

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

The IEERB Chairman was contacted by a search firm to apply for an open superintendent position with a school corporation that had matters pending before the agency. The Chairman worked with the IEERB Ethics Officer to implement internal procedures to ensure the Chairman is screened from any such matters while he is being considered for the position. SEC approved the procedure instituted by IEERB to screen the Chairman from involvement in matters involving the school corporation and recommended the same procedure be used for any other employment opportunities brought to the Chairman by the firm in which he might be interested. SEC found further that the Chairman would not be prohibited by the cooling off provision of the rule on Postemployment restrictions from accepting the position with the corporation immediately upon leaving IEERB; however, he should avoid working for the corporation on any of the matters pending before IEERB out of an abundance of caution.

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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 the Chairman of the Indiana Education Employment Relations Board (“IEERB”). In this position, he oversees the day-to-day functions of the agency and serves as a chairman of the three-member Board. The Board hears cases involving (1) unfair labor practices; (2) collective bargaining impasses; and (3) representative elections. Generally, meetings are called so that the Board may hear and ultimately rule upon an unfair labor practice case whose previous ruling by an administrative law judge (“ALJ”) has been appealed to the Board, or to hear a collective bargaining impasse case whose prior ruling by a fact-finder has been appealed to the board.

On April 23, 2013, the Chairman notified the IEERB’s Ethics Officer, that a search firm (“Firm”) had contacted him and encouraged him to apply for the open superintendent position of a School Corporation (“Corporation”). The Chairman has begun to submit his application for the position and will be meeting with the Firm next week. He has also notified the Governor, his appointing authority, of this development. The Chairman has recused himself from all matters involving the Corporation. Furthermore, the Ethics Officer instituted internal procedures screening the Chairman from the Board and staff regarding any matter involving the Corporation.

The IEERB currently has three pending cases involving the Corporation: U-12-01-3060; U-12-04-3060; and F-12-01-3060. The Chairman has only been procedurally involved in U-12-04-3060 and F-12-01-3060. U-12-01-3060 was filed under the previous Board chairman and has not required further action during the Chairman’s tenure as the Board chairman.

F-12-01-3060 involves the Corporation’s 2012-2013 Collective Bargaining Agreement (“CBA”). Pursuant to I.C. 20-29-6-14, if at any time after at least sixty days following the beginning of collective bargaining (August 1), parties have not agreed to and ratified a CBA the IEERB shall

declare an impasse and appoint a mediator. The Corporation and its exclusive representative did not ratify a CBA before October 1, 2012. Therefore, an impasse was declared and the Chairman appointed a mediator to the matter. The mediator is given full authority to settle the case, if possible, and seeks no involvement from the IEERB chairman or the Board. If mediation cannot settle a CBA, the parties must exchange their last best offer and provide fiscal rationale for their offer. Because any party may later appeal the fact-finder's decision in an impasse case to the Board, the agency's general counsel screens all Board members from viewing the last best offer submitted at the conclusion of mediation.

I.C. 20-29-6-13(e) provides that mediation shall be completed within thirty days. If an agreement has not been reached during mediation, I.C. 20-29-6-15.1 states that the IEERB shall initiate fact finding. On November 30, 2012, the Chairman appointed a fact-finder to this matter. Fact finding must culminate in the fact-finder imposing the terms of one of the party's last best offer. Once again, the fact-finder operates without the Board's involvement. Pursuant to I.C. 20-29-6-18, either party may appeal the decision of the fact-finder to the Board. It is only at this time that the Board makes a substantive decision regarding the case.

U-12-04-3060 involves an alleged unfair labor practice committed by the Corporation. Procedurally, once a complaint is filed with the IEERB, the Chairman appoints a hearing examiner to the case, who serves as an ALJ. The Chairman appointed the hearing examiner in this case on December 11, 2012. Among other things, the hearing examiner has the authority to administer oaths and affirmations, rule upon motion, regulate the course of the hearing, and make a final report ruling on the matter. Unfair labor practice cases are transferred to the Board after the hearing examiner produces her report; this report is still pending.

