

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

Once employment negotiations commenced between the Superintendent of a state hospital and a non-profit entity with which the hospital had a business relationship, he would be precluded from participating in any vote or decision related to the entity under the Conflicts of interest rule.

42 IAC 1-5-7 Conflicts of interest; contracts (IC 4-2-6-10.5)

Once employment negotiations commenced between the Superintendent of a state hospital and a non-profit entity with which the hospital had a business relationship, he would have a financial interest in a contract and therefore a conflict of interest would arise.

42 IAC 1-5-13 Ghost employment

The Superintendent of a state hospital was prohibited from offering his assistance to a non-profit during working hours unless otherwise permitted by a general written agency, departmental or institutional policy or regulation.

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

The Superintendent of a state hospital was restricted from assisting or representing a non-profit with any particular matter in which he personally and substantially participated, while he was in the State's employ, that involved the non-profit.

IC 4-2-6-6 Compensation resulting from confidential information

No violation regarding confidential information was found where the Superintendent of a state hospital indicated he had not used any confidential information in assisting a non-profit entity, which was confirmed by the agency's General Counsel.

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The Indiana State Ethics Commission (hereinafter "the Commission") issues the following advisory opinion concerning Indiana Code 4-2-6. Any opinion rendered by the Commission, until amended or revoked, is binding on the Commission in any subsequent allegations concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for the opinion or testimony before the Commission.

BACKGROUND

1. On May 30, 2006, the Commission received a written request from the Secretary of the Family and Social Services Administration ("FSSA"), for an advisory opinion regarding the application of state ethics law to the Superintendent of Richmond State Hospital ("RSH") with regard to his involvement with Behavioral Healthcare Services, Inc., a non-profit entity that has submitted a response to Request for Proposal 6-59 ("RFP"), which solicited proposals for the localization of RSH. Specifically, the Secretary requested the Commission to render an advisory opinion about the following two issues:
 - a. Do State Ethics laws prevent the Superintendent from assisting the non-profit in negotiation with FSSA?
 - b. Do State Ethics laws prevent the Superintendent from accepting employment with the non-profit after a contract with FSSA is in place and he is no longer a state employee?
2. In his May 30, 2006 request for an advisory opinion, the Secretary represented the following facts. FSSA has three major initiatives underway:
 - a. Modernization of eligibility determination for public assistance and other benefits. This will involve engaging a contractor or team of contractors to bring uniformity and speed to tasks currently done by FSSA employees at the county office level.
 - b. "Localization" of the operation and management of three state hospitals: Richmond, Madison and Evansville. This will involve hospitals, community

mental health centers, and others coalescing as a not-for-profit entity in the communities where these hospital are located. FSSA will then contract with the local not-for-profit to operate and manage the facility. FSSA believes that this will enhance the quality of management and make the facility more responsive to its constituents. [emphasis by the Secretary]

