

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

The General Counsel of the IGC was offered employment with a local law firm and sought advice on what rules in the Code of Ethics applied to his postemployment opportunity. SEC found that while the General Counsel may have advised or consulted with IGC staff on licensing matters, he did not have the authority to make regulatory or licensing decisions and his work therefore did not trigger the cooling off provision of the Postemployment rule. SEC determined, however, that the General Counsel had personally and substantially participated in a series of cases and contracts related to gaming matters and would be prohibited from ever representing or assisting the firm or its clients on those matters.

September 2010
No. 10-I-13

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 has served as the General Counsel for the Indiana Gaming Commission (IGC) since February 2005. The General Counsel intends to resign his position with the state and begin employment with an Indianapolis law firm (Firm), sometime during the first week of October 2010. He will be a full time employee of the Firm and will be working in an “of counsel” capacity.

The General Counsel would not engage in activity with the Firm that would require him to register as an executive branch lobbyist prior to the expiration of 365 days from his last day of state employment.

During his tenure with the IGC, the General Counsel never negotiated nor administered a contract with the Firm. In terms of regulatory or licensing matters, the General Counsel never possessed the unilateral authority to make independent regulatory or licensing decisions. He did, however, frequently advise or consult the IGC, the IGC Executive Director, and other agency staff prior to their having taken or authorized action on such matters. In his intended employment with the Firm, the General Counsel may represent entities whose past regulatory or licensing matters were the subject of IGC decisions in which he was involved.

The General Counsel has identified the following particular matters involving the State in which he has personally and substantially participated:

- Ongoing litigation matters to which the IGC is or has been a party are Cause No. 49D01-0504-PL-014394; Cause No. 49S02-0908-CV-00383; Cause No. 49D13-08-02-PL-006612; Cause No. 49D10-0908-CT-038683.
- The bidding on and/or negotiation of any IGC contracts for which he substantially participated in any stage of the vendor selection and/or contract drafting process, such as the contracts that are currently being, or will be, negotiated under RFP 10-83 (independent gaming laboratories) and RFP 11-11 (marine structural and life safety consultant).

- Any other specific matters that involve the State and remain pending at the time his employment with the IGC terminates, including things like ongoing discussions relating to the amendment or renegotiation of the East Chicago and Gary local development agreements, as well as the bankruptcy restructuring of Centaur, LLC.

In his role as General Counsel, he disclosed that he has personally and substantially worked on dozens of distinct matters that relate to various persons' and/or entities' suitability to hold a gaming license. The General Counsel seeks confirmation that his work on past licensure-related matters for certain persons or entities would not preclude him from representing or assisting some of the same persons or entities on new and distinct issues relevant to their ongoing licensure with the IGC. Examples of such matters may include: 1) future annual license renewals required by statute; 2) future periodic IGC reinvestigations necessary to maintain licensure, including related applications and procedures; 3) the adjudication and/or settlement of future administrative actions resulting from alleged regulatory violation; and 4) future financing transactions and other incident-specific commission approvals required by IGC laws and regulations.

ISSUE

What rules in the Code of Ethics would apply to the General Counsel's employment opportunity with the Firm, 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's intended employment with the Firm 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 would appear that the Firm'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 Firm'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 Firm. Accordingly, the General Counsel is prohibited from participating in any decision or vote during the remainder of his state employment in which the Firm has a financial interest in the outcome of the matter. To the extent that the General Counsel observes this provision and abstains from participation in any decision or vote affecting the Firm, 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, would prevent 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 Firm 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 disclosed that he has never negotiated nor administered a contract with the Firm on behalf of the IGC. To the extent that he never negotiated or administered a contract with the Firm 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 appear to be triggered by the General Counsel’s work at the IGC because he did not make regulatory or licensing decisions. Specifically, the Commission notes that while he may have advised or consulted with IGC staff on licensing matters he did not have the authority to make regulatory or licensing decisions.

Fourth, the General Counsel is 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 suggest the

Firm's offer of employment was done in an attempt to influence the employee in his capacity as General Counsel of the IGC.

Finally, the General Counsel may be subject to the post-employment rule's "particular matter" prohibition in his potential employment. 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":

- Ongoing litigation matters to which the IGC is or has been a party are Cause No. 49D01-0504-PL-014394; Cause No. 49S02-0908-CV-00383; Cause No. 49D13-08-02-PL-006612; and Cause No. 49D10-0908-CT-038683.
- The bidding on and/or negotiation of any IGC contracts for which he substantially participated in any stage of the vendor selection and/or contract drafting process, such as the contract that are currently being, or will be, negotiated under RFP 10-83 (independent gaming laboratories) and RFP 11-11 (marine structural and life safety consultant).
- Any other specific matters that involve the State and remain pending at the time his employment with the IGC terminates, including things like ongoing discussions relating to the amendment or renegotiation of the East Chicago and Gary local development agreements, as well as the bankruptcy restructuring of Centaur, LLC.

Accordingly, the General Counsel would be prohibited from representing or assisting the Firm and/or clients on any of the above listed pending proceedings. However, his work on past licensure-related matters for certain persons or entities would not preclude him from representing or assisting some of the same persons or entities on new and distinct issues relevant to their ongoing licensure with the IGC.

CONCLUSION

The Commission finds that the General Counsel's intended employment opportunity with the Firm 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 Firm would not violate I.C. 4-2-6-11.