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A former Administrative Law Judge for the Indiana Department of Workforce Development and for the Indiana Utility Regulatory Commission sought advice on whether a proposed post-employment opportunity with a law firm is subject to the post-employment restrictions in the Code of Ethics. The Commission finds that, so long as she refrains from working on any particular matters in which she personally and substantially participated as a state employee, the proposed employment would not be contrary to the Code of Ethics.

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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)(A)(ii). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A former state employee who most recently served as an Administrative Law Judge (ALJ) at the Indiana Department of Workforce Development (DWD) requested advice from the Commission. The former ALJ served in this role at DWD from September 2021 until her recent resignation from state employment. The former ALJ previously served as an ALJ at the Indiana Utility Regulatory Commission (IURC) until her resignation from that position in June 2021.

In her most recent role as an ALJ with DWD, she presided over unemployment hearings with former employees and employers and issued orders regarding benefit decisions. Her role did not involve her participation in the negotiation or administration of contracts.

In her previous role as an ALJ with IURC, she presided (often with IURC Commissioners) over hearings with utilities and interested parties and wrote Commission Orders reflecting the decisions of IURC Commissioners. This role did not involve her participation in the negotiation or administration of contracts.

The former ALJ was recently offered an Of Counsel position with a private law firm (the Firm). Based on the information provided, the Firm is not a regulated utility nor is it a parent or subsidiary of a regulated entity. In this prospective employment, she would be an employee of the Firm and advise the Firm's clients on legal issues, including but not limited to, filings before the IURC. The former ALJ does not anticipate engaging in lobbying activities as part of her employment with the Firm and acknowledges that she will not engage in any lobbying activities during the 365-day period after leaving state employment.

The former ALJ's prospective employment as Of Counsel with the Firm, based on a mutual agreement between her and the Firm, is subject to the following two conditions: 1. The former ALJ's receipt of a favorable formal advisory opinion from the Commission; and 2. The former ALJ would refrain from representing or assisting on any "particular matter" as

defined by IC 4-2-6-11(a) in which she personally and substantially participated during the course of her previous state employment, as required under IC 4-2-6-11(c) and IURC-04(IV)(b)(3).

The former ALJ sought the Commission's formal advisory opinion on whether her proposed employment with the Firm is subject to the one-year restriction on certain employment or representation under IC 4-2-6-11(b). She also requested the Commission's formal advisory opinion on whether, in her prospective Of Counsel position with the Firm, she may immediately work on and appear before the IURC in matters in which she did not personally and substantially participate during her employment as an ALJ at IURC.

ISSUES

1. What provisions of the Code would apply to the former ALJ if she were to accept employment as Of Counsel for the Firm?
2. Would any of the provisions of the Code prohibit the former ALJ from working on and appearing before the IURC in matters in which she did not personally and substantially participate as a state employee?

RELEVANT LAW

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.

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

A. Confidential Information

IC 4-2-6-6 prohibits the former ALJ 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.

The Commission finds that, so long as the former ALJ receives no compensation resulting from confidential information she acquired during her state employment, her potential post-employment opportunity with the Firm would not violate IC 4-2-6-6.

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

First, the former ALJ 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 former ALJ does not anticipate engaging in lobbying activities in her prospective role as Of Counsel with the Firm and affirms that she will not engage in lobbying activities during the initial 365 day period following her last day as a state employee.

To the extent that the former ALJ does not engage in executive branch lobbying for one year after the date she left state employment, the Commission finds that a post-employment position with the Firm would not violate this provision of the post-employment rule.

Second, the former ALJ 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 the nature of the administration of the contract.

It is unclear whether the Firm has a contract with the State; however, the former ALJ maintains that she had no involvement in any contract negotiations or administration, and as an ALJ for DWD and IURC, she was not in position to make discretionary decisions affecting contracts.

Third, the former ALJ 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.

Additionally, the former ALJ is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a decision as an ALJ or for whom she presided over information gathering or order drafting proceedings that directly applied to the employer or its parent or subsidiary in a material manner.

The former ALJ resigned from her position as an ALJ at IURC in June 2021 and provides that the decisions she made while presiding over hearings and the orders she drafted on behalf of the IURC applied to the utilities and interested parties involved and not to the private law firms representing those parties. She states that in her role as an ALJ at DWD, her authored opinions applied to the parties in the unemployment hearing and not to the private law firms representing the parties.

The Commission finds that these restrictions do not apply to the former ALJ's intended employment with Firm because, as a state employee, she was not in a position to make discretionary decisions affecting contracts, she did not make regulatory or licensing decisions affecting the Firm (or the Firm's parent or subsidiary), nor did she make any decision as an ALJ that directly applied to the Firm (or the Firm's parent or subsidiary) in a material way.

Finally, the former ALJ 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.

In this instance, the former ALJ would be prohibited from representing or assisting the Firm, its clients, as well as any other person, in a particular matter in which she personally and substantially participated as a state employee.

Based on the information provided, the former ALJ's initial negotiations for employment with the Firm resulted in a mutual agreement that the former ALJ would refrain from representing or assisting the Firm or its clients on any particular matter in which she personally and substantially participated during her state employment.

To the extent that the former ALJ is able to identify and refrain from representing or assisting the Firm, its clients or any other person in any particular matter in which she personally and substantially participated during her state employment, the Commission finds that the ALJ's employment with the Firm would not violate this restriction.

CONCLUSION

The Commission notes that this opinion is limited to the Code, and there are various rules of professional conduct that apply to government lawyers leaving to enter private practice as well as agency specific policies that might apply. Such other restrictions are outside of the scope of the Commission's authority to provide guidance on and are not addressed in this formal advisory opinion.

Subject to the foregoing analysis, the Commission finds that the former ALJ's proposed employment with the Firm would not violate the post-employment restrictions found in IC 4-2-6-11. Based on the information provided, the Code does not prohibit the former ALJ from immediately working for the Firm on matters before the IURC, provided she did not personally and substantially participate in the matter during her state employment.

Respectfully Submitted,

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