

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

The IFA's State Public Finance Director was offered employment with an Indianapolis organization that consists of multiple hospitals and health centers. The Director identified two separate resolutions involving the IFA and her prospective employer. SEC determined that the Director had not administered or negotiated the resolutions, nor had she made a decision that would subject her to the cooling off provision of the Postemployment rule. Further, the SEC determined the Director's involvement in the resolutions was minimal and did not rise to the level of personal and substantial participation required to implicate the particular matter restriction in the Posemployment rule.

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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**

An employee has served as the State Public Finance Director ("Director") since August 2007. She has been employed by the State of Indiana since February 2006 where she served as the Chief Operating Officer and General Counsel for the Indiana Finance Authority ("IFA"). The Director recently received an employment offer from an entity that is based in Indianapolis and is comprised of multiple hospitals and health centers ("Health Center").

The Health Center has had two separate dealings with the IFA during the Director's tenure with the State. The two dealings are described in board resolutions, which involve bond issuances and a lease-sublease purchase agreement (collectively referred to as "Resolutions"). The first dealing relates to Resolution 08-F-06 ("2008 Resolution") which involves a bond issue and the second relates to Resolution 10-F-1 ("2010 Resolution") which authorizes a form of lease-sublease purchase agreement.

The Director served as the Director when the Resolutions were considered by the IFA and as such, supervised the project manager who accepted the related applications and the General Counsel who reviewed the form documents to ensure compliance with IFA policies and procedures. If the applications were complete and the form documents were correct, the Resolutions would be included in the board packet for the board's consideration. The requirements for these matters are statutorily (I.C. 5-1-16) and procedurally outlined in IFA policies. The process of sponsoring entities such as the Health Center is a non-competitive process with form documents that govern the transactions. If the form language is used, there are no further discussions necessary for the creation and administration of the related contracts. While the Director signed the Resolutions and related documents, she was not involved in negotiating or administering these instruments or in the final approval of them. The Director's signature on the Resolutions and related documents as the Director was included to satisfy a statutory criterion that requires the signature of the chairman of the Board and/or the Public Finance Director.

**ISSUE**

What rules in the Code of Ethics would apply to the Director's intended employment opportunity with the Health Center, 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 Health Center 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 the Director provided in her request for an advisory opinion and her testimony, the Commission finds that the Health Center's offer of employment did not result from information of a confidential nature. Accordingly, the Commission finds that the Director's acceptance of the Health Center'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 both the employee and a potential employer. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes the interest an employee has that arises from employment or prospective employment for which negotiations have begun. In this case, the Director appears to have an arrangement for prospective employment with the Health Center. Accordingly, the Director is prohibited from participating in any decision or vote during the remainder of her state employment in which the Health Center has a financial interest in the outcome of the matter. The Director indicates that she is aware of this provision and has not participated in any decision or vote in which the Health Center would have a financial interest in the outcome of the matter in since she became aware of the prospective employment opportunity. To the extent that the Director continues to observe this provision and abstains from participation in any decision or vote affecting the Health Center, the Commission finds that the Director 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, prevents the Director from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Director would be prohibited from accepting employment as an executive branch lobbyist pursuant to I.C. 4-2-7-1(5) for the entirety of the cooling off period. Based on the information provided, the Commission finds that this provision would not apply to the Director. Specifically, the Director indicates that she will not be registering as an executive branch lobbyist for at least one year after leaving state employment.

Second, the Director would be prohibited from accepting employment from an employer with whom 1) she engaged in the negotiation or administration of a contract on behalf of her 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 signed the Resolutions. The Resolutions qualify as contracts between the IFA and the Health Center. In opinion 07-I-8, the Commission issued an advisory opinion to the former Director of the OMB finding that the 365-day postemployment restriction did not apply to the Director’s intended postemployment opportunity because the Director had voted on but had not negotiated or administered a contract on behalf of the State with the intended employer. More recently, in opinion 10-I-6, the SEC found that the 365-day post-employment restriction did not apply to the Commissioner of INDOT because the agency staff had engaged in the negotiation and administration of the contract with his intended employer, not the INDOT Commissioner himself. In both these decisions, the Commission focused on whether the person actually and, in fact, negotiated or administered the contract, in contrast to the formalities of the process such as signing the resulting contract. Additionally, in opinion 10-I-10, the Commission found that the 365-day post-employment restriction did not apply to a former OMB Director. More specifically, the Commission found that the Director’s signature on the contracts he identified as being involved in was a statutory requirement and did not amount to having negotiated or administered the contracts.

In this case, the Director was not involved in the negotiation or administration of the Resolutions with the Health Center. Instead, she supervised the project manager who accepted the related applications and the General Counsel who reviewed the form documents to ensure compliance with the IFA’s policies and procedures. In addition, she did not participate in any vote(s) involving the Resolutions. While the various agreements associated with the Resolutions bear the Director’s signature to fulfill a statutory requirement, she neither negotiated nor administered such agreements. Accordingly, the Commission finds that the Director did not negotiate or administer a contract with the Health Center. The Commission further finds that the 365-day restriction set forth in I.C. 4-2-6-11(b)(2) would not apply to the Director.

Third, the Director would be prohibited from accepting employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The Commission finds that this provision does not apply in this case since the Director has not made any regulatory or licensing decisions that applied to the Health Center.

Fourth, the Director would also be 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 Commission finds that none of the facts provided suggest that the Health Center's offer of employment to the Director was extended in an attempt to influence her in her capacity as Director.

Finally, the Director may be 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 for an employer 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 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 Resolutions would each qualify as particular matters in so far as each is considered to be a contract. As a result, the Director would be prohibited from working on these contracts if she personally and substantially participated in those matters while she was employed by the State.

In opinion 06-I-17, the Commission issued an advisory opinion to a former staff attorney of the IFA. In that opinion, the Commission opined that "[a]bsent an individual's disclosure to the Commission that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the Commission will make a case-by-case determination as to whether an individual would be subject to the particular matter restriction set forth in IC 4-2-6-11(c)." Based on the information provided, it would appear that the Director's involvement in the Resolutions was minimal. Specifically, the Director only supervised the project manager who accepted the related applications and the General Counsel who reviewed the form documents to ensure compliance with IFA policies and signed the documents to fulfill a statutory requirement. The Commission finds that the Director's involvement with the Resolutions does not rise to the level of "personal and substantial" and accordingly determines that the Director would not be prohibited from working on these matters in her employment with the Health Center.

### **CONCLUSION**

The Commission finds that the Director's intended employment opportunity with the Health Center would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the Director's intended employment with the Health Center would not violate I.C. 4-2-6-11.