- c. Aging - by utilizing funds from the recently enacted Quality Assessment Fee FSSA seeks to reduce overcapacity and over utilization of Medicaid nursing home facilities by encouraging assisted living arrangements pursuant to the new State Plan
3. In his May 30, 2006, request for an advisory opinion, the Secretary analyzed the application of three ethics statutes in relation to the Superintendent's involvement in the localization process of RSH, including IC 4-2-6-9, IC 4-2-6-10.5, and IC 4-2-6-11. The Secretary submitted the following conclusion to the Commission for consideration:
 - a. FSSA does not believe the Superintendent's situation in any way violates the State Ethics Code. We do not believe IC 4-2-6-9 has been violated since the Superintendent will not be involved in the decision of whether to award the contract to the non-profit that he may end up employed by in the future. Additionally, FSSA does not believe that the Superintendent will violate IC 4-2-6-10.5 since the Superintendent does not negotiate with or have authority to award contracts on behalf of FSSA to the non-profit and does not make any licensing decisions in the course of his work for FSSA. Finally, the Superintendent is not in a position to make discretionary decisions affecting the outcome of negotiations and administration of the contract with the non-profit.
 - b. Thank you in advance for your time and attention. If this situation is found by the Commission to violate the post employment restrictions of the State Ethics Code, then as appointing authority of FSSA I propose to waive the post employment restriction as permitted by IC 4-2-6-11(g). I find that waiver of this statute is necessary to the FSSA Localization initiative and as such consistent with the public interest...Id.
 4. On June 8, 2006, the Commission held its regular monthly meeting to consider various requests for advisory opinions. The Secretary was unable to attend the meeting; however, the agency's General Counsel appeared before the Commission on the Secretary's behalf. The General Counsel presented FSSA's position in accord with the Secretary's May 30, 2006 written request for an advisory opinion. State Ethics Commissioners Edward Charbonneau and Priscilla Keith recused themselves from consideration of the matter. Commissioner James Clevenger motioned to table the matter in order to allow FSSA staff to submit additional written analysis to the Commission. Commissioner Clare Nuechterlein seconded the motion, which passed.
 5. On July 3, 2006, the Commission received a submission of supplemental analysis from the General Counsel that was captioned "Memorandum" and dated June 30, 2006. In his memorandum, the General Counsel reiterated the policy behind FSSA's localization initiative and reemphasized the agency's position that no ethics violations have occurred with regard to the Superintendent's participation in the matter. Mr. Davis also addressed a separate ethics issue regarding whether the Superintendent's actions would implicate IC 4-2-6-6, which was raised during the June 8, 2006 meeting by Mary Lee Comer, then State Ethics Director and now Special Counsel to the Ethics Commission. In his memorandum, the General Counsel argued that IC 4-2-6-6, "is not applicable because no confidential information has been divulged to the responding non-profit entity." During the course of the June 8, 2006 meeting, Ms. Comer also questioned whether the non-profit entity that would seek to run RSH would be considered an "agency" for purposes of IC 4-2-6. In his memorandum, the General Counsel urged the Commission to

avoid classifying any potential vendor as an "agency" for purposes of state ethics law.

6. On July 13, 2006, the Commission held its regular monthly meeting. The Superintendent and the General Counsel testified at the meeting.
 - a. The Superintendent testified that he has been employed with RSH since 1972 and that he has held the position of Superintendent since 2000. He discussed his role in the localization process of RSH, which he referred to as the process of having a locally based not-for profit entity manage and operate RSH. The Superintendent testified about his role in organizing various leaders in the community to form Behavioral Healthcare Services, which is the non-profit entity that was organized for the purpose of submitting a proposal to the RFP. The Superintendent testified that he serves in an advisory capacity to the non-profit's board of directors of which he is not a member. With regard to any current RSH employee's expectation of prospective employment with Behavioral Healthcare Services, the Superintendent explained that the localization process is intended to provide current RSH employees with the opportunity to continue working at RSH provided they pass a criminal background check and drug test. The Superintendent testified as to his presumption that if he passed a criminal background check and drug test that he would be offered a new job with the non-profit and that he would hope to be considered as the person to run the hospital if Behavioral Healthcare Services was awarded the contract. The Superintendent testified that he has received no employment representations or offers as of yet. He testified as to his general involvement with the non-profit, which he stated included such activities as coordinating with community leaders and assisting the non-profit in gathering information that was needed to prepare its response to the RFP. For example, the Superintendent testified that he met with a prospective healthcare vendor on behalf of the non-profit to discuss contract rates for benefit packages that would be offered to those who may be employed by the non-profit. He also explained that he has spent time on the phone in the evenings and at noon talking with people about the non-profit and that he has met with various people to discuss the project. In general, the Superintendent represented that he has spent a lot of time on the project. Still, the Superintendent explained that he has not neglected his official duties and that he has not participated in negotiation matters with FSSA. He also represented throughout his testimony that he has not disclosed any confidential information to the non-profit.
 - b. The General Counsel testified that the non-profit entity in this case would not be technically qualified under the law as a state agency. He explained that the Superintendent's role has been that of the "convener" of the not for profits in the community that have coalesced to form Behavioral Healthcare Services. The General Counsel testified that the Superintendent provided technical assistance to FSSA and that he helped the agency scope the RFP. The General Counsel testified that the Superintendent helped the non-profit respond to the RFP. He explained that the Superintendent is not in a position with the State to award a contract, and that Mr. Butler has not negotiated a contract with the non-profit on behalf of FSSA. Mr. Davis testified that FSSA screened the Superintendent from the negotiation process and that he did not know to what extent the Superintendent had participated as part of the negotiating team on behalf of the non-profit, but that the Superintendent's overall participation in this matter has been with the knowledge and consent of FSSA. He also testified that the non-profit's bid has not been accepted as of yet and that the Superintendent does not currently have an offer of employment with the non-profit.

