

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 INDOT and DNR sought advice whether their review of a public works project in their new private sector position constitutes personal and substantial participation in the public works project such that the post-employment rule's particular matter restriction would prohibit their potential involvement. The Commission finds that the former employee's work on the public works project does not 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.

September 14, 2023

2023-FAO-008

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 former state employee whose proposed post-state employment activities serve as the basis for the request.

BACKGROUND

A former state employee (Former Employee), served from June 2018 to August 2022 as an Environmental Manager 2 for the Indiana Department of Transportation (INDOT) and as the North Region Environmental Biologist for the Indiana Department of Natural Resources (DNR).

The Former Employee left state employment on August 18, 2022. She is currently employed as an environmental specialist at Lochmueller Group (Lochmueller), a consulting firm.

As part of the Former Employee's previous job duties at DNR, she reviewed early coordination letters regarding various local and state projects. This process included her recommendations regarding minimizing impact to the environment based on the nature of the proposed project. For example, she provided recommendations specific to a bridge replacement project to allow wildlife passage and to minimize impact to the waterway.

The Former Employee's recommendations were included as part of the formal environmental response (ER) letter, which is included as part of a project's National Environmental Policy Act (NEPA) environmental documentation. The recommendations that the Former Employee provided were derived from a list of standard recommendations by project type. Such recommendations become commitments on a proposed project. Although the Former Employee provided the recommendations via DNR's ER letter, most (but not necessarily all) recommendations are covered by the Indiana Department of Transportation's (INDOT) standard specifications and have been identified by INDOT as commitments that shall not be included as part of the NEPA document.

The Former Employee also reviewed Construction in a Floodway (CIF) permit applications in her role at DNR.

The Former Employee has identified a particular project that she worked on at DNR (INDOT Des. No. 1700025), involving U.S. 41 in Lake County (U.S. 41 Project), which serves as the basis for this FAO request. At her previous role at DNR, she reviewed the ER letter and provided the "Fish & Wildlife Comments" section of the ER letter as part of the early coordination process for the U.S. 41 Project.

Lochmueller was not initially involved in this project but is currently working to enter into a contract for the project. The Employee notes that the recommendations she provided via the DNR's ER letter are not legally binding, and only conditions listed on an approved CIF permit are legally binding. The Employee provides that she did not review the CIF permit application for the U.S. 41 Project, and she does not believe an application for one has been submitted yet.

The Former Employee asks whether her review of the U.S. 41 Project's ER letter and the provision of Fish & Wildlife recommendations for the DNR's ER letter constitutes personal and substantial participation in the public works project such that the post-employment rule's particular matter restriction would prohibit her potential involvement in the U.S. 41 Project on behalf of Lochmueller.

ISSUE

Does the Former Employee's review and contribution of Fish & Wildlife recommendations via DNR's ER letter for the U.S. 41 Project constitute both personal and substantial work on a public works project such that the Code would prevent her from representing or assisting Lochmueller or any other person on that public works project?

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

The Former Employee's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Post-employment and Confidential Information. The application of each provision to the Former Employee's circumstances 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.

1. The "cooling off" period

The first prohibition, commonly referred to as the cooling off or revolving door period, prevents the Former Employee from accepting employment from an employer for 365 days from the date that she left state employment under various circumstances.

As it has been more than 365 days since she left state employment, the Former Employee is no longer subject to the provisions of the cooling off period under the Code's post-employment rule.

2. The particular matter restriction

The second prohibition under the post-employment rule, commonly referred to as the "particular matter" restriction, prevents a former state employee from working on the twelve types of matters listed in IC 4-2-6-11(a) if he/she personally and substantially participated in the matter as a state employee. These matters are 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 Former Employee's participation in the U.S. 41 Project was limited to reviewing the ER letter and authoring the "Fish & Wildlife Comments" section of the ER letter. The Former Employee did not have wide discretion in choosing the recommendations listed in the Fish & Wildlife Comments of the ER letter, as they are drawn from a list of recommendations that DNR maintains, and which are determined by project type. The recommendations included in DNR's ER letter are not binding. If a project moves forward and a CIF permit is deemed necessary, DNR would look to recommendations provided in the ER letter to include as conditions in a CIF permit; however, the Former Employee did not participate in the review of a CIF permit for the U.S. 41 Project prior to leaving state employment.

The Commission finds that the U.S. 41 Project in Lake County is a public works project subject to the particular matter restriction of the Code's post-employment rule. The Commission further finds that the Former Employee personally participated in the U.S. 41 Project by reviewing and providing content for DNR's ER letter during the early coordination process.

Although the Former Employee's participation in the early coordination process for the U.S. 41 Project was personal, the Commission finds that it was not substantial; therefore, the Code does not prohibit the Former Employee from assisting Lochmueller or any other person with the U.S. 41 Project in her post-state employment activities.

B. Confidential information

IC 4-2-6-6 prohibits the Former 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 Lochmueller. 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 Former Employee has acquired such confidential information obtained in her role at DNR or INDOT, she is prohibited not only from divulging that information, but from ever using it to benefit any person, including Lochmueller, in any manner.

CONCLUSION

The Commission finds that the Former Employee worked on the U.S. 41 Project during her state employment, and that the U.S. 41 Project is a public works project subject to the particular matter restriction of the Code's post-employment rule. The Commission further finds that the Former Employee's work at DNR on the U.S. 41 Project does not constitute both personal and substantial participation such that the Code prohibits her from assisting Lochmueller or any other person in her post-state employment activities.

Respectfully Submitted,

Sean Gorman
State Ethics Director