

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

An Environmental Scientist with IDEM was permitted to accept employment with the subcontractor of a State grantee since he only evaluated and made no discretionary decision with respect to the subcontract; however, he was prohibited from assisting the subcontractor in particular matters in which he personally and substantially participated as a state employee, including the subcontract between the subcontractor and State grantee.

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No. 07-I-6

The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6(b)(1).

BACKGROUND

A state employee serves as an Environmental Scientist 3 in the Watershed Planning Branch in the Office of Water Quality (OWQ) of the Indiana Department of Environmental Management (IDEM). He has worked for OWQ since August 1, 2005.

The Environmental Scientist's responsibilities include managing over 25 grant funded projects that are administered contractually between the State and local sponsors. The Environmental Scientist explained that the grant funded projects are locally led efforts to either improve planning for local stream resources or to install best management practices designed to improve water quality at the local level.

A Soil and Water Conservation District (SWCD) sponsors one of the projects the Environmental Scientist manages. The Environmental Scientist stated that he had no influence on the SWCD being awarded the grant, but he drafted the contract language. In addition, he helped oversee the contract between the State and the SWCD.

The Environmental Scientist explained that after the contract was signed, the SWCD subcontracted all work out to an environmental consulting firm (Firm). He indicated that the State does not influence the choice of the subcontractor, but reviews the subcontract to ensure that it complies with the budget, schedule, and scope of the original grant contract between the State and the SWCD. The Environmental Scientist wishes to accept an employment opportunity to work for the Firm.

ISSUES

The issue in this case is whether the Environmental Scientist would be prohibited from accepting employment with a subcontractor of a state grantee without violating the post-employment statute, IC 4-2-6-11.

RELEVANT LAW

IC 4-2-6-11

One year restriction on certain employment or representation; advisory opinion; exceptions

Sec. 11. (a) As used in this section, "particular matter" means:

- (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 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) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. 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 his or her 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) representation by; or
- (3) 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 a special state appointee who serves only as a member of an advisory body.

(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. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) does not apply to a special state appointee who:

- (1) was a special state appointee before January 10, 2005; and
- (2) is a special state appointee after January 9, 2005.

ANALYSIS

Based on the facts presented, it would appear that the Environmental Scientist's prospective employment with the SWCD's subcontractor invokes consideration of subsections (b)(2) and (c) of the post-employment statute.

With regard to subsection (b)(2), the Environmental Scientist indicated that he has not been involved in the selection of subcontractors as a state employee for the SWCD projects that he manages. However, he indicated that he reviewed the SWCD's subcontract with the Firm for consistency with the contract between the SWCD and the State. In this case, it appears that the Environmental Scientist was only involved in the evaluation of the subcontractor and was not in a position to make a discretionary decision that would affect the outcome or administration of the contract on behalf of the State. Accordingly, the Environmental Scientist would not be subject to the restriction set forth in subsection (b)(2) of the statute.

With respect to subsection (c), the Environmental Scientist would be prohibited from assisting or representing the subcontractor in any matter in which he personally and substantially participated in as a state employee. In this case, the Environmental Scientist indicated that his current responsibilities as a state employee generally include managing over 25 grant funded projects that are administered contractually between the State and local sponsors. In this case, the Environmental Scientist personally and substantially participated in the SWCD contract in that he drafted the contract language. SWCD then hired the Firm to do the work of the SWCD project. Accordingly, absent a waiver from his agency appointing authority, the Environmental Scientist would be prohibited from representing or assisting the Firm in the project that the SWCD subcontracted it to do. The analysis in this opinion only contemplates the activities that the Environmental Scientist has disclosed. Should the Environmental Scientist be required to represent or assist his intended employer in a particular matter that is enumerated in subsection (a) of the statute, the post-employment restriction in subsection (c) would be implicated and he would be prohibited from representing or assisting his intended employer on that particular matter for the life of the matter with which he was involved.

CONCLUSION

Pursuant to the foregoing analysis, the Commission finds that the three hundred sixty-five (365) day restriction set forth in the post employment statute does not apply to the Environmental Scientist. However, the Environmental Scientist would be prohibited from assisting the Firm in any "particular matter" that he personally and substantially participated in as a state employee, absent a waiver from his agency appointing authority.