

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

An employee with the IHCDA serves as a Multifamily Housing Compliance Monitor and was offered employment as a Compliance Director by a real estate services company for which she had recently monitored tenant files and reviewed owner certification for developments owned by the Company. SEC found the Compliance Monitor's involvement with the tenant files and certification for developments amounted to making a regulatory decision under the Postemployment rule, and she would need to observe the 365-day cooling off period before accepting employment with the Company, absent a waiver from her agency.

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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 been employed by the Indiana Housing and Community Development Authority ("IHCDA") since April 22, 2002, and currently serves as a Multifamily Housing Compliance Monitor. Her primary job duties are to complete compliance reviews of tenant files to ensure the development owners or award recipients who receive Section 42, HOME, CDBG, or Development allocations are renting units to qualified tenants as required by Section 42 and/or HOME, CDBG, or Development Fund programs. The Compliance Monitor also reviews the accuracy of annual Owner Certifications of Compliance to ensure the tenant events that occur in a development are entered in the IHCDA Online reporting system and are in compliance with the program requirements. The Compliance Monitor also notifies developments of monitoring letters and follow-up through complete resolution of monitoring issues. She also prepares and issues IRS Form 8823 on properties that do not comply with Section 42 of the Internal Revenue Code and provides technical assistance by conducting instructional workshops on Section 42. The Compliance Monitor's job duties also require her to review the RHTC Compliance Manual annually and make appropriate changes/suggestions based on any new changes to Section 42 Code or HOME, CDBG, or Development Fund federal and state regulations by Congress.

On January 6, 2011, a real estate services company contacted the Compliance Monitor regarding an employment opportunity as a Compliance Director. As a Compliance Director, her responsibilities would include ensuring the real estate services company's compliance with Section 42 tax credit, HOME, and CDBG programs through reviewing resident files for accuracy at initial certification or annual re-certification; developing the system, procedure, and tools needed to ensure compliance with the above mentioned programs; preparing the budget; entering tenant certification in the IHCDA Online Reporting System and reviewing of online reports to ensure no tenant certification has been missed; developing and revising company forms and procedures; and overseeing and/or supervising managed properties. In this position, the Compliance Monitor would also have compliance responsibilities for the NSP program.

The Compliance Monitor does not anticipate working on a "particular matter" during her employment with the real estate services company because specific guidelines for compliance with the rules and regulations of the programs require that all items be remedied within specific

timeframes to remain compliant. Accordingly, any items that were considered issues would presumably already be corrected. The Compliance Monitor and the real estate services company recognize that she would be required to recuse herself from any particular matter she may have been involved with as a state employee should such a matter arise.

On January 14, 2011, the Compliance Monitor requested an Informal Advisory Opinion to determine whether her intended employment with the real estate services company would be contrary to the Code of Ethics. In this request, the Compliance Monitor disclosed that her most recent interaction with the real estate services company included monitoring tenant files of two developments that they managed in 2010 and reviewing four owner certifications for developments that they managed in 2010. As a result, the Compliance Monitor was advised that it was unclear whether conducting tenant file reviews to ensure regulatory compliance would constitute making regulatory decisions.

ISSUE

What rules in the Code of Ethics would apply to the Compliance Monitor's intended employment opportunity with the real estate services company? Would her acceptance of the proffered 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 Compliance Monitor's intended employment with the real estate services company 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 Compliance Monitor's prospective employment is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Compliance Monitor 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 by the Compliance Monitor, it would not appear that the real estate services company's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Compliance Monitor's acceptance of the real estate services company'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 Compliance Monitor 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 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 Compliance Monitor appears to have an arrangement for prospective employment with the real estate services company. Accordingly, the Compliance Monitor is prohibited from participating in any decision or vote so long as she or the real estate services company has a financial interest in the outcome of the matter. To the extent that the Compliance Monitor has and continues to observe this provision for the remainder of her tenure with the State, the Commission finds that the Compliance Monitor 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 Compliance Monitor from accepting employment for 365-days from the date she leaves state government under various circumstances.