7. The second major initiative, Localization of Richmond State Hospital and the involvement of the incumbent Superintendent is the subject of this request. The Superintendent of Richmond State Hospital ("RSH") has taken the lead in coordinating the formation of a non-profit entity which has bid in response to the request for proposals for "localizing" RSH. The Superintendent has been a source of knowledge for FSSA of how the Hospital is run and has given information on details which would need to be addressed for a non-profit to run the hospital. The issue has now been raised that the Superintendent's participation in the bid process as a voice for the non-profit and his simultaneous existence as a source of information for FSSA may raise State Ethics Issues. The Superintendent is not in a position to award contracts on behalf of FSSA, does not make licensing decisions and is not engaged in the negotiation of this potential contract on behalf of FSSA. Further, when the non-profit takes over the Hospital, the Superintendent (along with all other incumbent RSH employees) will cease being a State employee. The non-profit currently has no contracts with the state of Indiana and at the point at which a signed contract between the state and the non-profit for the running of the Hospital would become effective, the Superintendent would no longer be a state employee. Upon resignation from state employment, FSSA expects that the Superintendent may become an employee of the non-profit that will run the Hospital. FSSA has encouraged this involvement, and has paid legal and accounting fees to enable technical assistance incident to the creation, organization and governance of the project.

It is important to stress that the Superintendent is not negotiating on behalf of FSSA and is not in a position to make any discretionary decisions affecting the outcome of the negotiation or the nature of the administration of any future contract for a non-profit to run RSH. The Superintendent is in effect negotiating on behalf of the non-profit against FSSA, with FSSA's knowledge and consent. He has simply been available to answer logistical questions about the day to day running of RSH. Id.

ISSUES

As set forth above, the Commission notes that the Secretary has requested an advisory opinion regarding the following two issues:

1. Do State Ethics laws prevent the Superintendent from assisting the non-profit in negotiation with FSSA?
2. Do State Ethics laws prevent the Superintendent from accepting employment with the non-profit after a contract with FSSA is in place and he is no longer a state employee?

RELEVANT LAW

IC 4-2-6-6

IC 4-2-6-9

IC 4-2-6-10.5

IC 4-2-6-11

42 IAC 1-5-10

Benefiting from confidential information

Authority: IC 4-2-7-3; IC 4-2-7-5

42 IAC 1-5-11
Divulging confidential information
Authority: IC 4-2-7-3; IC 4-2-7-5
Affected: IC 4-2-7

42 IAC 1-5-13
Ghost employment
Authority: IC 4-2-7-3; IC 4-2-7-5
Affected: IC 4-2-7

IC 35-44-1-7

ANALYSIS

As a threshold matter, the Commission finds that it has jurisdiction over the Superintendent in accordance with IC 4-2-6-2.5. The Commission is authorized under IC 4-2-6-4(b)(1) to render advisory opinions upon the request of any of the persons outlined in IC 4-2-6-4(b)(1)(A). In this case, the Commission issues an advisory opinion at the request of the Secretary as to the application of state ethics laws as to two questions. First, the Secretary seeks guidance from the Commission as to whether state ethics law would prevent the Superintendent from assisting Behavioral Healthcare Services in negotiation with FSSA. Second, the Secretary requests the Commission to offer guidance as to whether state ethics law would preclude the Superintendent from accepting a position with Behavioral Healthcare Services if it was awarded the contract to localize RSH and the Superintendent was no longer a state employee.

