

**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)**

An ISDH employee was interested in pursuing employment with a company that runs senior living communities. As Director of the Division of Long-Term Care, the employee was involved in the regulatory oversight of nursing homes and residential care facilities, including facilities owned and operated by the company. SEC determined that the employee made regulatory decisions that directly applied to the company and was prohibited, under the one-year cooling off requirement found in IC 4-2-6-11, from accepting employment with the company before the lapse of 365 days from the date she left state employment. SEC further found that the employee must refrain from assisting or representing the company 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**

The Ethics Officer for the Indiana State Department of Health (ISDH), seeks a formal advisory opinion on behalf of ISDH employee. The employee currently serves as the ISDH Director of the Division of Long Term Care (the Division). She is interested in pursuing a position with CarDon & Associates (CarDon), a company that runs senior living communities throughout Central and Southern Indiana.

The Division has regulatory oversight of nursing homes, residential care facilities, and intermediate care facilities for individuals with developmental disabilities. This would include facilities owned and operated by CarDon. Employees of the Division conduct surveys of the facilities to evaluate compliance with state and federal requirements. Based on the results of those surveys, federal enforcement remedies are recommended to the Centers for Medicare and Medicaid Services (CMS). State remedies are reviewed and determined by the employee's supervisor, the Assistant Commissioner of the Health Care Quality and Regulatory Commission. On a day-to-day basis, her job involves answering provider and public inquiries, offering rule or policy interpretation to staff, managing staff in the division, and signing survey, licensure, and enforcement notification letters.

As the director of the Division for the last seven years, the employee has been substantially involved in daily decision-making and rule/regulation interpretation and policies and procedures regarding licensing, plan review, surveys, and enforcement. A great majority of the Division's work is dictated by the State Operations Manual issued by CMS. Policies and Procedures primarily involve internal management of staff. Any areas of policy change, rule waiver, or state enforcement decisions are made by the Assistant Commissioner of the Health Care Quality and Regulatory Commission with input or recommendation by the employee, but the Assistant Commissioner is the final decision maker.

The employee is also involved in rule waiver recommendations related to the physical plant requirements for facilities, which are reviewed during the plan review process. Her supervisor makes the final determination on those. She has no involvement on any contracts other than occasionally being asked to serve as a reviewer on bids submitted in response to an RFP. She performed this service on one FSSA RFP and one ISDH RFP in 17 years of employment at ISDH. According to the Ethics Director, neither one of these involved CarDon or had any connection to CarDon.

The employee's prospective responsibilities with CarDon would include enhancing and maintaining an organization-wide, risk-based, service-driven compliance program that is proactive and progressive. She would design and implement policies, procedures, programs, and practices to ensure compliance with State and Federal regulations, laws, and mandates. The prospective position is also responsible for monitoring changes to laws and regulations to mitigate risk and take appropriate action to ensure the establishment and implementation of standard policies, procedures, and best practices across CarDons' facilities. She would provide support for the collection of data for regulatory filings, coordination and development of reports, projects, and assessment tools to verify compliance. She would also develop effective compliance communications to Executive Management team, Director of Operations, appropriate members of the Operations Team, and throughout the organization to educate staff on compliance policies.

The Ethics Officer also provided a listing of all pending actions involving the facilities managed by CarDon. The licenses of all but two of the facilities are held by hospitals that are not under the Division. There are five facilities with an open survey cycle that may or may not require a discretionary decision, but the employee is currently screened from any involvement, as she notified the Director and her agency appointing authority and developed a screening process with her supervisor. She filed her Ethics Disclosure Statement, Conflict of Interests – Decision and Voting form with the Office of the Indiana Inspector General on November 17, 2016.

The Ethics Officer provides that it is likely the employee would have contact with ISDH if she were to be employed by CarDon; however, she believes that contact would be incidental. The employee would be performing a corporate function at CarDon; typically, regulatory matters are addressed at the facility level and ISDH employees and surveyors would be speaking to employees at the facility in question, such as Directors of Nursing, rather than a corporate workforce member. She has provided that company representatives have assured her she will not attend any meetings, have business-related contact with any person at ISDH, including surveyors, nor will she have any involvement during surveys or any matters related to enforcement—the two areas where the ISDH has the most discretion where the facilities managed by the company is concerned.

