

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

The General Counsel of the IURC was offered employment with an electric supplier and sought advice on what rules in the Code of Ethics applied to his postemployment opportunity. SEC found that the General Counsel had not made a regulatory decision affecting the supplier since the Indiana Code provisions pertaining to the IURC place such decision-making authority in the hands of the IURC Commission and not its staff. SEC determined, however, that the General Counsel had personally and substantially participated in a series of cases involving the supplier and would be prohibited from ever representing or assisting the supplier on those matters. As a result, SEC concluded the cooling off restriction would not apply to the General Counsel, but he would be subject to the particular matter prohibition on those cases in which he was personally and substantially involved during his tenure at the IURC.

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

#### **BACKGROUND**

An employee is the General Counsel for the Indiana Utility Regulatory Commission (IURC). The General Counsel has been offered an employment opportunity by an electric supplier. The electric supplier is Indiana's largest electric supplier, providing electric service to approximately 780,000 customers in sixty-nine of Indiana's ninety-two counties. It is a utility regulated by the IURC.

During his tenure with the IURC, the General Counsel neither negotiated nor administered a contract with the electric supplier. In addition, the General Counsel has never made a regulatory or licensing decision on behalf of the IURC affecting the electric supplier. The General Counsel discloses that he was assigned to proceedings filed with the IURC and "personally and substantially" participated in the following cases involving the electric supplier:

- Cause No. 43501
- Cause Nos. 43114 IGC 4, 43114 IGCC 4-S-1, and 43114 IGCC 5
- Cause No. 42693 S-1
- Cause No. 43743
- Cause No. 43653

Upon submitting his resume to electric supplier, the General Counsel screened himself from pending proceedings involving the electric supplier to which he was assigned and reassigned the cases to other Administrative Law Judges. The General Counsel's intended employment with the electric supplier would not involve employment as a lobbyist.

#### **ISSUE**

What rules in the Code of Ethics apply to the General Counsel's intended employment opportunity with the electric supplier, and would his acceptance of the offered position subject him to any post-employment restrictions under I.C. 4-2-6-11?

## RELEVANT LAW

### **I.C. 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.

### **I.C. 4-2-6-9 (42 IAC 1-5-6)**

#### **Conflict of economic interests**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer,

employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

### **I.C. 4-2-6-11 (42 IAC 1-5-14)**

#### **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 I.C. 4-22-2 to establish criteria for post employment waivers.

### ANALYSIS

The General Counsel intended employment with the electric supplier invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the General Counsel is analyzed below.

#### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the General Counsel from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. Based on the information the General Counsel provided, it appears that the electric supplier's offer of employment did not result from information of a confidential nature. Accordingly, the Commission finds that the General Counsel's acceptance of the electric supplier's employment offer would not be in violation of I.C. 4-2-6-6.

#### *B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the General Counsel from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the General Counsel has an arrangement for prospective employment with the electric supplier. Accordingly, the General Counsel is prohibited from participating in any decision or vote during the remainder of his state employment in which the electric supplier has a financial interest in the outcome of the matter. The General Counsel indicates that he has screened himself from matters involving the electric supplier and has not participated in any decision or vote affecting the electric supplier since he submitted his resume to the utility. To the extent that the General Counsel continues to observe this provision and abstains from participation in any decision or vote affecting the electric supplier, the Commission finds that the General Counsel would not be in violation of I.C. 4-2-6-9.

#### *C. Post-Employment*

I.C. 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 period, prevents the General Counsel from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the General Counsel is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Based on the information provided, it would not appear that this provision would apply to the General Counsel. Specifically, he indicates that the position with the electric supplier does not involve employment as a lobbyist pursuant to I.C. 4-2-7-1(5).

Second, the General Counsel is prohibited from accepting employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of his state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract. In this case, the General Counsel discloses that he has never negotiated nor administered a contract with the electric supplier on behalf of the IURC. To the extent that he has never negotiated or administered a contract with the electric supplier during his tenure with the State, this restriction would not apply to the General Counsel.

Third, the General Counsel is prohibited from accepting employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This provision would not be triggered by the General Counsel’s work at the IURC as he was neither a commissioner nor a voting member of the regulatory body that may have made license or permit decisions regarding the electric supplier.

Fourth, the General Counsel is also prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence him in his official capacity as a state employee. None of the facts presented to the Commission suggest that the electric supplier’s offer of employment to the General Counsel was done in an attempt to influence him in his capacity as General Counsel of the IURC.

Finally, the General Counsel is subject to the post-employment rule’s “particular matter” prohibition in his potential employment with the electric supplier. This restriction prevents him from working 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.

In this case, the General Counsel discloses that he was personally and substantially involved in the following docketed proceedings that would qualify as “particular matters” regarding the electric supplier:

- Cause No. 43501
- Cause Nos. 43114 IGC 4, 43114 IGCC 4-S-1, and 43114 IGCC 5
- Cause No. 42693 S-1
- Cause No. 43743
- Cause No. 43653

Accordingly, the General Counsel would be prohibited from representing or assisting the electric supplier on any of the above listed pending proceedings.

### **CONCLUSION**

The Commission finds that the General Counsel’s intended employment opportunity with the electric supplier would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that, subject to the particular matters identified, the General Counsel’s intended employment with the electric supplier would not violate I.C. 4-2-6-11.