

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

The DNR Director was offered employment with Ivy Tech as the Director of Statewide Safety and Security. Since Ivy Tech does not have any contractual, regulatory, or licensing relationship with DNR in which the Director was involved, he was not prohibited from accepting employment with Ivy Tech immediately upon leaving state government.

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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 currently serves as the Director of the Indiana Department of Natural Resources (“DNR”). Ivy Tech has extended an employment offer to him to serve as the Director of Statewide Safety and Security. He will not lobby the executive branch of state government in this position. DNR does not currently have, nor has it had, any contracts or grants with Ivy Tech during his tenure. The Director did not make any regulatory or licensing decisions affecting Ivy Tech or its subsidiaries and was never personally and substantially involved in any particular matters involving Ivy Tech throughout the course of his state employment.

ISSUE

What rules in the Code would apply to the Director’s intended employment opportunity with Ivy Tech? Would his acceptance of the offered position subject him to any postemployment 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. 4-2-6-9 (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 Director's intended post-employment venture implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Director's arrangement is analyzed below.

A. Confidential Information

I.C. 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 his employment offer from Ivy Tech would have resulted from information of a confidential nature. Accordingly, the Director's intended employment with Ivy Tech would not violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 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 himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In this case, the Director has an arrangement for prospective employment with Ivy Tech. Consequently, a conflict of interest would arise for the Director if he were to participate in a vote or decision in which he or Ivy Tech would have a financial interest. While he indicates that there are currently no such decisions or votes pending before the DNR, the Director must abstain from participating in any decision or vote for the remainder of his employment with the State in which he or Ivy Tech has a financial interest in the outcome of the matter to ensure he avoids violating I.C. 4-2-6-9. He must ensure compliance with I.C. 4-2-6-9(b) if a potential conflict of interest arises.

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. 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. The Director does not anticipate engaging in any lobbying activities in his prospective employment with Ivy Tech. In this case, the Director's intended employment opportunity with Ivy Tech would not require him to accept compensation as an executive branch lobbyist. To the extent he continues to observe this restriction during the cooling off period, he would not be in violation this portion of the rule.

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, the Director indicates that he has never negotiated or administered a contract with Ivy Tech on behalf of the State. Accordingly, this restriction would not apply to the Director's intended employment with Ivy Tech.

Third, the Director is prohibited from accepting employment for 365 days from the last day of his state employment from 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 Ivy Tech because he did not make regulatory or licensing decisions affecting Ivy Tech 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 Ivy Tech'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 Ivy Tech.

Finally, the Director is subject to the post-employment rule's "particular matter" prohibition in his prospective 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.

While the Director has not identified any particular matters in which he anticipates working on in his intended post-employment venture with Ivy Tech, he must continue to ensure compliance with this restriction.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Director may accept employment with Ivy Tech immediately upon leaving state employment as that intended employment does not violate I.C. 4-2-6-11.