

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 FSSA employee was considering employment with a hospital association. FSSA confirmed that there were no contracts between FSSA and the association and that FSSA does not regulate or license the association or its members. SEC determined that the employee was not subject to the one-year cooling off restrictions noted in IC 4-2-6-11(b)(2) and (3) and could immediately begin employment at the association. SEC also confirmed that the employee is restricted from engaging in executive branch lobbying activities for one year after leaving state employment under IC 4-2-6-11(b)(1). The employee must also refrain from assisting or representing the association in any particular matters he personally and substantially participated in as a state employee.

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No. 16-I-11

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 General Counsel and Ethics Officer for the Family and Social Services Administration (“FSSA”), seeks an opinion on behalf of an FSSA employee who worked as a Chief Quality Officer. The Chief Quality Officer has served in various leadership roles within FSSA. He joined FSSA on June 1, 2010, as Statewide Health IT Director overseeing the State Health Information Exchange (“HIE”) program reporting to the Secretary of FSSA. Upon the ending of the federal funding for the State HIE grant program, the Chief Quality Officer transitioned to the role of Director of Healthcare Strategy and Technology where he was responsible for the management and oversight of the technology group at FSSA. In September 2015, the employee became Chief Quality Officer for the Division of Quality and Compliance for FSSA.

On February 16, 2016, the Chief Quality Officer informed the Ethics Officer that he was interested in returning to private sector employment. The Ethics Officer advised the Chief Quality Officer of the post-employment restrictions and discussed the need to set up an internal screen for any interactions with parties with whom he discussed post-employment opportunities. At this time, there were no identified employers and therefore no specific matters from which the Chief Quality Officer needed to be screened.

On May 9, 2016, the Chief Quality Officer and the Ethics Officer discussed a post-employment opportunity for the Chief Quality Officer to serve as a Vice President for the Indiana Hospital Association (“IHA”). The Ethics Officer conducted a search and found no state contracts with IHA. Further, the Chief Quality Officer indicated that he was not working with IHA on any matters. Accordingly, the Ethics Officer determined there were no matters he needed to be screened from during the employment negotiation process; however, it was agreed that should a matter involving IHA arise, the Chief Quality Officer would notify the Ethics Officer immediately.

Established in 1921, IHA provides Indiana hospitals with leadership, representation, and support as they work to improve the health of Indiana citizens. The employee's responsibilities in the role of Vice President at IHA would include providing leadership and strategic direction to IHA to achieve the Association's goals with respect to healthcare operations, information technology, health information exchange, cybersecurity, telemedicine, and healthcare workforce issues. As a former hospital administrator himself, the Chief Quality Officer will utilize previous clinical and technical experiences to better assist IHA's members. His duties would also include communicating regularly with membership at district and council meetings and serving as a liaison between IHA and its hospital members and other affiliated organizations.

The Chief Quality Officer indicates that IHA does have registered lobbyists within the organization. The current duties of the role of Vice President for IHA do not include lobbying efforts. However, the Chief Quality officer provided that it is possible that the scope of his duties may change. FSSA indicates that as a state employee, the Chief Quality Officer neither engaged in the negotiation or administration of any contract between the State and IHA, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with IHA. Notably, IHA does not have contracts with the State.

FSSA does not regulate or license IHA or its members. Hospitals are licensed by a separate state agency, the Indiana State Department of Health. FSSA does reimburse hospitals for certain services, including Medicaid services; however, this is not a discretionary process and does not intersect with the Chief Quality Officer's current responsibilities with the State.

According to the information provided by FSSA, the Chief Quality Officer's interactions with IHA as an FSSA employee have been minimal. He indicates he might receive an email or call every two to three months from IHA for clarification on the Meaningful Use program, a federally funded and defined program. Additionally, he attends the IHA Council on Information Management meetings, which are held three times a year. The purpose of these meetings is to discuss quality initiatives, and they are attended by more than 30 hospital representatives. The Chief Quality Officer's role in attending these meetings is to provide general knowledge on HIE and Meaningful Use.

