

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

The Director of the OMB was offered employment with a healthcare organization to become its Vice President Controller. SEC found the cooling off restrictions would not prohibit the Director from accepting employment with the organization immediately upon leaving state employment; however, he would need to avoid participating in any decision or vote involving his prospective employer, including signing off on Budget Committee minutes.

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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 state employee currently serves as the Director of the Office of Management and Budget (“OMB”) and State Budget Agency (“SBA”). The Director has been offered an employment opportunity by a healthcare organization to become its Vice President Controller beginning January 28, 2013. The Director would not be required to register as an executive branch lobbyist in his intended post-employment position with the healthcare organization.

The Director began working for the State in January 2005 and has served in various capacities since then, including Director of the OMB and SBA, Deputy Director of the SBA, and Director with the Government Efficiency and Financial Planning (“GEFP”) Division of OMB.

The Director has identified his involvement in three areas related to the healthcare organization throughout the course of his state employment. First, statutory provisions require that all contracts include signatory approval from the Department of Administration, Office of the Attorney General, and the SBA on the “Executive Document Summary” of the contract. During his tenure as Budget Director, the Director delegated his signatory authority to SBA staff pursuant to a written delegation. While the Family and Social Services Administration (“FSSA”) and other state agencies may have contracted with the healthcare organization to perform services on their behalf, the Director was not personally involved in the negotiation or administration of these contracts. In addition, neither the OMB nor the SBA has had any contracts or grant agreements with the healthcare organization. Moreover, the Director has never personally signed any contract or grants with the healthcare organization during his tenure with the state.

Second, the Director has been a voting member of the State Budget Committee (“Budget Committee”) since September 2010. The Budget Committee routinely reviews capital projects for the seven (7) public universities. Regarding Indiana University (“IU”) specifically, most projects are initiated by IU itself. However, some projects included on Budget Committee meeting agendas since September of 2010 may have a nexus with the healthcare organization because of its association with IU. Specific projects include the IU School of Medicine, Riley Hospital, and the Neuroscience Research Building.

At the October 10, 2012 meeting of the Budget Committee, an IU project related to a lease of the IU Health Neuroscience Clinical Office Building was included on the agenda. Consequently, the Director abstained from the vote because he was engaged in negotiations with the healthcare organization at the time and had previously received an informal advisory opinion related to potential employment. While he will continue to abstain from any future Budget Committee votes involving any projects or topics related to the healthcare organization, the Director is seeking guidance to determine whether he may sign the minutes for the October 10, 2012 Budget Committee meeting or whether he should delegate this responsibility.

Furthermore, as part of its review, the Budget Committee delegates to the SBA review of the financing plan for the capital project. This is consistent with IC 21-34-10 and 21-35 which provides that no bonds may be issued by a university without approval of the Budget Committee, Budget Agency, and Governor. Financing plans are received and reviewed by the State Public Finance Director, in consultation with the Assistant Director for Education within the State Budget Agency. After review by the Public Finance Director and SBA staff, a recommendation for approval is made to the Budget Director. See IC 21-34-10-1(b). Approval is then transmitted through a written letter. The transmittal letter serves as the final step in the consideration of the project. The Director did not personally and substantially participate in the review of a university's financing plan other than signing the approval letter, which is a statutory formality. This process, form, and mode of approval have been consistently used since the 1980s for all legislatively authorized university capital projects.

Finally, the Director was a member of the Hospital Assessment Fee Committee ("HAF Committee") established by HEA 1001-2011. As a member of the HAF Committee, he reviewed state plan amendments, waiver requests, and any revisions to state plan amendments or waiver requests as required by HEA 1001-2011. He did not participate in any negotiations regarding the implementation of the Hospital Assessment Fee or how it would be assessed.

The Director will not participate in any decisions or votes regarding the healthcare organization during the remainder of his state employment and will continue to follow the steps prescribed in IC 4-2-6-9(b) if a potential conflict of interest arises.

ISSUE

1. Would a conflict of interest arise for the Director if he participates in any decision or vote in which he or the healthcare organization would have a financial interest in the outcome of the matter?
2. May the Director sign the minutes for the October 10, 2012 Budget Committee meeting in which an IU project related to a lease of the IU Health Neuroscience Clinical Office Building was included on the agenda?
3. What rules in the Code of Ethics would apply to the Director's intended employment opportunity with the healthcare organization, and would his acceptance of the offered position subject him to any post-employment restrictions under IC 4-2-6-11?

