

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

A former Indiana Attorney General sought advice as to whether he would be permitted under the Code of Ethics to contract with the State to lead a national tobacco arbitration proceeding. SEC found the “particular matter” restriction of the Postemployment rule did not apply since an agency in the executive branch of state government did not qualify as a “person” pursuant to the definition of the term in IC 4-2-6-1(a)(12). Specifically, SEC interpreted the term “governmental agency” included in the definition of “person” as excluding an agency in the executive branch of state government.

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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

A former state officer who served as Attorney General (“former AG”) for the State of Indiana, requests this opinion from the Commission to determine the application of IC 4-2-6-11(c), a post-employment restriction, to his intended contractual employment with the Indiana Office of the Attorney General (“OAG”) to represent the State in a national tobacco arbitration set to begin in 2010.

In November of 1998, Indiana, along with 45 other states (“States”), entered into an agreement with major tobacco companies to recover funds for certain health care related costs expended by the States. The agreement is known as the Master Settlement Agreement (“MSA”). The MSA governs financial and other obligations between the participating tobacco companies or manufacturers (“PMs”) and the States. It also establishes a dispute resolution process to resolve certain disputes relating to terms contained in the MSA. Some provisions of the MSA require the States to enforce certain measures against other tobacco companies that are not part of the MSA, known as non-participating manufacturers (“NPMs”).

A dispute now exists between the PMs and the States regarding a financial matter associated with the States’ enforcement of certain measures against NPMs during the year 2003. The dispute will be presented to a national arbitration panel that is in the process of being selected. Once that forum is convened, Indiana will be required to present its argument with respect to its enforcement of matters against the NPMs for 2003. The 2003 enforcement proceedings were forums where Indiana was opposed by NPMs. The pending national arbitration proceeding is a forum where Indiana is opposed by PMs.

The current Indiana Attorney General has requested the former AG to lead Indiana’s efforts in the pending arbitration proceeding related to the MSA. Before entering into an employment contract directly with the OAG, the former AG requests this opinion from the Commission to determine whether accepting such offer would be contrary to the State Code of Ethics.

ISSUE

Does the particular matter restriction set for in IC 4-2-6-11(c) prohibit the former AG from entering into an employment contract with the OAG to work on a national tobacco arbitration proceeding?

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

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

....

(12) "Person" means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.

...

(17) "State officer" means any of the following:

....

(F) The attorney general.

ANALYSIS

IC 4-2-6-11 is the ethics rule that governs post-employment for members of the executive branch of state government. This rule outlines various restrictions that apply to a former state officer that may limit the type of work the former state officer may engage in after leaving their employment with the state. Generally, IC 4-2-6-11 provides for a one-year “cooling-off” period before the former state officer may perform certain work. The waiting period may be longer in cases that involve a “particular matter” as defined by the statute.

In this case, the former AG’s intended contractual employment with the OAG invokes consideration of IC 4-2-6-11(b)(2) and IC 4-2-6-11(c). IC 4-2-6-11(b)(2) sets forth the one-year “cooling off” period requirement for state officers wishing to engage in certain types of work. The former AG was elected to office in 2000 and re-elected in 2004. His second term concluded in 2008. Because the former AG’s date of separation from the State exceeds 365 days, the Commission finds that this provision is no longer applicable to him.

The restriction set forth in IC 4-2-6-11(c) is separate and applies to a “particular matter.” This prohibition generally lasts for the life of the particular matter involved, which could be greater than or less than 365 days. The particular matters subject to this restriction are enumerated in IC 4-2-6-11(a)(1)-(12).

If applicable, the restriction set forth in IC 4-2-6-11(c) would prohibit the former AG from representing or assisting any *person* in a “particular matter” on which he personally and substantially worked on while employed with the state, even if he was to receive no compensation for the representation or assistance. [Emphasis added]. In this case, the former AG would be contracting directly with the State to represent or assist the OAG on the MSA. Accordingly, the Commission looks to the definition of the term “person” to determine whether the OAG qualifies as such.

The definition of the term “person” includes a governmental agency. IC 4-2-6-1(a)(12). The term “governmental agency” is not defined in IC 4-2-6. Accordingly, it is the interpretation of Commission that the term “governmental agency” does not include an agency in the executive branch of state government.

CONCLUSION

Having determined that the term “person” does not include an agency in the executive branch of state government, the Commission finds that the particular matter restriction set forth in IC 4-2-6-11(c) would not prohibit the former AG from entering into an employment contract with the OAG to work on a national tobacco arbitration proceeding.