

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

The former Director of the Behavioral Health and Human Services Licensing Board with the Professional Licensing Agency represents an addiction counseling organization as a client of her private legal practice. PLA expressed some concern about the Director's representation of the client before the Board regarding the selection of an exam, and the Director sought ethics advice. SEC advised the Director to contact the Executive Branch Lobbying division at the Department of Administration to confirm her representation of her client would not require her to register as a lobbyist in violation of the revolving door provision of the rule on Postemployment restrictions. In addition the SEC concluded that although the Director was aware of the exam selection process during her employment with the state, her involvement in the initial stages did not amount to personal and substantial participation in violation of the particular matter provision of the 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

A state employee is the former Director of the Behavioral Health and Human Services Licensing Board ("Board") with the Indiana Professional Licensing Agency ("IPLA"). The former Director left this position on July 8, 2011, and since then, has opened a private legal practice. The former Director has retained an addiction counseling organization as a client. The Board licenses addiction professionals in the State of Indiana.

Pursuant to her representation of the addiction counseling organization, the former Director attempted to sit in on a meeting on January 26, 2012, with the current Board Director, the IPLA staff attorney, and the addiction counseling organization representative to discuss the current status of the addiction rules, licensure, and examination selection process. IPLA expressed a concern regarding her participation in the meeting. As the former Director, she was aware of the Board's need to select an exam. She also participated in the initial discussion of the exam selections process which included reviewing the introductory material necessary to begin the RFP process.

ISSUE

Does the Code of Ethics prohibit the former Director from representing her client in matters related to addiction counselor licensures and the examination selection process before the Board?

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 former Director's intended representation of the addiction counseling organization invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the former Director is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the former 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 addiction counseling organization's hiring of the former Director resulted from information of a confidential nature. Accordingly, the Commission finds that the former director's acceptance of compensation from the addiction counseling organization for representation services would not violate 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 former Director from accepting employment for 365 days from the date she leaves state government under various circumstances.

First, the former Director would be prohibited from accepting compensation or employment as an executive branch lobbyist for the entirety of the cooling off period. The term lobbyist is defined as an individual who seeks to influence decision making of

an agency and who is registered as an executive branch lobbyist under rules adopted by the Indiana Department of Administration (“IDOA”). See I.C. 4-2-6-1(b); I.C. 4-2-7-1(5). In this case, it appears that the former Director may be seeking to influence the decision making of the Board with IPLA, an executive branch agency. However, it is unclear whether the former Director’s interactions with the Board are the type that would require her to register as an executive branch lobbyist. Specifically, while an attorney who represents a client in certain proceedings is not considered a lobbyist¹, the meeting with the Board on January 26, 2012 that the former Director attended does not appear to be the type of proceeding contemplated in 25 IAC 6-1-1(8)(B). Accordingly, it is the opinion of the Commission that the former director contacts the Executive Branch Lobbying office at the IDOA to ensure that her interaction(s) with the Board or any other executive branch agency would not require her to register as an executive branch lobbyist. To the extent that she is not required to register as an executive branch lobbyist for the entirety of the cooling-off period, the former Director would not be in violation of this restriction.

Second, the former director would be prohibited from accepting employment for the entire cooling off period from an employer with whom 1) she 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. Similarly, the former Director would be prohibited from accepting employment for the entire cooling off period from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. Third, the former Director would be prohibited from accepting employment altogether 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 aforementioned restrictions would apply to the former Director. Specifically, the former Director has a private legal practice. The addiction counseling organization is one of her clients. Clients of a self-employed individual in a sole proprietorship or a professional practice are not considered to be an employer for purpose of the post-employment rule. I.C. 4-2-6-1(a)(9).

To the extent that the former Director representation of the addiction counseling organization’s interests before the Board is not considered executive branch lobbying, the one year cooling off restriction would not be triggered. However, the former Director may still be subject to the post-employment rule’s “particular matter” prohibition. This restriction prevents her from representing or assisting a person in any of the following

¹ **25 IAC 6-1-1 Definitions**

Sec. 1. The following definitions apply throughout this article:

(8) "Executive branch lobbyist" means any individual who is employed and receives payment, or who contracts for financial consideration, exceeding one thousand dollars (\$1,000) in any registration year, for the purpose of engaging in executive branch lobbying activity. The term does not include any of the following:

...

(B) An attorney or any other individual who represents a client in any proceeding conducted under IC 4-21.5, in a comparable proceeding conducted by an agency exempted by IC 4-21.5-2-4, or in a proceeding described in IC 4-21.5-2-6.

twelve matters 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 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. 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 former Director indicates that she anticipates assisting her client, the addiction counseling organization, with matters that relate to addiction counselor licensure and the examination selection process. While she does not specifically identify the matters related to addiction counselor licensure she anticipates working on, she would not be prohibited from working on addiction counselor licenses generally because particular matters do not include consideration, adoption, or implementation of a rule or an administrative policy or practice of general application. However, the examination selection process associated with the addiction counselor licenses would involve a contract. A contract is a particular matter. The former Director indicates that she was aware of the need to select an exam and participated in the initial discussions of the exam selection process. While it appears that the former Director participated in the initial stages of the exam selection process, her involvement does not amount to personal and substantial. Accordingly, the particular matter restriction would not apply to the exam selection process.

CONCLUSION

Subject to the foregoing analysis, the Code of Ethics does not prohibit the former Director from representing her client in matters related to addiction counselor licensures and the examination selection process before the Board.