

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

A former special counsel and policy director for the Governor accepted a position with a law firm whose members had assisted the former special counsel with certain matters while he worked for the state. SEC determined that the former special counsel would be prohibited from assisting the firm on any of the identified matters except for the FSSA Modernization Project since the interests of the law firm would be the same interests that the former special counsel represented while he was with the State.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1).

BACKGROUND

A former state employee served as Special Counsel and Policy Director on Health for Governor Mitch Daniels from January 10, 2005 to July 27, 2007. In that capacity, the former state employee was the liaison and executive assistant in the Governor’s Office for the following state agencies: the Indiana Family and Social Services Administration, the Indiana Department of Health, the Indiana Department of Child Services, and the Indiana Department of Insurance. He also represented the Governor regarding health policy matters before of the Indiana General Assembly and worked with the Governor's General Counsel from time to time regarding various legal matters that were mostly non-health care related. He also served on a few task forces and had a short term as Chairman of the now-dissolved Indiana Health and Education Finance Authority.

After leaving his employment with the State, the former state employee served as the General Counsel and Program Director for My Health Care Manager, LLC, an Indiana health care start-up company. Pursuant to this employment opportunity, the former state employee requested and obtained an informal advisory opinion.

More recently, the former state employee has accepted a position with a law firm. He joined the Firm as a Senior Attorney and works with the Business, Health Care, and Government Affairs practice groups.

The former state employee never engaged in the negotiation or administration of any contract with the Firm on behalf of the state and he never made a regulatory or licensing decision that directly applied to the Firm. However, the former state employee discloses that members of the Firm served as outside counsel to the State to assist in the contract negotiations between the State and IBM and its coalition of companies to administer the portions of the State’s public assistance application and job training programs (“FSSA Modernization Project”). The former state employee further discloses that he worked closely with members of the Firm regarding the FSSA Modernization Project.

ISSUE

What post-employment restrictions, if any, would apply to the former state employee in his employment with the Firm?

RELEVANT LAW

IC 4-2-6-11

One year restriction on certain employment or representation; advisory opinion; exceptions

Sec. 11. (a) As used in this section, "particular matter" means:

- (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 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) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. 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 his or her 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) representation by; or
- (3) 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 a special state appointee who serves only as a member of an advisory body.

(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. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

ANALYSIS

The restriction set forth in section (b)(1) of the post-employment rule would not apply to the former state employee as he will not register as an executive-branch lobbyist for a period of 365 days from the date that he left state employment. Furthermore, the former state employee did not engaged in the negotiation or administration of a contract on behalf of the state with the Firm or make any regulatory or licensing decisions that directly applied to the Firm. Accordingly, the 365 day restrictions described in sections (b)(2) and (b)(3) above would not apply in this case. Similarly, the circumstances surrounding the former state employee's services to the Office of the Governor and his employment with the Firm would not appear to trigger subsection (d) above.

The former state employee's participation in various matters during his tenure with the Governor's office, however, invites specific consideration of the "particular matter" restriction. Specifically, the former state employee was involved in the following matters while he was employed with the state:

- Angel Combs v. Mitchell E. Daniels, No. 22A01-0602-CV-70, Indiana Court of Appeals (August 28, 2006) (a matter concerning the Indiana State Health

Department's decision to close the Silvercrest Children's Developmental Center);

- Anita Suller and AFSCME v. Mitchell .E Daniels, Peter Bisbecos, and Mitch Roob, No. 02A05-06010CV-22, Indiana Court of Appeals (July 16,2007) (a matter concerning FSSA's decision to contract with an outside company to administer and wind down the affairs of the Fort Wayne Developmental Center);
- Any matters before the Indiana Health and Education Finance Authority (now dissolved) that occurred between the approximate dates of August 2006 to June 2007;
- Any matters regarding the Indiana Department of Child Services's RFP process to contract with an outside vendor to administer the Child Support State Disbursement Unit;
- The Indiana Department of Insurance's liquidation proceedings regarding Benicorp Insurance Company; and
- The Indiana Department of Insurance's administration of the Indiana Patient's Compensation Fund ("PCF") regarding two potential claims against the PCF: (1) a series of negligence cases involving a Lake County surgeon, and (2) a case involving the Indiana Department of Corrections and a death at the Indiana Women's Prison.

The former state employee personally and substantially participated in the "particular matters" listed above. Accordingly, the former state employee would be prohibited from assisting or representing the Firm on any of the particular matters identified above. The "particular matter" restriction however, would not prohibit the former state employee from assisting the Firm on the FSSA Modernization Project he participated in as a state employee. More specifically, because the former state employee would continue to represent the state's interest in working on the Project on behalf of the Firm, the "particular matter" restriction would not apply.

CONCLUSION

Subject to the foregoing analysis and identified "particular matter" employment restrictions, the Commission finds that the former state employee's employment with the Firm would not violate IC 4-2-6-11.