

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

A former IDHS Executive Director was approached by U.S. Steel to provide contracted emergency service and safety personnel training. Although IDHS regulates activities at U.S. Steel, SEC found the former Executive Director would not violate the “cooling off” provision of the Postemployment rule by contracting his services to the company since other staff at the agency had been involved with and made the regulatory decisions.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

#### **BACKGROUND**

A state employee is a former Indiana Department of Homeland Security (“IDHS”) employee. He served as the Director of Preparedness and Training from October 2005 to March 2008 and as the IDHS Executive Director from March 17, 2008 to January 11, 2013.

The Executive Director has been approached by U.S. Steel to provide incident command and incident management training related to its emergency services and safety personnel on an independent contractor basis. The first training session is scheduled in Gary, Indiana for April 16-18, 2013, and there may be other training sessions in the future at other U.S. Steel plants around the country.

The IDHS regulates U.S. Steel through a variety of programs. For example, the IDHS issues permits to U.S. Steel for its elevators and other lifting devices as well as boilers and pressure vessels. In addition, U.S. Steel is required to obtain a design release, which is a type of permit, for construction projects that it undertakes. The IDHS also issues certifications to U.S. Steel to allow it to operate as an emergency medical services provider.

All of the decisions related to IDHS regulatory activities concerning U.S. Steel were handled by agency staff. The Executive Director did not participate in any of these decisions. There are, however, three certification letters issued by the IDHS with respect to U.S. Steel’s emergency medical services program that have the Executive Director’s signature on them. These signatures were applied to the letters electronically without the Executive Director’s review, consistent with IDHS procedure.

An EMS provider, such as U.S. Steel, is required to renew its certification every two years. An applicant’s request for re-certification is reviewed by agency staff to ensure that all issues are addressed and that the applicant is in compliance with all applicable requirements. If the request is satisfactory, the IDHS employee recommends approval and the certification letter is printed with the signature already applied.

Similarly, ambulances are also required to be certified by the IDHS. The other two letters involve the certifications of U.S. Steel ambulances. Typically, an IDHS employee would inspect an ambulance and if it met all requirements, the employee would recommend approval of the certification. This certification letter, too, would be printed with the signature already applied.

### ISSUE

What rules in the Code apply to the Executive Director's post-employment opportunity to provide instructional services to U.S. Steel as an independent contractor? Does this opportunity subject him 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. 4-2-6-11 (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 Executive Director's intended post-employment opportunity implicates provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the Executive Director's arrangement is analyzed below.

### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the Executive 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 his intended independent contractor relationship with U.S. Steel resulted from information of a confidential nature. Accordingly, it does not appear that the Executive Director's work with U.S. Steel would 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 or revolving door period prevents the Executive Director from accepting employment under various circumstances for 365 days from the date that he left state government.

First, the Executive Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A 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 the rules adopted by the Indiana Department of Administration. Based on the information provided, it does not appear that the Executive Director's intended work for U.S. Steel would be considered lobbying activity. To the extent this is accurate, this restriction does not apply.

Second, the Executive Director is prohibited from accepting employment for 365 days from the last day of his state employment from an employer 1) with whom he engaged in the negotiation or administration of a contract on behalf of a state agency and was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract or 2) for whom he made a regulatory or licensing decision. The term "employer" is defined in I.C. 4-2-6-1(a)(10) and specifically indicates that a customer or client of a self-employed individual in a sole proprietorship or a professional practice is not considered an employer. In this case, the Executive Director will be an independent contractor for U.S. Steel. To the extent that the Executive Director provides his services as a self-employed individual in a sole proprietorship, U.S. Steel would not be considered an "employer" pursuant to this definition. As a result, none of the remaining one-year cooling off prohibitions appears to be implicated by the Executive Director's proposed post-employment opportunity.

Even if the Executive Director does not provide his services as a self-employed individual in a sole proprietorship it does not appear that any of the one-year cooling off prohibitions apply in this case. Specifically, there is no information to indicate the Executive Director engaged in the negotiation or the administration of a contract with U.S. Steel on behalf of the State or made any regulatory or licensing decisions that directly affected U.S. Steel, its parent, or any subsidiaries.. Specifically, while the IDHS issues permits to and regulates U.S. Steel, these decisions were handled by agency staff, not the Executive Director.

Although it appears the cooling off provision of the post-employment rule does not apply to the Executive Director's post-employment opportunity, he is still subject to the rule's "particular matter" prohibition. This restriction prevents him from working 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.

The Executive Director has not identified any particular matters he anticipates working on in his intended post-employment opportunity. However, the re-certification of U.S. Steel as an EMS provider and the two certification letters of the U.S. Steel ambulances would appear to qualify as particular matters in that they were all determinations. While the Executive Director's signature was on the three certification letters, it appears that he was not otherwise involved. Accordingly, he would not appear to have been personally and substantially involved in those matters. The restriction would therefore not apply to these matters. Aside from these three certification matters, the Executive Director must continue to ensure compliance with this restriction and refrain from assisting any person in any particular matter he personally and substantially participated in as a state employee whether the matter involves U.S. Steel or not.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Executive Director's acceptance of the employment opportunity with U.S. Steel would not violate the one year cooling off restriction set forth in I.C. 4-2-6-11. The Commission further finds that the Executive Director would be prohibited from representing or assisting any person, including U.S. Steel, on any particular matter he may have personally and substantially participated in during the course of his employment with IDHS.