

IC 4-2-6-6 Confidential information
42 IAC 1-5-6 Conflicts of interests; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

An ISDH employee was considering employment with a local health department that had a contract with ISDH as one of ISDH's grantees. The employee was responsible for overseeing the contract and making sure the grantee met all deliverables. SEC found that the employee would have a conflict of interest if she participates in decisions or votes, or matters related to such decisions or votes, involving the grantee, because she was negotiating employment with the grantee; therefore, ISDH must screen her from any matter in which she or the grantee would have a financial interest for the remainder of her state employment and file a Conflict of Interest Disclosure Statement with the OIG. SEC further found that the employee administered a contract between ISDH and the grantee 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 the grantee until the expiration of 365 days from the last day of her state employment.

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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 state employee serves as the tuberculosis (TB) Chief Nurse Consultant for the Indiana State Department of Health (ISDH). The employee has also been acting as the Interim Director of the TB Division for the ISDH since January 2016. In her role as Chief Nurse Consultant, the employee provides technical support to local health departments, TB patients, the general public, and others on TB prevention, control, and treatment. The employee's position requires that she play a key role in TB outbreak or expanded screening and provides surge capacity to local health departments. In this role, she is also the liaison between ISDH and the Marion County Public Health Department's (MCPHD) TB program, regarding case management. The MCPHD has a contract with ISDH as one of the ISDH's grantees for the past several years.

As Chief Nurse Consultant and Interim Director, the employee oversees this contract and ensures that the deliverables are being met by the MCPHD. This includes making sure the MCPHD follows protocols relating to reporting data related to TB cases to the State. The employee was not involved in the negotiation of this contract nor has she made any decisions related to the amount of funding provided to the MCPHD under this contract. In addition, the employee's prospective position with the MCPHD would not be funded under this contract. This contract provides the funding for a part-time community health worker and a TB nurse.

In the employee's role as Interim Director of the TB Division, she is also responsible for the administration and management of the ISDH Division of TB/Refugee Health. This Division provides essential public health services as they relate to TB control and prevention and refugee health throughout the State.

The employee has applied for and has been offered a job with the MCPHD as a TB Nurse Case Manager. At ISDH, she is currently working on an application for a Center for Disease Control grant that, if awarded, would benefit the MCPHD. The employee asserts that in her new role with MCPHD, she would not work on the grant or otherwise be involved in managing or supervising the grants she worked on as an ISDH employee.

ISSUE

What rules apply to the employee's prospective post-employment opportunity as the TB Nurse Case Manager for the MCPHD?

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

The employee's post-employment opportunity implicates the provisions of the Code pertaining to confidential information, conflict of interests, and post-employment. The application of each provision to the employee's employment opportunity with the MCPHD is analyzed below.

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. Based on the information provided, it does not appear that the employee would utilize confidential information in her potential employment with the MCPHD. Accordingly, so long as any compensation the employee receives does not result from confidential information, the Commission finds that her employment with the MCPHD does not violate IC 4-2-6-6.

B. Conflict of Interest

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 as the employee indicated that the MCPHD has offered her the position of TB Nurse Case Manager. Accordingly, she 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 the MCPHD, or the MCPHD itself would have a financial interest in the outcome of the matter. In this case, it appears that the employee's duties at ISDH would require her to interact with the MCPHD and potentially participate in decisions or votes, or matters related to such decisions or votes, in which the MCPHD may have a financial interest.

IC 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer and either (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; or (2) file a written disclosure statement with the Commission detailing the conflict of interest and describing and affirming the implementation of a screen established by the ethics officer. The employee has requested an advisory opinion from the Commission as provided in the rule and has notified her appointing authority of her employment negotiations with the MCPHD.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, ISDH must impose a screening mechanism that would shield the employee from participating in matters in which she or the MCPHD would have a financial interest and file a completed Conflict of Interest Disclosure form with the Office of Inspector General (“OIG”). The screen should remain in effect until the employee leaves state employment or the employment negotiations with the MCPHD otherwise terminate.

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.

“Employer” is defined in IC 4-2-6-1(a)(10) as “any person from whom a state officer or employee or the officer’s or employee’s spouse received compensation.” The MCPHD is an entity outside of the executive branch and would be considered an employer for purposes of the Code, and the employee is subject to any post-employment restrictions that would be applicable due to her work with the MCPHD while a state employee.

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.

The information provided by the employee indicates that her intended work for the MCPHD would not require her to engage in any lobbying activities or register as an executive branch lobbyist. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, her intended employment with the MCPHD 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 employee provided that MCPHD’s contract with the ISDH has been in place for several years, and she was not involved in the negotiation of this contract or any funding decisions related to the contract.

However, regarding administration of this contract, the Commission determined that the employee administered this contract in ensuring that the deliverables were met by the MCPHD. In addition, as Chief Nurse Consultant and Interim Director, she oversaw the contract and was in a position to make discretionary decisions affecting the nature of the administration. Therefore, the post-employment rule's cooling off requirement precludes the employee from accepting employment with the MCPHD until the elapse of 365 days from the date she leaves state employment.

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.

This provision does not appear to apply to the employee as the information she has provided indicates that her job duties at ISDH did not involve regulatory or licensing matters. So long as she has not made any regulatory or licensing decisions that directly applied to the MCPHD, this provision would not apply to the employee's employment opportunity with the MCPHD.

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. None of the information provided suggests that the MCPHD offered the employee employment 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 employee has been involved in the grant agreement (contract) between ISDH and MCPHD and grant applications. These matters would qualify as particular matters. The employee provided that she does not anticipate working on these matters as an employee of the MCPHD. Accordingly, the Commission advises that the employee refrain from assisting or representing the MCPHD, 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.

In addition, the employee should keep in mind that she is prohibited from assisting the MCPHD, 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 the MCPHD, for the life of these matters.

CONCLUSION

The Commission finds that a conflict of interests would arise for the employee if she participates in decisions or votes, or matters related to such decisions or votes, involving the MCPHD, because she has been offered a position by the MCPHD. Therefore, the employee must be screened from any matter in which she or the MCPHD would have a financial interest for the remainder of her state employment and file a Conflict of Interest Disclosure Statement with the OIG. The Commission further finds that the employee administered a contract between ISDH and the MCPHD 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 the MCPHD until the expiration of 365 days from the last day of her state employment.

Respectfully Submitted,

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