

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

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

A former employee for the Indiana Department of Transportation (INDOT) sought advice on post-state employment restrictions regarding assisting on a project he was involved with while employed with INDOT. The Commission finds that the project is a public works project subject to the particular matter restriction under IC 4-2-6-11 and that the Ethics Code prohibits the employee from assisting on the project.

June 9, 2022
2022-FAO-011

The Indiana State Ethics Commission (Commission) issues the following formal 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 and the Agency Ethics Officer.

BACKGROUND

A former Indiana Department of Transportation (INDOT) employee (Employee) started in the role of INDOT Highway Technician 3 in 2015. INDOT promoted the Employee to a Highway Technician 1 position in 2018 and again to a Construction Project Supervisor position in 2021. The Employee left his position with the State on March 2, 2022, to begin work at his current employer, Lochmueller Group (Lochmueller), as a Construction Inspector 1.

During his employment at INDOT, the Employee was assigned to complete a stage 2 constructability review for a bridge replacement project in Martin County (B-40589 Project). In conducting that review, he was provided a set of plans and engineers' estimates of pay items and quantities for the B-40589 Project. Based on the review, he provided a list of questions and suggestions for designers to consider. Prior to his separation from state employment in March of 2022, INDOT slated the Employee to serve as Project Supervisor in charge of overseeing construction for the B-40589 Project for INDOT.

INDOT recently published a Request for Proposal (RFP) for the B-40589 Project, with an anticipated letting date of June 15, 2022. Lochmueller is interested in submitting a proposal for the RFP and would like to list the Employee as the proposed Highway Technician or Inspector for the Project. If INDOT selects Lochmueller's proposal for the B-40589 Project contract, the Employee's role on behalf of Lochmueller would be measuring, tracking and paying for project materials, as well as being responsible for a large portion of the material and testing requirements under the contract. He would also be responsible for ensuring that the contractor follows all INDOT standards and specifications for the Project.

The RFP for the B-40589 Project identifies a delayed start date of February 1, 2023, with the need for construction inspection activities from January 1, 2023, through November 2023. The RFP requires identification of a contractor's personnel who will be supplying services under the construction contract for the Project.

The Employee requested INDOT's review of whether Lochmueller may bid on the B-40589 Project and identify the Employee as one of Lochmueller's assigned personnel. The Employee's

proposed work on the B-40589 Project was reviewed for a recommendation by INDOT's Selection Review Committee (SRC) for a conflict of interest under INDOT agency policy. The SRC recommendation determined that Lochmueller may pursue work on the B-40589 Project and that the Employee's proposed involvement on behalf of Lochmueller would not violate INDOT's agency conflict of interest policy.

The Employee is requesting the Commission's opinion as to whether Lochmueller may identify the Employee as one of Lochmueller's personnel who will be supplying services in Lochmueller's proposal for the B-40589 Project RFP. Further, should INDOT award Lochmueller the B-40859 Project, the Employee requests that the Commission determine whether he would be permitted by the Code of Ethics (Code) to begin work on the Project in January of 2023, approximately ten months following his separation from state employment.

ISSUE

Are there any restrictions for the Employee under the Code as it relates to his proposed participation in the B-40859 Project on behalf of Lochmueller?

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 4-2-6-11 (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 Employee, as a former state 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.

So long as any compensation the Employee receives does not result from confidential information that he learned in his role at INDOT and in his work as a state employee on the B-40589 Project, his post-employment position at Lochmueller 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 Employee from accepting employment from an employer for 365 days from the date that he left state employment under various circumstances.

The Commission notes that the Employee has already begun employment with Lochmueller within the 365 day “cooling off” period following his separation from state employment. Therefore, the Commission declines to analyze the Employee’s compliance with this provision retroactively.

The second prohibition, known as the “particular matter” restriction prevents a state employee 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 Employee is prohibited under this provision from representing or assisting Lochmueller, as well as any other person, in a particular matter in which he personally and substantially participated as a state employee.

The Employee asked if he can serve as the proposed Highway Technician or Inspector for Lochmueller on the B-40589 Project. Based on the information provided, the Employee’s

role for INDOT on the B-40589 Project involved evaluating the construction quantities based on preliminary plans and preparing a list of questions and suggestions for INDOT designers.

The Commission finds that the B-40589 Project is a public works project subject to the particular matter restriction under IC 4-2-6-11. Furthermore, the Commission finds that, based on the information provided, the Employee's work on the B-40589 Project while with INDOT was personal and substantial. The Commission determines that his proposed work on the B-40859 Project on behalf of Lochmueller or any other person is prohibited under the particular matter restriction.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the B-40589 Project is a public works project subject to the particular matter restriction under IC 4-2-6-11, and that the Employee personally and substantially participated in the B-40589 Project as Construction Project Supervisor at INDOT. Therefore, the Code prohibits the Employee from assisting on the B-40589 Project on behalf of Lochmueller or any other person.

Respectfully Submitted,

Sean Gorman
Ethics Director