A. Do State Ethics laws prevent the Superintendent from assisting the non-profit in negotiation with FSSA?

With regard to the Secretary's first question, the Commission notes that it confines its advisory opinion to the statutes and rules that it is granted authority to interpret in accordance with IC 4-2-6-4(b)(1). The Commission offers guidance to the Secretary about the various state ethics laws with which the Superintendent must ensure compliance. The Commission does not have jurisdiction to determine the Superintendent's official duties. Therefore, the Commission's analysis of the Secretary's first question focuses on the state ethics laws that would be implicated if the Superintendent were to assist the non-profit in its negotiation with FSSA, irrespective of whether such activity by the Superintendent would be deemed within the parameters of his official duties by the Secretary.

The Superintendent has an ethical obligation to ensure compliance with the state ethics rule pertaining to ghost employment, 42 IAC 1-5-13. This rule would prohibit the Superintendent from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation. To the extent that the Superintendent would offer any assistance to the non-profit in its negotiation with FSSA during working hours, and if such assistance would not be considered an official duty, he would be precluded from offering the assistance during working hours, unless otherwise permitted by a general written agency, departmental, or institutional policy or regulation. During the Commission's meeting on June 8, 2006, the agency's General Counsel testified that FSSA has posted an agency policy that authorizes RSH employees, with supervisor approval, to spend up to 200 hours a year on matters pertaining to supporting management's response to the RFP. To the extent that the Superintendent's activities have been authorized by and comport with agency policy, such activity would not appear to be in violation of 42 IAC 1-5-13.

In all his dealings with the non-profit, the Superintendent also has an ethical obligation to ensure compliance with the following state ethics law and rules pertaining to confidential information: 42 IAC 1-5-10, 42 IAC 1-5-11, and IC 4-2-6-6. Specifically, 42 IAC 1-5-10 would prohibit the

Superintendent from benefiting from, or permitting any other person to benefit from, information of a confidential nature except as permitted or required by law. 42 IAC 1-5-11 would prohibit the Superintendent from divulging information of a confidential nature except as permitted by law. IC 4-2-6-6 would also prohibit him 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. During his testimony, the Superintendent stated that he has not used any confidential information while assisting the non-profit with its bid to the RFP. The General Counsel also represented to the Commission in his memorandum, dated June 30, 2006, that no confidential information has been divulged to the responding non-profit entity. Based on both the Superintendent's and the General Counsel's representations, there would appear to be no violation of the state ethics law and rules pertaining to the use and disclosure of confidential information.

B. Do State Ethics laws prevent the Superintendent from accepting employment with the non-profit after a contract with FSSA is in place and he is no longer a state employee?

The Secretary's second question invokes consideration of the following state ethics laws and criminal statute: IC 4-2-6-9, IC 4-2-6-10.5, IC 4-2-6-11, and IC 35-44-1-7. The Commission separately analyzes each statute with regard to its potential application to Mr. Butler and his prospective employment with the non-profit.

IC 4-2-6-9 pertains to potential and actual economic conflicts of interest under state ethics law. The latter statute would be implicated if the Superintendent were to participate in a decision or vote regarding any aspect of the possible contract between FSSA and the non-profit. IC 4-2-6-9 generally prohibits state officers, employees, or special state appointees from making any decision or vote on a matter in which the officer, employee, or 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; or, (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment. IC 4-2-6-(a)(9) provides the definition of "financial interest" for purposes of IC 4-2-6, which includes "an interest arising from employment or prospective employment for which negotiations have begun."

In this case, the parties have represented that no employment negotiations have begun between the Superintendent and the non-profit. If any employment negotiations were to occur between the Superintendent and the non-profit, the Superintendent's interest in prospective employment would be considered a "financial interest" for purposes of IC 4-2-6-9; therefore, he would generally be prohibited from participating in any decision or vote while in the state's employ that would affect the outcome of a matter as between FSSA and the non-profit, including matters involving any current or future contract negotiations. In the event that the Superintendent would be in a position that might give rise to a potential or actual conflict of interest under the statute, he would have a statutory duty to notify his appointing authority and seek an advisory opinion from the Commission in accordance with IC 4-2-6-9(b). The Commission has authority to recommend various remedies in cases of conflicts of interest, which include identifying necessary screening measures and recommending that a matter be assigned to another person.