First, the Compliance Monitor 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 apply to the Compliance Monitor as long as she continues to ensure compliance with this restriction for 365-days from her final date of state employment. Specifically, the job duties associated with the prospective employment do not indicate that the Compliance Monitor would be performing duties that would require her to register as an executive branch lobbyist.

Second, the Compliance Monitor 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, it does not appear that the Compliance Monitor was involved in the negotiation or administration of any contracts with the real estate services company on behalf of the State. Specifically, the Compliance Monitor’s job duties with the State do not indicate that she had any involvement with contracts. Accordingly, the Commission finds that this provision would not apply to the Compliance Monitor.

Third, the post-employment rule would prohibit the Compliance Monitor 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. In this case, it is the opinion of the Commission that the Compliance Monitor makes regulatory decisions as an employee of the IHCDA. Specifically, the Compliance Monitor is charged with making decisions by monitoring compliance of development owners and award recipients with various rules and regulations. Her

job duties at the IHCD require the Compliance Monitor to complete compliance reviews of tenant files to ensure the development owners or award recipients who receive Section 42, HOME, CDBG, or Development allocations are renting units to qualified tenants as required by Section 42 and/or HOME, CDBG, or Development Fund programs. The Compliance Monitor also reviews the accuracy of annual Owner Certifications of Compliance to ensure the tenant events that occur in a development are entered in the IHCD Online reporting system and are in compliance with the program requirements. The Compliance Monitor also notifies developments of monitoring letters and follow-up through complete resolution of monitoring issues.

Having found that the Compliance Monitor makes regulatory decisions at IHCD, the Commission must then determine whether she made a regulatory or licensing decision affecting the real estate services company or its parent or subsidiary to determine whether the one-year “cooling off” period would restrict the Compliance Monitor from accepting the proposed employment. In her request for an informal advisory opinion, the Compliance Monitor discloses that she reviewed some (not more than 20% per development) of the real estate services company’s tenant files and owner certifications to verify that they are complying with the applicable program requirements based on the type of funding the development has. The tenant files and annual owner certifications she reviewed were for tenants that have already moved into the developments the real estate services company owns and/or manages. Based on the information provided, it appears that the Compliance Monitor’s review of the real estate services company’s tenant files would be considered regulatory decisions that directly affect the real estate services company. Specifically, her job description indicates that she reviews tenant files to ensure the *development owners* or award recipients who receive Section 42, HOME, CDBG, or Development allocations *are renting units to qualified tenants as required by Section 42 and/or HOME, CDBG, or Development Fund program.* (Emphasis added). Similarly, it would appear that her review of the real estate services company’s ownership certificates for compliance with applicable program requirements would be a regulatory decision that directly applied to the real estate services company. The Commission therefore finds that the Compliance Monitor made a regulatory decision that directly applied to her intended employer during her tenure with the State. Accordingly, the Commission determines that the one-year cooling off period would apply to the Compliance Monitor and she would therefore be prohibited from accepting employment from the real estate services company until after the expiration of 365-days from the last date of her state employment absent a waiver from her agency appointing authority.

Should the Compliance Monitor accept employment with the real estate services company after the expiration of 365-days from the last date of her state employment or upon receiving a waiver, she would still 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, while the Compliance Monitor has not

identified any particular matters in which she anticipates the real estate services company would require her to work, it is the opinion of the Commission that the real estate services company must continue to ensure compliance with this restriction.

CONCLUSION

The Commission finds that the Compliance Monitor's intended employment with the real estate services company would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the one-year restriction set forth in I.C. 4-2-6-11(b)(3) does apply to the Compliance Monitor's intended employment with the real estate services company. Accordingly, the Compliance Monitor is prohibited from accepting employment with the real estate services company until after the expiration of 365-days of her last day of state employment.