

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

The Deputy Director and Chief Technology Officer for PERF was offered employment and an ownership-interest by an Indianapolis-based IT consulting firm. The firm does not have any contracts with PERF or TRF but does have some contracts with other state agencies such as the BMV. SEC found that the Deputy Director would not be subject to any of the cooling off provisions of the rule on Postemployment restrictions; however, although the Deputy Director did not identify any particular matters in which he participated with PERF, he would still need to ensure compliance with those restrictions in the event he encountered any such matters in his post-employment.

January 2011
No. 11-I-4

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 serves as the Deputy Director and Chief Technology Officer for the Indiana Public Employees’ Retirement Fund (“PERF”). The Deputy Director has worked for PERF from May 2005 until December 2010. The Deputy Director’s responsibilities included assessing, defining and driving the information technology strategy and vision for PERF and the Indiana State Teachers’ Retirement Fund (“TRF”). In this position, the Deputy Director reported to the PERF/TRF Executive Director. In addition, the Deputy Director was a member of an executive management team that supports both PERF and TRF. He was a member of this team since its creation in June 2010.

The Deputy Director was offered employment by an Indianapolis-based IT consulting firm. Specifically, the Deputy Director has been offered the ownership-based position of Chief Operating Officer with the consulting firm. The primary responsibilities associated with that position include the management of the day-to-day operations of the consulting firm. The position is also responsible for, among other things, supporting other business functions of the consulting firm including finance, human services, sales and marketing. In this position, the Deputy Director will not be serving as an executive branch lobbyist for at least one year after leaving state employment. The Deputy Director commenced employment conversations with the consulting firm approximately six months prior to leaving state employment.

While the consulting firm does not have any contracts with PERF or TRF, the consulting firm does have some contracts with other state agencies, such as the Bureau of Motor Vehicles, and another contract to build a component of Indiana’s online voter registration system. The Deputy Director, however, was in no way associated with the negotiation or administration of these contracts or any other contracts between the consulting firm and Indiana or any agencies thereof.

ISSUE

What rules in the Code of Ethics would apply to the Deputy Director’s intended employment opportunity with the consulting 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. 4-2-6-11 (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 Deputy Director's intended employment with the consulting firm invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the Deputy Director is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Deputy 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 Deputy Director provided in his request for an advisory opinion, the Commission finds that the consulting firm's offer of employment did not result from information of a confidential nature. Accordingly, the Commission finds that the Deputy Director's acceptance of the consulting firm's employment is not in violation of I.C. 4-2-6-6.

B. 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 Deputy Director from accepting employment for 365 days from the date that he left state government under various circumstances.

First, the Deputy 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 Deputy Director. Specifically, he indicates that he will not be required to register as an executive branch lobbyist for at least one year since the last day of his state employment.

Second, the Deputy Director would be prohibited from accepting employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of the State 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 Deputy Director indicates that the consulting firm does not have any contracts with either PERF or TRF. He further indicates that he has not had any involvement in any contract(s) the consulting firm may have with other state agencies. Accordingly, the Commission finds that this provision does not apply to the Deputy Director.

Third, the Deputy Director would be 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. The Deputy Director has not made any regulatory or licensing decisions that applied to the consulting firm. More specifically, PERF or TRF is not a licensing or regulating entity for the consulting firm. The Commission therefore finds that this restriction does not apply to the Deputy Director.

Fourth, the Deputy 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 him in his official capacity as a state employee. The Commission finds that none of the facts provided suggest that the consulting firm’s offer of employment to the Deputy Director was extended in an attempt to influence him in his official capacity as a state employee.

Finally, the Deputy Director 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 for an employer 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. The particular matter restriction applies to any matter in which the Deputy Director personally and substantially participated as a state employee, whether it involved his new employer or not.

In this case, the Deputy Director indicates that he has not personally or substantially participated in any particular matter with the consulting firm during his employment with the State. While the Deputy Director has not identified any particular matters in which he anticipates the

consulting firm would require him to work on at this point, the Deputy Director must continue to ensure compliance with this restriction.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Deputy Director's intended employment opportunity with the consulting firm would not violate I.C. 4-2-6-6 or I.C. 4-2-6-11.