied to TCC or its parent or any subsidiaries. Furthermore, regarding the work that she will be doing with TCC, she does not anticipate doing any work on any project or matters for TCC in which she has had any involvement as a state employee.

The former Director requested an informal advisory opinion from the Office of Inspector General. While no applicable restrictions were identified in the issued opinion, she wishes to confirm that her acceptance of a position with TCC would be permissible under Indiana's ethics laws. She also understands that transparency is important to the public, constituents and colleagues, especially in light of the number of contracts that TCC has with the State.

ISSUE

What rules in the Code apply to the former Director's post-employment opportunity with TCC?

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.

ANALYSIS

The former Director's post-employment opportunity with TCC implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the former Director's prospective post-employment opportunity with TCC is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the former 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 provided, it does not appear that the former Director would utilize confidential information in her potential employment with TCC. So long as any compensation she receives does not result from confidential information, her potential employment with TCC would not violate IC 4-2-6-6.

B. 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 former Director from accepting employment from an

employer for 365 days from the date that she leaves state employment under various circumstances.

First, the former Director 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 former Director indicates that her intended work with TCC would not require her to engage in lobbying activities or register as an executive branch lobbyist. To the extent that she does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with TCC would not violate this provision of the post-employment rule.

Second, the former Director 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 provision does not apply to the former Director as she has not been involved in any regulatory or licensing decisions that applied to TCC and, to the best of her knowledge, FSSA does not regulate or license TCC or its parent or subsidiaries. Consequently, she is not prohibited under this provision from accepting employment with TCC immediately upon leaving state employment.

Third, the former Director 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.

This provision does not appear to apply to the former Director's opportunity with TCC. While FSSA and other state agencies have contracts with TCC, the former Director has provided that she neither engaged in the negotiation nor the administration of any contract between the State and TCC. Accordingly, the Commission finds that this provision of the cooling-off restrictions would not prohibit the former Director from pursuing the employment opportunity with TCC immediately upon leaving state employment.

Fourth, the former Director 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 an offer of employment from TCC was extended to the former Director in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to her intended employment opportunity with TCC.

Finally, the former Director 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 former Director has not identified any particular matters that she anticipates working on in her intended employment with TCC. The Commission finds that the former Director must ensure compliance with the particular matter restriction and refrain from assisting or representing TCC, 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 involved TCC.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the former Director's post-employment opportunity with TCC would not violate the post-employment restrictions found in IC 4-2-6-11.