The Ethics Officer provided a list of more specific functions of the employee's current role and how they may affect her possible future role at CarDon:

**Licensing:** Licenses in the Division of Long Term Care are issued according to the language in the statute. If there are any issues or questions about a license application, she forwards

documentation that is reviewed by an attorney in the Office of Legal Affairs. Her signature on the licenses is pre-printed. She signs the licensure letters only to verify the dates are correct. She does not have discretion in granting or denying a license, as that can only be done with her supervisor's approval. She usually makes a recommendation to her supervisor if a licensure action is necessary. Sometimes her supervisor initiates the discussion and determines the agency needs to take a licensure action.

**Certification:** The certification process is tightly controlled by CMS directives and final approval of certification or re-certification is with CMS. The employee has no discretion in this area. All certification and re-certification is a recommendation from her division to CMS, based on the documentation and survey results. It is an automatic process in which she is not involved because the State Operations Manual directs, based on the survey results, whether the ISDH should recommend certification, decertification, or denial of certification.

**Surveys:** This is an area where the employee has the most discretion/influence. This discretion comes from interpreting regulations, helping staff evaluate the facts/evidence to determine compliance with the regulations, and, if there is non-compliance, the extent and severity level of the non-compliance. There is a lot of CMS guidance and directives in this area. The employee and her team explore the facts with the surveyors, ask clarifying questions, or request additional information. They review the regulations and any other CMS guidance, then recommend to the surveyors what they should do. Many times, she gives surveyors options and guidance and leaves the final decision to them because they are onsite, they are trained, and they are nurses.

This process does not occur for every survey, as there is a deputy director who handles these on a day-to-day basis, but only on those issues brought to the employee. She has stated that representatives from CarDon have assured her she would have nothing to do with any survey that took place while she was still at ISDH. For surveys at CarDon facilities after she leaves the ISDH, she may be consulted by the facility on particular issues, but she would not be onsite in the facilities during a survey and she would not be asked to contact anyone at the ISDH about a survey or would she be writing Plans of Correction or participating in any Informal Dispute Resolution proceedings.

**Plan Review:** This is another area where there is discretion. In this area, the Health Care Engineering staff bring the employee any requests for a waiver of the physical plant standards in the rules. Sometimes this is done face-to-face with the providers, sometimes just on paper. Any decision she makes is a recommendation to her supervisor. Her supervisor reviews and makes the final decision to grant or deny a waiver request. Currently, there are no pending review projects for any buildings associated with CarDon.

**Bed Changes:** Federal regulations and guidance dictate bed changes in certification facilities. Ninety-nine percent of bed changes are handled automatically by the Provider Services' staff without the employee's input. Occasionally, she is asked a question if a particularly unusual situation arises about how to process a bed change or if the provider should ask for a plan review first; however, this is more often a procedural issue and not a grant or denial. The grounds for granting or denying a bed change are dictated by CMS guidelines or the current State Moratorium law.

The Ethics Officer has also provided further information on the employee's involvement with CarDon as an ISDH employee. As to licensing, the relevant statute requires that the director finds that the licensee will operate in compliance with the state rules before issuing a license. This is accomplished through staff going through the routine process of receiving the applications, reviewing the documents and, if all is complete, generating the license and letter with the employee's signature. If there has been a problem with compliance, this would be handled with a licensure action upon the Administrative Orders and Procedures Act (AOPA) and the Assistant Commissioner, the employee's boss, makes the decision to pursue licensure. The employee has advised the Director that there has been nothing involving licensure on any of the facilities licensed or managed by CarDon other than the routine processing.

The employee has further advised that CarDon recently had a couple of facilities that underwent a plan review to make some modifications to allow the addition of residential care beds. This required a rule waiver that her supervisor approved on her recommendation after meeting with the engineers and discussing with the architect. The employee also states she has not talked with anyone from CarDon on a regulatory issue in several years; she estimates around four years ago there was an abuse issue cited at the Immediate Jeopardy level, and she and a member of her team met with representatives from CarDon to discuss it.

The Ethics Officer seeks clarification from the Commission regarding the post-employment rule as it applies to the employee. Specifically, she would like clarification from the Commission regarding whether the employee would be restricted under the post-employment rule's cooling off period from going to work for CarDon immediately after leaving state employment. Further, the Ethics Officer would also like clarification as to whether the employee's participation in certain matters would trigger the post-employment rule's particular matter restriction.