FSSA asserts that the Chief Quality Officer knows and understands that Indiana's ethics laws will continue to apply to him as a private sector employee. Further, he understands and agrees not to divulge or benefit from confidential FSSA information during his post-employment endeavors.

FSSA sought advice from the Commission to confirm that the Chief Quality Officer's return to private sector employment as Vice-President of IHA would be permissible under Indiana's ethics laws. The Chief Quality Officer also seeks clarification regarding the extent of the post-employment rule's one-year lobbying restriction.

ISSUE

What rules in the Code apply to the Chief Quality Officer's post-employment opportunity with IHA?

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 Chief Quality Officer's post-employment opportunity with IHA implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Chief Quality Officer's prospective post-employment opportunity with IHA is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Chief Quality Officer 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 the Chief Quality Officer would utilize confidential information in his

potential employment with IHA. So long as any compensation the Chief Quality Officer receives does not result from confidential information, his potential employment with IHA would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9(a)(1) prohibits the Chief Quality Officer from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the Chief Quality Officer from participating in any decision or vote in which a person or organization with whom he 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 it appears that employment negotiations have begun as the Chief Quality Officer contacted the Ethics Officer about the specific opportunity he was pursuing with IHA. Accordingly, a conflict of interest would arise for the Chief Quality Officer if he participates in a decision or vote in which either he, by virtue of his employment negotiations with IHA, or IHA would have a financial interest.

In this case, the Ethics Officer determined that there were no state contracts with IHA, and the Chief Quality Officer indicated that he was not working on any current matters with IHA. The Ethics Officer and the Chief Quality Officer then discussed implementing an internal screen, but they determined that there were no existing matters between FSSA and IHA. The Chief Quality Officer must continue to ensure he does not participate in any decisions or votes, or matters relating to any such decisions or votes, in which he or IHA has a financial interest in the outcome of the matter for the remainder of his state employment. Further, if he identifies a potential conflict of interests, he must follow the requirements in IC 4-2-6-9(b) to avoid violating this rule.

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 Chief Quality Officer from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the Chief Quality Officer 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 Chief Quality Officer indicates that his initial work with IHA would not require him to engage in lobbying activities or register as an executive branch lobbyist, but that the scope of his position with IHA may expand in the future to include lobbying activities. The Commission confirmed that the Chief Quality Officer is

restricted from engaging in executive branch lobbying activities for one-year after leaving state employment. To the extent that the Chief Quality Officer ensures compliance with this provision for the entirety of the cooling off period, his intended employment with IHA would not violate this provision of the post-employment rule.

Second, the Chief Quality Officer is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The Commission finds that this provision does not appear to apply as the Ethics Officer has provided that FSSA does not regulate or license IHA or its members; therefore the Chief Quality Officer has never made a regulatory or licensing decision that applied to IHA or its subsidiaries during his state employment. Consequently, the Chief Quality Officer is not prohibited under this provision from accepting employment with IHA immediately upon leaving state employment.

Third, the Chief Quality Officer is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he 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.

IHA does not have current or previous contracts with FSSA. Accordingly, the Commission finds that this provision of the cooling-off restriction would not prohibit the Chief Quality Officer from pursuing the employment opportunity with IHA immediately upon leaving state employment.

Fourth, the Chief Quality Officer is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not suggest that the offer of employment from IHA was extended to the Chief Quality Officer in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the Chief Quality Officer's intended employment opportunity with IHA.

Finally, the Chief Quality Officer is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he 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 Chief Quality Officer has not identified any particular matters that he anticipates working on in his intended employment with IHA. The Commission finds that the Chief Quality Officer must ensure compliance with the particular matter restriction and refrain from assisting or representing IHA, or any other person, on any of the particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves IHA.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the Chief Quality Officer's post-employment opportunity with IHA would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

Jennifer Cooper
Ethics Director