

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

The Director of the Office of Energy Development with the Lt. Governor's Office was offered employment at a public service company as their Manager of Regulatory Affairs. SEC determined the revolving door provision of the rule on Postemployment restrictions would not prohibit the Director from accepting employment with the company immediately upon leaving state employment since the company had no contracts with the agency, nor did the agency regulate the company. In addition, although the Director did not identify any particular matters, the SEC advised that he should ensure he observes this restriction in his employment with the company.

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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 has worked for the Office of Energy Development ("OED"), a division of the Lt. Governor's Office, since 2005. The state employee currently serves as the OED Director. In this capacity, the OED Director functions as the energy policy director for Lt. Governor Skillman, offering advice on energy programs, services, and initiatives for the administration. The OED Director also oversees a four member staff.

The OED is a pass through entity for federal grant dollars such as the State Energy Program, Energy Efficiency and Conservation Block Grant, and Clean Cities programs. The OED staff ensures compliance with federal program rules and regulations, develop program rubric and applications and engage the public to foster better understanding of alternative and renewable energy technologies and grant programs. The OED does not have any regulatory or licensing authority.

The OED Director reports to the Lt. Governor's Deputy Chief of Staff. The OED Director discusses upcoming grant programs, communications initiatives, and legislation with the Deputy Chief of Staff. The Deputy Chief of Staff and the Lt. Governor give the final approval for all OED initiatives. The OED is supported by financial and legal staff from the Lt. Governor's office. The Lt. Governor's Controller has final authority to approve and pay all OED expenditures. The Lt. Governor's General Counsel works closely with the OED Director on legal matters, including contract disputes, grantee default, or programmatic issues to assist the Deputy Chief of Staff in reaching a final course of action for OED.

An Indiana public service company has offered the OED Director the opportunity to serve as their Manager of Regulatory Affairs. In this role, the OED Director would work with the public service company's engineers, lawyers, and rate analyzers in front of the Office of Utility Consumer Counselor and the Indiana Utility Regulatory Commission. The OED Director would predominately work on rate issues, making sure that the public service company staff and the relevant state agencies are communicating clearly and working to ensure delays are not encountered. The OED Director would not serve as a lobbyist and, based on the current job

description, would not interact with the OED on any programs or issues as separate divisions at the public service company handle these matters.

The OED has not made any contract or grant awards to the public service company since the OED Director joined the office in 2005. A search of the contract management system maintained by the Indiana Department of Administration reveals four agreements between the State and the public service company. None of the four agreements are with the Lt. Governor's office, including the OED. Furthermore, the public service company does not currently have any applications for grants or contracts pending with OED.

ISSUE

Would the OED Director's acceptance of the intended post-employment opportunity violate the Code of Ethics?

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 OED Director's intended employment with the public service company invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the OED Director's prospective employment is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the OED 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 by the OED Director and his agency Ethics Officer, it does not appear that the public service company's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the OED Director's acceptance of the public service 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 OED 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. 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, it appears that the OED Director has an arrangement for prospective employment with the public service

company. Accordingly, the OED Director would be prohibited from participating in any decision or vote in which he or the public service company would have a “financial interest” in the outcome of the matter. The OED Director indicates that he has had occasional interaction with the public service company since 2005, but asserts that such interaction is minimal and “general” in nature. To the extent that the OED Director has complied with this provision and continues to abstain from participation in any decision or vote in which he or the public service company would have a financial interest in the outcome of the matter for the remainder of his state employment, the Commission finds that the OED Director’s intended employment with the public service company would not violate 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 OED Director from accepting employment for 365 days from the date he leaves state government under various circumstances.

First, the OED Director would be prohibited from accepting employment as an executive branch lobbyist for the entirety of the cooling off period. Based on the information provided, it does not appear that this provision would apply to the OED Director. Specifically, the OED Director indicates that he would not be required to register as an executive branch lobbyist in his intended employment with the public service company. As long as he continues to ensure compliance with this restriction for the entire cooling off period, the OED Director would not be in violation of I.C. 4-2-6-11(b)(1).

Second, the OED 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 OED Director indicates that the public service company does not have any contracts the OED. Accordingly, the OED Director acceptance of the public service company’s offer of employment would not be in violation of I.C. 4-2-6-11(b)(2).

Third, the OED 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 OED does not have licensing or regulating authority. Accordingly, the restriction set forth in I.C. 4-2-6-11(b)(3) does not apply in this case since the OED Director has not made any regulatory or licensing decisions that applied to the public service company.

Fourth, the OED 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. None of the facts provided suggest that the public service company’s offer of employment to the OED Director was extended in an attempt to influence him in his capacity as Director. Specifically, the public service company is neither regulated nor licensed by the OED and the public

service company does not have any applications for grants or contracts pending with OED. Accordingly, the restriction set forth in I.C. 4-2-6-11(d) does not apply in this case.

Finally, the OED 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.

In this case, the OED Director indicates that he has not personally or substantially participated in any particular matter with the public service company during his employment with the State. While he does not identify any particular matters in which he anticipates the public service company would require him to work on at this point, it is the opinion of the Commission that the public service company must continue to ensure compliance with this restriction.

CONCLUSION

The Commission finds that the OED Director's intended employment with the public service company does not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the OED Director's intended employment with the public service company does not violate I.C. 4-2-6-11.