

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

A former IDHS Executive Director sought the advice of the SEC as to what restrictions under IC 4-2-6-11 would apply to him in leaving state employment to work for his former employer. SEC found that, while the former Director would remain subject to particular matter prohibitions, he was not bound by the 365-day “cooling off” restriction since the screening mechanism the SEC had previously approved prevented him from engaging in regulatory or licensing decisions that applied to his former employer during his tenure with the State.

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

BACKGROUND

Upon commencing his service with the Indiana Department of Homeland Security (“IDHS”), the former Executive Director obtained a formal advisory opinion from the Commission. In advisory opinion no. 06-I-3, the Commission noted that the former Executive Director was on detail with the IDHS from Purdue University (“Purdue”) through an Employee Interchange Program (“EIP”) pursuant to IC 5-10-7. The Commission approved a screening mechanism pursuant to IC 4-2-6-9 (b) in which the former Executive Director was to be screened from all IDHS contracts, grants and permit decisions that could impact Purdue during his tenure with the agency.

In his role as Executive Director, the former employee oversaw the entire agency and directly participated in the following projects:

- Fire training and Disaster Funds which were funded by new fees on fireworks
- Fusion Center
- Operational Plans
- Interoperable Communications

In addition, the former Executive Director was involved in various contracts (see attachment). The former Executive Director’s involvement with these contracts was limited to the approval of the budget and final timing of the projects after IDHS staff had selected the vendors.

The former Executive Director recently completed his services with the IDHS and has returned to work at Purdue.

ISSUE

What post-employment restrictions, if any, would apply to former Executive Director in his employment with Purdue?

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.

ANALYSIS

In this case, it does not appear that the former Executive Director engaged in the negotiation or administration of a contract on behalf of the state with Purdue or that the former Executive Director made any regulatory or licensing decisions that directly applied to Purdue. Specifically, the screening mechanism that was previously approved by the Commission would have prevented the former Executive Director from engaging in these types of decisions during his tenure with the state. Accordingly, the 365-day restrictions described in sections (1) and (2) above would not apply to the former Executive Director. Similarly, the circumstances surrounding the former Executive Director's services to IDHS and employment with Purdue would not appear to trigger subsection (4) above.

The former Executive Director's participation in various projects while at the IDHS, however, invites specific consideration of the "particular matter" restriction. In this case, the particular matters that merit consideration are the contracts that the former Executive Director was involved with during his tenure with the state. Based on the information provided, it would appear that the former Executive Director's approval of the budgets and final timing for the contracts listed in the attachment would constitute personal and substantial involvement. Accordingly, the former Executive Director would be prohibited from assisting or representing Purdue on any of the contracts he approved (see attachment) for the life of those contracts.

The restriction is not only limited to “particular matters” involving IDHS and Purdue. Instead, the former Executive Director would be prohibited from representing or assisting Purdue on *any* “particular matters,” in which he personally and substantially participated in during his service with the state.

CONCLUSION

Pursuant to the foregoing analysis, the Commission finds that the 365-day restriction set forth in the post employment statute does not apply to the former Executive Director. However, the former Executive Director would be prohibited from assisting or representing Purdue in any “particular matter(s)” that he personally and substantially participated in as a state employee, including the contracts listed in the attached document.