IC 4-2-6-10.5 provides a general prohibition against a state officer, employee, or special state appointee from knowingly having a financial interest in a contract made by an agency. Again, to the extent that any employment negotiations were to begin between the Superintendent and the non-profit, the Superintendent would have a "financial interest" for purposes of IC 4-2-6-10.5. However, the general prohibition against a state officer, employee, or special state appointee does not apply to the following:

1. a state officer, an employee, or a special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency, if:
 - a. the contract is made after public notice or, where applicable, through competitive bidding;
 - b. the state officer, employee, or special state appointee files with the commission a statement making full disclosure of all related financial interests in the contract;
 - c. the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee; and
 - d. in the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee; or
2. a state officer, an employee, or a special state appointee who, acting in good faith, learns of an actual or prospective violation of the prohibition in subsection (a), if, not later than thirty (30) days after learning of the actual or prospective violation, the state officer, employee, or special state appointee:
 - a. makes a full written disclosure of any financial interests to the contracting agency and the commission; and
 - b. terminates or disposes of the financial interest.

In this case, the parties have represented that no contract has been entered into between FSSA and Behavioral Healthcare Services, which would therefore preclude application of IC 4-2-6-10.5 at this time.

However, the statute would be invoked if the Superintendent were to obtain a "financial interest" in any contract between FSSA and the non-profit while still in the state's employ.

The Commission also highlights for the parties' consideration IC 35-44-1-7, which is a criminal statute that prohibits a person from knowingly or intentionally obtaining a pecuniary interest in a contract or purchase with an agency within one (1) year after separation from employment of other service with the agency and the person is no longer a public servant for the agency but who as a public servant approved, negotiated, or prepared on behalf of the agency the terms or specifications of the contract or the purchase. The Commission does not have jurisdiction to interpret or apply criminal statutes. However, the Commission refers the parties to IC 35-44-1-7 given the statute's potential application to the facts presented.

Lastly, the Commission offers its analysis of how the state's post-employment statute, IC 4-2-6-11, would impact Mr. Butler with regard to whether he would be precluded from accepting employment with the non-profit after a contract with FSSA was in place and he was no longer a state employee. IC 4-2-6-11 generally restricts state officers, employees, and special state appointees from engaging in certain types of employment activity until the elapse of at least three hundred sixty-five (365) days after the date on which the person ceases to be a state officer, employee, or special state appointee. In Mr. Butler's case, application of the state's post-employment statute would preclude him from the following:

1. Accepting employment or receiving compensation as a lobbyist until the elapse of at least three hundred sixty-five (365) days after the date on which he ceases to be a state employee (see IC 4-2-6-11(b)(1));
2. Accepting employment or receiving compensation from any employer with whom he was engaged in the negotiation or administration of a contract with the prospective employer on behalf of the state or an agency and was in a position to make a discretionary decision affecting the outcome of the

- negotiation or the nature of the administration of the contract until the elapse of at least three hundred sixty-five (365) days after the date on which he ceases to be a state employee (see IC 4-2-6-11(b)(2));
3. Accepting employment or receiving compensation from any employer for whom he made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer until the elapse of at least three hundred sixty-five (365) days after the date on which he ceases to be a state employee (see IC 4-2-6-11(b)(3));
 4. Representing or assisting an employer or any person in a "particular matter" involving the state if he personally and substantially participated in the matter as a state employee, even if he were to receive no compensation for the representation or assistance (see IC 4-2-6-11(c)); or
 5. Accepting employment or receiving 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 their duties or responsibilities while a state officer, an employee, or a special state appointee.

