

42 IAC 1-5-6 Conflicts of Interests (IC 4-2-6-9)
42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)
42 IAC 1-5-10 Benefiting from confidential information
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IC 4-2-6-6 Compensation resulting from confidential information

The Ethics Officer for the Indiana Department of Child Services (DCS) sought advice on behalf of DCS' Chief of Staff regarding a post-employment opportunity with a nonprofit child and family services agency that contracts with DCS. The Commission finds that the post-employment opportunity would not violate the post-employment restrictions.

July 11, 2024
2024-FAO-003

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 FAO is based exclusively on sworn testimony and documents presented by the requestor, an agency Ethics Officer, and the state employee whose post-employment opportunity serves as the basis for this request.

BACKGROUND

The Ethics Officer for the Indiana Department of Child Services (DCS) is requesting the Commission's FAO on behalf of DCS's Chief of Staff (Chief of Staff). Specifically, the Ethics Officer is requesting an opinion from the Commission regarding the Chief of Staff's proposed post-state employment opportunity with The Villages of Indiana, Inc. (The Villages). The Villages is a nonprofit child and family services agency.

The Chief of Staff began working for DCS as Chief Financial Officer on October 26, 2020, and he became Chief of Staff on April 30, 2023. As DCS Chief of Staff, he is responsible, directly or indirectly, for the policy, fiscal, personnel and operational decisions for DCS. He reports to the DCS Director.

The Chief of Staff has entered employment negotiations to serve as the Chief Financial Officer for The Villages. The position has responsibility for sound financial management at The Villages through planning, implementation, managing and running of all finance activities, including business planning, budgeting, forecasting, government contracts and audits. According to the Ethics Officer, the Chief of Staff will not engage in any lobbying activities in his prospective employment with The Villages.

On June 11, 2024, DCS filed an Ethics Disclosure Statement for Conflicts of Interests – Decisions and Voting with the Commission on the Chief of Staff's behalf because the Chief of Staff had interviewed with and received a contingent employment offer from The Villages. The Disclosure Statement includes a screen that prohibits the Chief of Staff from working with The Villages as a DCS employee. The screen also prohibits the Chief of Staff from handling any duties that would relate to decisions or votes or related matters in which The Villages is involved. The Chief of Staff represents that he has not disclosed confidential information in his employment negotiations with The Villages.

According to the Ethics Officer, The Villages receives funding through DCS contracts and grants awarded on a competitive basis. There are teams that review these bids, and the Chief of Staff has advised he is not on any of those teams and is never in the position where he scores proposals for each agency/provider. The Chief of Staff has worked to create programs and establish parameters around programs that have been competitively bid, but he has not been directly involved in who gets what contracts. Furthermore, the Chief of Staff represents that he has never personally engaged in the negotiation or administration of any contracts between DCS and The Villages, and he is not in a position to make discretionary decisions affecting the outcome of the negotiation or nature of the administration of contracts with The Villages.

The Villages provides care to children with money calculated by the DCS finance team in a rate setting process. The Chief of Staff is involved in rate setting parameters that impact the rate setting process and licensing decisions for The Villages and all other similarly situated providers. Pursuant to 465 IAC 2-17, DCS annually sets cost-based rates for Child Placing Agencies (CPAs). These annual rates are set pursuant to the methodology outlined in the stated rule. This rule establishes the procedures DCS will use for determining and making maintenance payments to or for foster parents of children placed by DCS or a probation department with a CPA for foster care in a licensed foster home and administrative payments to CPAs in the State of Indiana. Moreover, rates are calculated based on a set formula and descriptions of each cost limit and adjustments are released annually in DCS's rate bulletins.

The Chief of Staff represents that he has not made any regulatory or licensing decisions in his position with DCS that directly applied to The Villages. Also, the Ethics Officer writes that the present situation should not lead a reasonable person to believe there is or has been inappropriate influence here. DCS has screened the Chief of Staff from working with The Villages as a DCS employee. Furthermore, the Chief of Staff agrees that he must refrain from representing or assisting The Villages on any particular matter in which he personally and substantially participated as a state employee.

On behalf of the Chief of Staff, the Chief of Staff is seeking the Commission's FAO regarding the application of any of the rules in the Code to the Chief of Staff's proposed post-employment with The Villages.

ISSUES

What ethics issues, if any, arise for the Chief of Staff if he accepts a post-employment position with The Villages?

RELEVANT LAW

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 relating 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 not 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 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.

42 IAC 1-5-10 Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by 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.

ANALYSIS

The Ethics Officer's request for a FAO invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Post-employment and Benefitting from and Divulging Confidential Information. The application of each provision to the Chief of Staff's situation is analyzed below.

A. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Chief of Staff from participating in any decision or vote, or matter relating to that 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 of Staff from participating in any decision or vote, or matter relating to that decision or vote, if the business organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the matter.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority in writing and either seek an advisory opinion from the Commission or file a written disclosure statement.

DCS filed an Ethics Disclosure Statement for Conflicts of Interests – Decisions and Voting on the Chief of Staff's behalf. The Disclosure Statement includes a screen that prohibits him from working with the Villages as a DCS employee. The screen also prohibits the Chief of Staff from handling any duties that would relate to decisions or votes or related matters in which The Villages is involved. As such, he has complied with the requirements in IC 4-2-6-9 for any potential conflict of interests that exists between his DCS employment and his employment negotiations and arrangement concerning prospective employment with The Villages.

B. 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 of Staff from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the Chief of Staff 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, the Chief of Staff would not be engaging in any lobbying activities in his position at The Villages. To the extent that the Chief of Staff does not engage in executive branch lobbying for one year after leaving state employment, his post-employment opportunity at The Villages would not violate this provision of the post-employment rule.

Second, the Chief of Staff 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. Based on the information provided, the Chief of Staff has not negotiated or administered a contract with The Villages, and he is not in a position at DCS to make discretionary decisions affecting the outcome of the negotiation or nature of the administration of contracts with The Villages.

Third, the Chief of Staff 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 Chief of Staff represents that he has not made any regulatory or licensing decisions in his position with DCS that directly apply to The Villages.

Fourth, the Chief of Staff 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 Villages has extended an offer for the Chief of Staff's prospective new role in an attempt to influence him in his capacity as a state employee.

Accordingly, the Commission finds that the post-employment rule's cooling off period would not apply to the Chief of Staff's intended employment opportunity with The Villages, and he may begin such employment immediately after his separation from state employment.

Finally, the Chief of Staff 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.

In this instance, the Chief of Staff would be prohibited from representing or assisting The Villages, or any other person in a particular matter in which he personally and substantially participated as a state employee.

The Chief of Staff represents that he is familiar with the twelve matters, and he verifies that he has not personally and substantially participated in any particular matters while at DCS on which he plans to represent or assist others in his post-state employment at The Villages.

The Commission finds that the Chief of Staff's prospective scope of employment, as described, is not prohibited by the particular matter restriction under IC 4-2-6-11.

C. Confidential information

The Chief of Staff is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the Chief of Staff 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 an organization, such as The Villages. 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 Chief of Staff has acquired or maintains access to such confidential information obtained in his role at DCS, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including The Villages or its clients, in any manner.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Chief of Staff's proposed role of Chief Financial Officer for The Villages 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 Chief of Staff's proposed role of Chief Financial Officer for The Villages would not involve representing or assisting The Villages on a particular matter that the Chief of Staff personally and substantially participated in as a state employee; therefore, the Chief of Staff's post-employment opportunity with The Villages 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 Chief of Staff from his proposed role of Chief Financial Officer for The Villages.

Respectfully Submitted,



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