

**IC 4-2-6-6 Present or former state officers, employees, and special state appointees;
compensation resulting from confidential information
42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**

The former Director of the OMPP secured three employment opportunities following his departure from state employment and sought advice on the appropriateness of engaging in each of the ventures in light of his former employment with FSSA. SEC found the former Director would not be prohibited by either of these rules from accepting employment with any of the three potential employers.

August 2009
No. 09-I-09

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 was employed as the Director of the Indiana Office of Medicaid Policy and Planning (“OMPP”) from April 2, 2007 until February 28, 2009. In his capacity, the former Director was responsible for overseeing the operations of the OMPP, managing the State’s Medicaid budget, serving on various task forces and committees, and representing the current Administration in front of the Indiana General Assembly and in Washington D.C. with respect to health care and Medicaid finance and policy matters.

Since his last date of state employment, the former Director has sought and secured the following three employment opportunities:

After leaving state employment, the former Director formed his own health care consulting company. Since forming this company, the former Director entered into the following two contracts to provide health care consulting services:

From March 1, 2009 to June 30, 2009, the Director provided consulting services to an international consulting firm regarding administration of care and disease management programs, opportunities under the American Recovery and Reinvestment Act, emerging health information technologies and implications for health care reform policies. In connection with this work, the former Director sought and received an Informal Advisory Opinion on February 15, 2009, confirming that this work did not violate any post-employment restrictions. The former Director indicated that he did not negotiate or administer a contract on behalf of the State with the international consulting firm, nor did he make a regulatory or licensing decision that directly applied to the international consulting firm or one of its subsidiaries while he was employed with the State. In addition, the work that he conducted for the international consulting firm is not part of any “particular matter” as the term is defined by IC 4-2-6-11(a). The former Director indicated that he has not been nor will he be providing any service to the international consulting firm that would require him to register as a lobbyist.

From mid-June 2009 until mid-September 2009, the former Director provided consulting services to a diagnostic company. Those services include working with the diagnostic company as it addresses various health care finance and policy issues regarding public-sector (Medicare and Medicaid) programs in states other than Indiana. The former Director indicated that he did not negotiate or administer a contract on behalf of the State with the diagnostic company, nor did he make a regulatory or licensing decision that directly applied to the diagnostic company or one of its subsidiaries while he was employed with the State. In addition, the work that he conducted for the diagnostic company is not part of any “particular matter” as the term is defined by IC 4-2-6-11(a). The former Director indicated that he has not been nor will be providing any service to the diagnostic company that would require him to register as a lobbyist.

In addition to consulting work, the former Director accepted a position as President and Chief Medical Officer with a new health care start-up company effective May 1, 2009. The start-up company is seeking to provide on-site health and wellness services in the workplace. While he was employed by the State, the former Director indicated that he did not negotiate or administer a contract with the start-up company on behalf of the State, nor did he make a regulatory licensing decision that directly applied to the start-up company. The start-up company was recently formed in January of this year, though the former Director’s involvement did not begin until May 1, 2009.

While he was employed at the State, the former Director was aware of and did participate in preliminary conversations with representatives of various state agencies on how to improve the health and well being of state employees. One possible concept included providing on-site health and wellness services. His participation in those conversations was brief, and according to the former Director, did not rise to the level of being substantial.

It is possible that the start-up company will want the former Director to continue to discuss providing its services to the State of Indiana. The former Director stated that a conversation between the start-up company and the State took place, but he did not participate. He anticipates that conversations could include the Indiana State Personnel Department and the Indiana Department of Administration. While he was employed with the State, he worked for neither agency nor had discretion or involvement in the decision-making process for those agencies.

Effective July 1, 2009, the former Director resumed his medical residency program at an Indiana school (“School”). The residency program is a thirty-six month post-graduate formalized training program required to achieve board certification as a general internist. The former Director suspended his residency program and entered into a non-paid leave status from the program when he commenced his employment with the State.

Although the School has a series of relationships with FSSA and OMPP, including the receipt of grants and contracts, the former Director indicated that he did not exercise discretionary authority over funds or programs relating specifically to the School or the residency program. The former Director indicated that no implicit or explicit

arrangements were ever entered into impacting his ability or decision to return to complete his residency training with the School.

ISSUE

What post-employment restrictions, if any, would apply to the former Director in his employment with the three employment opportunities?

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

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.

(h) Subsection (b) does not apply to a special state appointee who:

(1) was a special state appointee before January 10, 2005; and

(2) is a special state appointee after January 9, 2005.

ANALYSIS

A. IC 4-2-6-6, Compensation resulting from confidential information

In general, IC 4-2-6-6 prohibits a former state employee 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 any of the former Director's three employment opportunities resulted from information of a confidential nature he may have

gained during the course of his state employment. Accordingly, the Commission finds that none of his proposed post-employment ventures would be in violation of IC 4-2-6-6.

B. IC 4-2-6-11, Post-employment

Based on the information provided, the Commission finds the post-employment rule would not apply to any of the former Director's post-employment opportunities. Specifically, the restriction set forth in section (b)(1) of the post-employment rule would not apply to the former Director since he indicates that none of his three post-employment opportunities would require him to engage in executive-branch lobbying. Furthermore, the former Director indicated that he did not engage in the negotiation or administration of a contract on behalf of the state with any of the three employers. While he concedes that the School has a series of relationships with FSSA and OMPP, including the receipt of grants and contracts, the former Director states that he did not exercise discretionary authority over funds or programs relating specifically to the School or the residency program. Accordingly, IC 4-2-6-11(b)(2) would not apply. In addition, since the former Director did not make any regulatory or licensing decisions that directly applied to any of his employers, the restriction in IC 4-2-6-11(b)(3) above would not apply in this case. Similarly, the circumstances surrounding the former Director's employment opportunities would not appear to trigger subsection IC 4-2-6-11(d).

Finally, IC 4-2-6-11(c) would not apply to any of the former Director's intended post-employment activities as the facts presented do not appear to suggest that he would be required to represent or assist anyone on any particular matters that he was personally and substantially involved in as a state employee. While the former Director identifies the concept of providing on-site health and wellness services to state employees as a potential particular matter that he participated in as a state employee, his participation was limited to preliminary conversations with representatives of various state agencies on how to improve the health and well being of state employees. He further discloses that a conversation between the state-up company and the State took place, but clarifies that he did not participate. The Commission finds that the particular matter restriction set forth in IC 4-2-6-11(c) would not prohibit the former Director from engaging in discussions with the state for this particular project on behalf of the start-up company because his involvement in the matter as a state employee was minimal and does not rise to the level of substantial.

CONCLUSION

The Commission finds that IC 4-2-6-11 and IC 4-2-6-6 does not prohibit the former Director from accepting employment with the health care consulting company, the new health care start-up company, or the School – Internal Medicine Residency Program.