

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

The Legislative Director and Senior Policy Director with the Governor's Office was offered employment with an Indianapolis firm to lobby for clients and perform legal work. SEC determined the revolving door restrictions in the Postemployment rule would not apply to the Director's employment opportunity. SEC further found the Director's participation in a contract between the State and the Firm for legislative purposes was not personal and substantial and would not implicate the particular matters provision of the Postemployment rule; however, her involvement in a contract between the Firm and the State pertaining to litigation was personal and substantial and would fall within the prohibitions of the particular matter restriction.

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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

A state employee currently serves as the Legislative Director and Senior Policy Director of the Office of the Governor. The Director previously worked at the Family and Social Services Administration ("FSSA"). Her primary duties during her employment with the State have included policy making, advising, and implementing programs. The Director's responsibilities have never included negotiating or administering a contract or a grant or making regulatory or licensing decisions.

An Indianapolis-based firm ("Firm") has extended an employment offer to the Director to work in their governmental affairs practice group. The Director's duties at the Firm would include lobbying for a wide variety of clients. The Director would also, on occasion, be asked to perform legal work as it becomes necessary although she would not be a litigator.

The Firm has numerous contracts with the State to do a variety of legal work. The Director has never engaged in the negotiation or administration of any contract with the Firm on behalf of the State. She has, however, met with members of the Firm and their clients to discuss policy decisions the State made or pending policy decision the State was planning to make. She has also worked with various members of the Firm once they were hired by the State.

The Director has specifically identified the following matters in which she has been involved as a state employee that also involve the Firm:

- 1) Patient Protection and Affordable Care Act (PPAC); and
- 2) IBM contract and litigation.

The Firm is assisting the State with matters relating to the PPAC and federal legislation pursuant to a contract; however, the Director discloses that she was not involved in any way in the selection of the Firm to do the work. The Director primarily interacts with a representative from the healthcare reform for the State. The Director indicates she receives guidance and information from the representative and her team. The Director has attended a meeting or two

where the Firm was present to discuss potential legislative changes the State might need to make to comply with the new law.

Regarding the IBM contract and litigation, the State entered into a contract with IBM to outsource the State's eligibility systems. ACS was a subcontractor to IBM for this contract. While she was at FSSA, the Director was involved in the communication strategy around the announcement of the project. She has also been consistently involved in updates on the project. IBM and the State are currently in the middle of litigation over the contract. She has been deposed as a witness for the State in this litigation. The Firm represents ACS in some matters related to this litigation which are not adverse to the State.

ISSUE

What rules in the Code of Ethics would apply to the Director's employment opportunity with the Firm, and would her acceptance of the offered position subject her 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 Director'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 Director is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Director 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 does not appear that the Firm's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Director'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 Director from participating in any decision or vote if she has knowledge that various persons may have a "financial interest" in the outcome of the matter, including herself and a potential employer. The definition of "financial interest" in I.C. 4-2-6-1(a)(10) includes "an interest arising from employment or prospective employment for which negotiations have begun." In this case, the Director has an arrangement for prospective employment with the Firm and therefore would have a

financial interest in the outcome of any matter related to the Firm. Accordingly, the Director is prohibited from participating in any decision or vote during the remainder of his state employment in which she or the Firm has a financial interest in the outcome of the matter. To the extent that the Director has and will continue to observe this provision, the Commission finds that she 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 Director from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Per I.C. 4-2-7-1(5), this restriction applies to lobbying of the executive branch only, not the legislative branch. Based on the information provided, the Director would engage in lobbying of the legislative branch only for the first year after leaving her state employment.

Second, the Director is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she engaged in the negotiation or administration of a contract on behalf of a 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 Director represents she has never negotiated or administered a contract with the Firm on behalf of the State. Accordingly, the Commission finds that this restriction would not apply to the Director’s intended employment with the Firm.

Third, the Director is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This provision would not apply to the Director’s intended employment with the Firm because she did not make regulatory or licensing decisions affecting the Firm at any time during her entire tenure with the State. Accordingly, the Commission finds that this restriction would not apply to the Director’s intended employment with the Firm.

Fourth, the Director is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence her in her official capacity as a state employee. The information presented to the Commission does not suggest that the Firm’s offer of employment was extended to the Director in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to the Director’s intended employment with the Firm.

Finally, while the one-year cooling off period would not apply to the Director, she is still subject to the post-employment rule’s “particular matter” prohibition in her potential employment. This restriction prevents her from working on any of the following twelve

matters if she 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 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. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue.

In this case, the Director has identified two matters that qualify as “particular matters” as defined by the rule. The first matter is a contract between the State and the Firm to assist in PPAC and federal legislation. A contract is one of the twelve “particular matters” listed in the rule, regardless of the substance of the underlying contract. Consequently, while the contract may be to assist the state with policy matters of general application, it is nevertheless a contract and therefore qualifies as a particular matter for purposes of this provision. In this case, the Commission finds that the Director’s involvement in the contract, if any, was not personal and substantial. Accordingly, the Director would not be prohibited from representing or assisting any person, including the Firm, on this matter.

The second matters regarding the IBM contract and litigation appears to clearly qualify as a particular matter since they are both a contract and a lawsuit. Both a lawsuit and a contract are “particular matters” identified in the rule. Based on the information provided, it would appear that the Director was personally and substantially involved in the IBM contract and litigation. Specifically, she was initially involved in the contract as a state employee and then subsequently deposed in the litigation. Accordingly, the Director would be prohibited in representing or assisting any person, including the Firm, in anything related to that lawsuit or contract.

CONCLUSION

The Commission finds that the Director intended employment with the Firm does not violate I.C. 4-2-6-6 or I.C. 4-2-6-9.

The Commission further finds that the one-year restrictions set forth in I.C. 4-2-6-11 do not apply to the Director’s intended employment with the Firm. The Director is, however, prohibited from representing or assisting any person, including the Firm, on the IBM contract and/or IBM litigation.