

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

The General Counsel and EO for IEDC sought postemployment advice on behalf of three employees that would potentially be leaving the agency to join a nonprofit corporation to work on a research and technology fund. SEC examined the three rules in the Code of Ethics that are implicated in postemployment situations and determined none of them would appear to apply in the circumstances described by the IEDC EO.

September 2010
No. 10-I-12

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 Vice President and General Counsel for the Indiana Economic Development Commission (IEDC). The General Counsel also serves as the Ethics Officer for the IEDC and is seeking post-employment advice on behalf of three employees of the IEDC.

The IEDC provides support for entrepreneurs through a variety of programs, the most dynamic being an Indiana research and technology fund (Fund). Pursuant to I.C. 5-28-16-2, the Fund is administered by the IEDC for the purpose of providing grants or loans to support the development and commercialization of new technologies and ideas that fuel economic growth.

The Fund has developed extensive business and technical due diligence processes to assess the potential of early-stage technology development and commercialization efforts of promising small businesses. All applicants are screened using these processes, and applicants are provided constructive feedback regardless of whether awards are provided. All award recommendations are provided to a committee made up of IEDC's Board of Directors for approval. All approved awards are further reviewed by the State Appropriations Committee. All professional services agreements are approved and executed by the Chief Executive Officer of the IEDC.

The IEDC intends to partner with other key economic development partners to provide additional services to Indiana's entrepreneurial community and create new jobs for Hoosiers. Specifically, IEDC would like to partner with an Indiana nonprofit corporation to implement its innovation and entrepreneurship strategies. IEDC would enter into a professional services agreement with the nonprofit corporation to provide for the continuation of due diligence and portfolio management services for the Fund on a contract basis. As the nonprofit corporation's capabilities expand, the IEDC may enter into a grant agreement, in partnership with the nonprofit corporation and other economic development partners to provide additional support to early state entrepreneurs.

As part of the transition, the nonprofit corporation would hire three current IEDC employees and key members of the Fund team in order to assist with the implementation of these strategies.

In terms of duties, two of the IEDC employees presently serve as Managing Director and Assistant Director of the Fund. They are predominantly responsible for performing business due diligence on and assistance to early-state entrepreneurs. The third IEDC employee serves as the Fund's Chief Technical Officer and leads the Fund's technical efforts. In these roles, the three IEDC employees have not negotiated, approved or administered any existing or prior agreements with the nonprofit corporation.

ISSUE

What rules in the Code of Ethics would apply to the three IEDC employee's intended employment opportunity with the nonprofit corporation, and would their acceptance of a position with the nonprofit corporation subject them 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 three IEDC employees' intended employment with the nonprofit corporation 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 three IEDC employees is analyzed below. The Commission emphasizes that the analysis below is intended to apply only to the three IEDC employee's intended employment with the nonprofit corporation. It is not intended to apply to the three IEDC employee's potential employment with any other employers or the employment of other IEDC employees with nonprofit corporation.

A. Confidential Information

I.C. 4-2-6-6 would prohibit the three IEDC employees 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 provided, it would appear that an offer of employment for the three IEDC employees from the nonprofit corporation would not be a result of information of a confidential nature. Accordingly, the Commission finds that the three IEDC employee's acceptance of the nonprofit corporation'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 three IEDC employees from participating in any decision or vote if they have knowledge that various persons may have a "financial interest" in the

outcome of the matter, including a potential employer. In this case, the three IEDC employees may have an arrangement for prospective employment with the nonprofit corporation. Accordingly, the three IEDC employees would be prohibited from participating in any decision or vote during the remainder of their state employment in which the nonprofit corporation would have a financial interest in the outcome of the matter. To the extent that the three IEDC employees observe this provision and abstain from participation in any decision or vote affecting the nonprofit corporation, the Commission finds that the three IEDC employees 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, would prevent the three IEDC employees from accepting employment for 365 days from the date that each leaves state government under various circumstances.

First, the three IEDC employees are prohibited from accepting employment as lobbyists for the entirety of the cooling off period. Based on the information provided regarding the potential duties the individuals will perform for the nonprofit corporation, it would not appear that this provision would apply to the three IEDC employees.

Second, the three IEDC employees are prohibited from accepting employment from an employer with whom they (1) engaged in the negotiation or administration of a contract on behalf of IEDC and (2) were 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 three IEDC employees have never negotiated or administered a contract with the nonprofit corporation on behalf of the IEDC. Accordingly, the Commission finds that this restriction would not apply to the three IEDC employees in their intended employment with the nonprofit corporation.

Third, the three IEDC employees are prohibited from accepting employment from an employer for whom they made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This provision would not appear to be triggered in this case because the three IEDC employees have never made a regulatory or licensing decision that applied to the nonprofit corporation or its parent or subsidiary.

Fourth, the three IEDC employees are also prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence any of these individuals in their official capacity. Based on the General Counsel’s testimony that the three IEDC employees had no involvement in IEDC’s decision to partner with the nonprofit corporation, the Commission is of the opinion that the nonprofit corporation would not be extending an offer of employment to the three IEDC employees in an attempt to influence them in their official capacity.

Finally, the three IEDC employees may be subject to the post-employment rule’s “particular matter” prohibition in his potential employment. This restriction prevents

these individuals from working on any of the following twelve matters if they personally and substantially participated in the matters 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. While the General Counsel does not identify any particular matters in which the three IEDC employees would have been personally and substantially involved while with the IEDC that they would be required to assist the nonprofit corporation on, the three IEDC employees must be mindful of this prohibition and continue to ensure compliance in their intended employment with the nonprofit corporation.

CONCLUSION

The Commission finds that the three IEDC employees' intended employment with the nonprofit corporation would not violate I.C. 4-2-6-6, I.C. 4-2-6-9 or I.C. 4-2-6-11.