

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

A former Department of Education employee had been responsible at one time for facilitating the review process for new program applications submitted to the Office of Educator Licensing and Development, including the submission of a college with which she subsequently sought employment. The employee requested advice from the SEC on whether the revolving door restriction—particularly the provision pertaining to regulatory actions—would prohibit her from accepting employment with the college immediately upon leaving state employment. SEC found her involvement in the application review process did not amount to having made a regulatory or licensing decision that directly affected the college since she did not possess any discretionary authority in the matter; however, the application did qualify as a particular matter in which she personally and substantially participated and would therefore not be permitted to represent or assist the college with.

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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 a former employee of the Indiana Department of Education (“DOE”) and was employed there for approximately 3 ½ years. The former employee accepted a position with a college and resigned from the DOE in March 2012. The former employee is currently on unpaid leave of absence from the college pending a decision by the Commission.

In her position at DOE, the former employee was responsible for facilitating the review process for new program applications submitted to the Office of Educator Licensing and Development (“OELD”). Any program seeking the authority to recommend candidates for teacher licensure was once required to submit a proposal to the State for review using this process.

The review process for new program applications consisted of a multi-step approach. First, a team of individuals at OELD would use a set of guidelines and standards developed by DOE to independently review the proposal. Following that review, the team members would compile their determinations and, based upon those results, submit the proposal to the Division of Professional Standards Board (“Board”). Regarding the college’s proposal specifically, which was submitted in the Summer of 2010, the former employee served as one of two Coordinators of Education Preparation and was immediately subordinate to the Assistant Director and Director of Education Preparation. The former employee reviewed the college application to ensure it included the necessary information and documentation for consideration by the Board. She did not exercise any discretion in reviewing the proposal since the application was either compliant with the established standards or was not compliant. Once OELD confirmed a proposal was compliant, the former employee issued a confirmation on behalf of OELD to officially recommend it to the Board. The Board was then responsible for recommending approval of new licensure program applications and would receive program information for review, hear presentations, and vote on whether to move forward with an approval recommendation to the State Superintendent of Public Instruction (“Superintendent”). Upon the Superintendent’s

approval, individuals who completed the requirements of the approved licensure program were eligible for a state-issued teacher or administrator license.

The Board was dissolved in 2011, and the process has been revised to conform to DOE's reform agenda. However, the college completed this process in November 2010 and ultimately received approval from the Superintendent to begin its licensure program.

### ISSUE

What post-employment restrictions under I.C. 4-2-6-11, if any, is the former employee subject to?

### RELEVANT LAW

#### **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

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 former employee from accepting employment for 365 days from the date that she leaves state government under various circumstances. In this case, the former employee has accepted college’s employment. She is, however, on unpaid leave pending the Commission’s decision on this matter.

First, the former employee is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Per I.C. 4-2-6-1(b) and I.C. 4-2-7-1(5), this restriction applies to lobbying of the executive branch only. It does not include the legislative branch. The former employee’s employment with the college will not include lobbying. So long as the former employee does not lobby the executive branch for one year from the last date of her state employment, she would not be in violation of this restriction.

Second, the former employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she 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 former employee has ever negotiated or administered a contract with the college on behalf of the State. Accordingly, the Commission finds that this restriction would not apply to the former employee's employment with the college.

Third, the former employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The Commission finds that the former employee's involvement in college's 2010 program application does not amount to "making a regulatory or licensing" decision. Specifically, while the former employee reviewed the college application to ensure it included the necessary information and documentation for consideration by the Board, she did not exercise any discretion in reviewing the proposal. The application was either compliant with the established guidelines or was not compliant. If the application was compliant, the former employee issued a confirmation on behalf of the OELD to officially recommend the program to the Board. Accordingly, the former employee would not be prohibited from immediately accepting employment with the college.

Fourth, the former employee is prohibited from accepting employment 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 information presented to the Commission does not suggest that the college's offer of employment was extended to the former employee in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the former employee's intended employment with the college.

Finally, the former employee is subject to the post-employment rule's "particular matter" prohibition in her employment with the college. This restriction prevents her from working on any of the following 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 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 and applies even if the matter arises at a later date in the course of her post-employment.

The program proposal by the college falls within the scope of either an application or a determination. The former employee would be prohibited from ever representing or assisting the college with this application in light of what appears to be her personal and substantial participation while she was employed by the DOE.

## **CONCLUSION**

Subject to foregoing analysis, the Commission finds that the former employee's employment with the college does not violate I.C. 4-2-6-11.