RELEVANT LAW

IC 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.

IC 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.

IC 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 healthcare organization 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

IC 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 healthcare organization's offer of employment was a result of information of a confidential nature. Accordingly, it is the Commission's opinion that the Director's acceptance of the healthcare organization's employment offer does not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the Director from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the Director has an arrangement for prospective employment with the healthcare organization. Accordingly, the Director would be prohibited from participating in any decision or vote in which he or the healthcare organization would have a "financial interest" in the outcome of the matter. The Director indicates that he recused himself from a Budget Committee vote on October 10, 2012 that involved an IU project related to IU Health's Neuroscience Clinical Office Building. The Director must continue to recuse himself from any decisions or votes, including Budget Committee votes, if they involve projects or topics related to the healthcare organization. However, the Director has yet to sign the minutes for that meeting and may have future meeting minutes to sign from meetings where projects or topics related to the healthcare organization may have been discussed. Out of an abundance of caution, it is the Commission's opinion that the Director should not sign the minutes of the meeting and instead, he should designate that duty to someone else.

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 he 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. In this case, the Director indicates that he will not be required to register as an executive branch lobbyist. To the extent the Director ensures

compliance with this provision for the entirety of the cooling off period, he would not be in violation of this provision.

Second, the Director is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he 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, it does not appear that the Director has ever negotiated or administered a contract with the healthcare organization on behalf of the State. While the SBA is statutorily required to approve all contracts, the contracts are negotiated or administered by the individual agencies. Moreover, the Director delegated his signatory authority to other SBA staff members. Accordingly, it does not appear that this restriction would apply to the Director's intended employment with the healthcare organization.

Third, the Director is prohibited from accepting employment for 365 days from the last day of his state employment with an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. This restriction would not apply to the Director's intended employment with the healthcare organization because he did not make regulatory or licensing decisions affecting the healthcare organization at any time during his tenure with the State.

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 him in his official capacity as a state employee. The information presented to the Commission does not suggest that the healthcare organization's offer of employment was extended to the Director in an attempt to influence him in his capacity as a state employee. Accordingly, this restriction would not apply to the Director's intended employment with the healthcare organization.

Finally, the Director is subject to the post-employment rule's "particular matter" prohibition in his potential post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters 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.

In this case, the Director has identified two different matters that may qualify as "particular matters." The first matter identified relates to the approval of capital projects pursuant to his membership on the Budget Committee. While it is unclear whether the Director has participated in votes involving capital projects related to the healthcare organization since September 2010 and prior to his commencing employment negotiations with the healthcare organization as a member of the Budget Committee, it is

necessary to determine whether the particular matter restriction would apply to any such projects. In opinion 12-I-2, the Commission determined that capital projects of state universities would not qualify as "particular matters" for purposes of the post-employment rule. Specifically, out of the twelve particular matters listed in the post-employment rule, these legislatively approved capital projects would only qualify as "particular matters" if they are "public works projects." While the term "public works project" is not defined in IC 4-2-6, we look to the definition of the term in IC 4-13.6-1-13. IC 4-13.6 governs state public works. IC 4-13.6-2-3(b)(2), however provides that this article does not apply to state educational institutions. Accordingly, the Commission determined that a university's legislatively approved capital projects are not "public works projects" and are therefore not "particular matters" that are subject to the post-employment rule analysis.

The second matter identified by the Director involves his participation in the HAF Committee. Based on the information provided, it does not appear that the Hospital Assessment Fee or its assessment qualifies as a particular matter. Specifically, particular matters do 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*. IC 4-2-6-11(a) (Emphasis added). In this case, it is the opinion of the Commission that the Hospital Assessment Fee would be at a minimum, a legislative matter, if not a matter of general application. Accordingly, the particular matter restriction would not apply to the Hospital Assessment Fee or its assessment.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Director may accept employment with the healthcare organization immediately upon leaving state employment as that intended employment does not violate IC 4-2-6-11. During the remainder of his state employment, the Director must recuse himself from all the healthcare organization's matters and screen himself from participating in any decision or vote in which he or the healthcare organization would have a "financial interest" in the outcome of the matter. The Commission further finds that, out of an abundance of caution, the Director should not sign Budget Committee minutes and should designate that duty to a subordinate.