

42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)

IC 4-2-6-6 Compensation resulting from confidential information

A former state employee who previously worked for the Family and Social Services Administration (FSSA) sought the State Ethics Commission's (Commission) determination as to whether their potential role as a consultant would violate the Code of Ethics (Code) post-employment restrictions. The Commission finds that the former employee's consultant work does not violate either the one-year cooling off period or constitute both personal and substantial participation such that the Code prohibits them assisting their new employer or any other person in their post-state employment activities.

**INDIANA
STATE ETHICS COMMISSION**

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2023-FAO-013

The Indiana State Ethics Commission (Commission) issues the following formal advisory opinion (FAO) 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, a former state employee whose proposed post-state employment activities serve as the basis for the request.

BACKGROUND

The requestor of this Formal Advisory Opinion (Requestor) previously served as the Director of Learning and Development at the Family and Social Services Administration's (FSSA) Division of Family Resources (DFR). The Requestor's last day of state employment was March 17, 2023.

In her previous role at FSSA, the Requestor participated in an advisory capacity for the Request for Proposals (RFP) process through which FSSA selected a learning and development vendor, Conduent. Through the learning and development contract, Conduent assists with the development of training content and provides training to FSSA eligibility staff to process Medicaid, TANF and SNAP benefits. The Requestor was involved in monitoring the budget, work product/deliverables and compliance with the contract.

A separate FSSA vendor, Briljent, provided support staff to Conduent in the training classrooms. The Requestor also monitored performance of this contract. According to FSSA's Ethics Officer, who testified before the Commission, the Requestor did not sign FSSA's contract with Briljent, and she was not involved in the negotiation of this contract. FSSA's Ethics Officer also stated that the Requestor had no discretionary decision-making authority involving Briljent's contract with FSSA and she could not have taken action regarding this contract without her supervisor's approval. He further provided that as an FSSA employee, the Requestor was not involved in any regulatory or licensing decisions involving Briljent.

FSSA is set to release a new RFP later this year or early next year for a new learning and development contract. The Requestor would like to provide part-time consulting services to Briljent to assist with Briljent's response during the RFP process. The Requestor would not engage in lobbying in her role with Briljent.

The Requestor seeks the Commission's advisory opinion as to the Code's applicability to her proposed post-employment consulting arrangement with Briljent.

ISSUES

What ethics issues, if any, arise for the Requestor in her proposed post-employment services to Briljent?

RELEVANT LAW

IC 4-2-6-11 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.

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.

ANALYSIS

This request for a FAO invokes consideration of the provisions of the Code pertaining to post-employment and confidential information. The application of these ethics rules to the Requestor's proposed post-employment activities supporting Briljent in the RFP process is analyzed below.

A. 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 Requestor from accepting employment from an employer for 365 days from the date that she left state employment under various circumstances.

First, the Requestor 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, Briljent has in the past, and may continue to provide services to FSSA under a contract, and as Briljent appears interested in pursuing future business with FSSA under the soon to be released RFP for a new learning and development contract, there is likely to be continued coordination between FSSA and Briljent. The Requestor stated that she would not be engaging in activity that would constitute executive branch lobbying in her proposed consultant role at Briljent. To the extent that the Requestor does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that her post-employment opportunity at Briljent would not violate this provision of the post-employment rule.

Second, the Requestor 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 Requestor monitored Briljent staff performance and reviewed and approved Briljent invoices to FSSA under Briljent's contract with FSSA; however, she did not have discretionary decision-making authority over Briljent's contract with FSSA. Based on the information provided, the Commission finds that this provision does not prohibit the Requestor's post-employment opportunity with Briljent.

Third, the Requestor 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 Requestor was not involved in any regulatory or licensing decisions involving Briljent while with FSSA; therefore, this provision does not prohibit the Requestor's post-employment opportunity with Briljent.

Fourth, the Requestor 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 Requestor is a former state employee and nothing in the information presented to the Commission suggests that Briljent has extended an offer for her prospective new role in an attempt to influence her prior to her separation from state employment.

Finally, the Requestor is subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents the Requestor 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.

In this instance, the Requestor would be prohibited from representing or assisting Briljent, or any other person, in a particular matter in which she personally and substantially participated as a state employee.

Based on the information provided, the new RFP set to be released by FSSA later this year or early next year for a new learning and development contract is a new contract; thus, it is not a particular matter that the Requestor personally and substantially participated in as a state employee.

The Commission finds that the new RFP is not subject to the particular matter restriction under IC 4-2-6-11.

B. Confidential information

IC 4-2-6-6 prohibits the Requestor as a former state employee from accepting any compensation from any employment, transaction or investment that is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as Briljent. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the Requestor has acquired or maintains access to such confidential information obtained in her previous role at FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including Briljent, in any manner.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Requestor's proposed role of providing consulting services to Brilljent would not violate the post-employment rule's cooling-off restrictions found in IC 4-2-6-11(b). The Commission further finds that the Requestor's proposed consulting services to Brilljent on the new RFP does not constitute a particular matter that the Requestor personally and substantially participated in as a state employee; therefore, the Requestor's post-employment opportunity with Brilljent and proposed work activities on a new RFP would not violate the post-employment rule's particular matter provision found in IC 4-2-6-11(c). Based on the information provided, the Commission finds that the Code does not prohibit the Requestor from her proposed role of providing consulting services to Brilljent.

Respectfully Submitted,

David Cook
Inspector General
State Ethics Director