With regard to paragraph four listed above, IC 4-2-6-11(a) lists twelve types of "particular matters" that would cause application of a waiting period before a state officer, employee, or special state appointee would be permitted to represent or assist an employer or any person with a "particular matter" after having left the state's employ. The applicable waiting period has been interpreted to last for the life of the particular matter and is not otherwise limited to a three hundred sixty-five day period. IC 4-2-6-11(g) also provides that a state employee's state officer or appointing authority may waive application of subsections (b) and (c) of the statute when deemed consistent with the public interest.

In this case, the Superintendent's involvement in forming Behavioral Healthcare Services and assisting the non-profit in preparing its response to the RFP necessitates scrutiny of the Superintendent's conduct under subsections (b) and (c) of IC 4-2-6-11. With regard to subsection (b), the parties have represented to the Commission that the Superintendent has not negotiated or administered any contract on behalf of the state with the non-profit and that he has not made any regulatory or licensing decision that directly applied to the non-profit. To the extent the foregoing representations are accurate, the Superintendent would not be subject to a three-hundred sixty-five (365) day post-employment restriction with regard to these limitations as set forth under IC 4-2-6-11(b). However, with regard to the "particular matter" restriction under subsection (c) of the statute, the Commission finds that the Superintendent's conduct would implicate a post-employment restriction. The Commission finds that the Superintendent has personally and substantially participated in "particular matters" as defined by IC 4-2-6-11(a). Specifically, the Commission finds that the Superintendent has personally and substantially participated in "an application," "a business transaction," and a "contract" with regard to his role in assisting Behavioral Healthcare Services. The Commission finds that the Superintendent has personally participated in particular matters involving the state and the non-profit's bid to localize RSH in that he has assisted in matters in an individual capacity, and the assistance that has been offered is otherwise unique to the Superintendent in his position with RSH. The Commission also finds that the Superintendent has substantially participated in particular matters involving the state and the non-profit in that he performed the following activities: He recruited community leaders to organize the non-profit; he assisted the non-profit in gathering information that was needed to prepare its bid to the RFP; he met with an insurance vendor on behalf of the non-profit; he made several phone calls and participated in meetings to discuss the project; he spent personal time on matters involving the non-profit; and he provided technical assistance to FSSA and helped the agency scope the RFP.

Based on the foregoing analysis, the Commission finds that the Superintendent would be restricted from assisting or representing Behavioral Healthcare Services with any particular matter on which he personally and substantially participated while in the state's employ that involved the non-profit. In particular, if Behavioral Healthcare Services was awarded the contract to localize RSH, application of IC 4-2-6-11(c) would result in restricting the Superintendent from assisting or representing the non-profit in the execution of its contract for the initial contract term.

While the Commission finds that the Superintendent's prospective post-employment with Behavioral Healthcare Services would be limited by application of the "particular matter" post-employment restriction under IC 4-2-6-11(c), the Commission notes that subsection (g) of the statute permits an employee's or special state appointee's state officer or appointing authority to waive application of subsection (b) or (c) in individual cases when deemed consistent with the public interest. The statute requires that waivers must be in writing and filed with the Commission.

In this case, the Secretary has disclosed his intent to waive application of a post-employment restriction to the Superintendent. Specifically, in the Secretary's request for an advisory opinion dated May 30, 2006, he states, "If this situation is found by the Commission to violate the post employment restrictions of the State Ethics Code, then as appointing authority of FSSA I propose to waive the post employment restriction as permitted by IC 4-2-6-11(g). I find that waiver of this statute is necessary to the FSSA Localization initiative and as such consistent with the public interest." The Commission's finding that the Superintendent would be subject to a post-employment restriction under subsection (c) of IC 4-2-6-11 does not preclude the Secretary from waiving application of this restriction if he were to deem such waiver consistent with the public interest.

CONCLUSION

Subject to the foregoing analysis, the Superintendent must ensure compliance with this advisory opinion and all provisions of the state ethics code. To the extent that the Secretary would seek to waive application of the identified post-employment restriction if the Superintendent were to obtain employment with the non-profit, the Commission directs the Secretary to comply with the waiver guidelines provided in IC 4-2-6-11(g).