### **ISSUE**

1. What rules in the Code apply to the employee's prospective post-employment opportunity with CarDon?
2. Would the employee be prohibited from accepting employment with CarDon immediately upon leaving state employment?
3. Would the employee be prohibited from assisting or representing CarDon in particular matters that she participated in as a state employee?

### **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 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. She affirmed that she would not use confidential information in her employment with CarDon. So long as any compensation the employee receives does not result from confidential information, her potential employment with CarDon would not violate IC 4-2-6-6.

### *B. Conflict of Interests*

IC 4-2-6-9(a)(1) prohibits the employee 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. Accordingly, the employee 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 CarDon, or CarDon itself would have a financial interest in the outcome of the matter.

Because she identified a potential conflict of interests, the employee has followed the requirements in IC 4-2-6-9(b)(2) and filed a written disclosure statement with the Office of Inspector General that detailed her conflict of interest, described and affirmed the implementation of a screen established by the Director to shield her from participating in any pending actions involving CarDon’s facilities, and notified her agency’s appointing authority of the potential conflict.

The employee must continue to ensure she does not participate in any decisions or votes, or matters relating to any such decisions or votes, in which she or CarDon has a financial interest in the outcome of the matter for the remainder of her state employment or until employment negotiations end.

### *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 employee from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the employee 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.

Based on the information provided, the employee would not be required to engage in any lobbying activities or register as an executive branch lobbyist in her prospective employment with CarDon. To the extent that she does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with CarDon would not violate this provision of the post-employment rule.

Second, the employee 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.

The Commission finds that this prohibition does not apply to the employee's opportunity with CarDon. The Ethics Director has indicated that the employee has not had any involvement in any state contracts with CarDon. Further, the Ethics Officer provided that the employee's only participation in any state contracts was participation in the RFP process for two contracts not related to CarDon.

Third, the employee 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 employee, as the Director for the Division of Long Term Care, has regulatory oversight of nursing homes and residential care facilities, including facilities owned and operated by CarDon. In this role, she has been substantially involved in daily decision-making and rule/regulation interpretation and policies and procedures regarding licensing, certification, plan review, surveys, and enforcement involving these facilities.

Accordingly, the Commission finds that the employee made regulatory and licensing decisions that directly applied to CarDon. Specifically, her role in issuing licenses to CarDon's long term care facilities overseen by her Division would constitute making a licensing decision, as the staff she oversees receives the applications and provides her with the information she needs to make the decision to sign the licensing letter or to make a recommendation to her supervisor to pursue another course of action. Although her supervisor is the ultimate decision-maker, she makes the recommendations to him that he uses for his decisions, and she is therefore substantially involved in making these decisions.

Further, it appears that the employee's role in the plan review and waiver decisions involving CarDon facilities also constitutes making a licensing or regulatory decision, as she reviews the requests and makes a recommendation to her supervisor to grant or deny the request. Although her supervisor is the ultimate decision-maker, she makes the recommendations to him that he uses for his decisions, and she is therefore substantially involved in making these decisions.

Therefore, absent a waiver from her agency's appointing authority, the post-employment rule's cooling off requirement precludes the employee from accepting employment with CarDon until the elapse of 365 days from the date she leaves state employment.

Fourth, the employee 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 CarDon extended an offer of employment to the employee in an attempt to influence her in her capacity as a state employee.

Finally, the employee 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 term particular matter does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or administrative policy or practice of general application.

The employee was involved in applications, determinations, and licenses in her role as Director of the Division of Long Term Care. These matters would qualify as particular matters. She provided that she would not be expected to work on any of these particular matters in her prospective employment with CarDon. She has also provided that CarDon representatives have assured her she will not attend any meetings or have business-related contact with any person at ISDH regarding surveys or anything else regarding enforcement.

Accordingly, the Commission advises that the employee refrain from assisting or representing CarDon, or any other person, in these matters to avoid a violation or a perceived violation of the particular matter provision of the post-employment rule.

Further, the employee must ensure compliance with the particular matter restriction and refrain from assisting or representing CarDon, 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 CarDon, for the life of these matters.

### **CONCLUSION**

The Commission finds that the employee made licensing and regulatory decisions that directly applied to CarDon during her state employment. Accordingly, absent a waiver, the post-employment rule's one-year cooling off period would prohibit her from accepting employment with CarDon until the expiration of 365 days from the last day of her state employment.

Respectfully Submitted,

Jennifer Cooper

Ethics Director