

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

A former director with the IHRC was offered employment as the secretary of the Indiana Thoroughbred Owners and Breeders Association (“ITOBA”) and inquired whether such post-employment was permissible under the Code of Ethics. SEC found that employment by the former employee with ITBOA did not implicate any of the “cooling off” provisions of the Postemployment rule and advised her to continue to comply with the requirements of the “particular matter” portion of the rule in her new position.

January 2010

No. 10-I-1

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

A former employee of the Indiana Horse Racing Commission (“IHRC”) served as the Director of Thoroughbred and Quarter Horse Breed Development for the IHRC until March 2009 when the former employee left the state’s employ. In this capacity, the former employee had various job duties including overseeing the budgeting and disbursements of a multi-million dollar breed development fund designed to stimulate the agribusiness sector of Indiana’s economy and compiling records to calculate purse awards, verify eligibility, approve and process payment of awards.

The Indiana Thoroughbred Owners and Breeders Association (“ITOBA”) has extended the former employee an offer of employment to fill the Secretary position for the organization. The ITOBA is an association that represents thoroughbred owners, breeders, and trainers. It also receives funding through the IRHC.

The former employee requests this opinion from the Commission to determine whether the intended post-employment with the ITOBA would be contrary to the Code of Ethics.

ISSUE

Is the former employee prohibited from accepting an employment opportunity with the ITOBA before the expiration of the one-year cooling off period required by the post-employment rule set forth in IC 4-2-6-11(b)?

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.

IC 4-2-6-1 Definitions

(b) The definitions in IC 4-2-7 apply throughout this chapter.

IC 4-2-7-1 Definitions

Sec. 1. The following definitions apply throughout this chapter:

...

(5) "Lobbyist" means an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under rules adopted by the Indiana department of administration.

ANALYSIS

The former employee would be prohibited from accepting an employment opportunity with the ITOBA until the elapse of at least three hundred sixty-five (365) days of leaving state employment if any of the following three conditions apply: (1) the former employee is going to perform work as a lobbyist, (2) the former employee negotiated or administered a contract with the ITOBA on behalf of the IHRC and was in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration, or (3) made a regulatory or licensing decision that directly applied to the ITOBA or to a parent or subsidiary of the ITOBA.

Based on the information provided, the Commission finds that the 365-day post-employment restriction would not apply to the former employee's intended employment with ITOBA. Specifically, the former employee indicates that her job duties at the ITOBA would not require her to engage in lobbying activity. In addition, the former employee never negotiated or administered a contract with ITOBA during her tenure with the State. Finally, the former employee did not make a regulatory or licensing decision

as a state employee that would have affected ITOB or any of its subsidiaries.

With respect to IC 4-2-6-11(c), the former employee would be prohibited from representing or assisting the ITOBA in any “particular matter” in which she personally or substantially participated in during her tenure with the State. In this case, the former employee has not identified any particular matters that she personally and substantially participated in while at the IHRC that she would be required to work on in her intended post-employment with the ITOBA.

CONCLUSION

Based on the foregoing analysis, the Commission finds that the former employee is not prohibited from accepting an employment opportunity with ITOBA before the expiration of the one-year “cooling off” period required by the post-employment rule set forth in IC 4-2-6-11(b). However, the former employee should continue to ensure compliance with the “particular matter” restriction set forth in IC 4-2-6-11(c).