These two cases intersected in December 2012 when the complaint for unfair labor practice was filed. Because this complaint alleges wrongdoing during the collective bargaining process, through the disposition of various motions, the Chairman ordered the suspension of the fact-finding proceedings in the F-12-01-3060 matter so that the hearing examiner could make a final judgment on the merits of the unfair labor practice related to the U-12-04-3060 matter.

### ISSUE

What rules in the Code would apply to the Chairman's potential employment opportunity with the Corporation? Would his acceptance of the potential employment position with the Corporation 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 employer'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 Chairman's potential post-employment opportunity with the Corporation implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Chairman is analyzed below.

*A. Confidential Information*

I.C. 4-2-6-6 prohibits the Chairman 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. At this point, based on the information provided and the fact that an offer of employment has not yet been extended, it does not appear that any potential employment offer from the Corporation would be resulting from information of a confidential nature. To the extent this is accurate it would not appear that the Chairman's potential employment with the Corporation would violate I.C. 4-2-6-6.

*B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Chairman 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 Chairman appears to have commenced employment negotiations for purposes of this rule with the Corporation. Specifically, he has submitted an application and will be meeting with the Firm. Consequently, a conflict of interest would arise for the Chairman if he participates in a vote or decision in which he or the Corporation has a financial interest. The Chairman has indicated that three matters involving the Corporation are currently pending before the Board. Because the Corporation would likely have a financial interest in the outcome of those matters, the Chairman would be prohibited from participating in any decision or vote involving those or any other matters in which he or the Corporation would have a financial interest.

I.C. 4-2-6-9(b) provides that a state employee 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. In this case, the Chairman requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to the Governor, his appointing authority.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, IEERB proposes a screening mechanism where the Chairman would be shielded from participating in any decision that affects the Corporation, including the three

aforementioned pending matters. Another state employee will serve as the acting chairman for any and all matters involving the Corporation. The Administrative Assistant will continue to serve as the case administrator and another state employee will continue to serve as general counsel. Furthermore, the IEERB members and staff are prohibited from communicating with, sharing, and/or providing non-public information to the Chairman in any matter involving the Corporation.

*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 Chairman from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Chairman 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. It is unclear whether the Chairman would be required to engage in any lobbying activities in his potential employment with the Corporation. To the extent that his potential employment with the Corporation would not require him to accept compensation as an executive branch lobbyist during the cooling off period, this restriction would not apply.

Second, the Chairman 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. The information provided in this case does not appear to suggest that the Chairman has ever negotiated or administered a contract with the Corporation on behalf of the State. Accordingly, it does not appear that this restriction would apply to the Chairman’s potential employment opportunity with the Corporation.

Third, the Chairman 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 Chairman’s intended employment with the Corporation because he did not make regulatory or licensing decisions affecting the Corporation at any time during his tenure with the State. Specifically, while three separate matters are pending with the IEERB, none of the actions the Chairman took in any of these matters amounted to regulatory or licensing decisions.

Fourth, the Chairman 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 this restriction would apply. Specifically, an offer of employment has not been extended yet. Moreover, the Chairman has been screened from any involvement related to any matters related to the Corporation before the IEERB.

Finally, the Chairman 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.

In this case, the three cases pending before the Board that the Chairman has identified would appear to qualify as particular matters as either enforcement or judicial proceedings. The particular matter restriction would not apply to the U-12-01-3060 matter because the Chairman has had no involvement with this matter. Regarding the remaining two matters, U-12-04-3060 and F-12-01-3060, it does not appear that the Chairman's participation would be considered personal and substantial. Specifically, the Chairman has, in both proceedings, only made procedural decisions by appointing various members to make substantive decisions/findings. Accordingly, the particular matter restriction would not appear to apply.

### **CONCLUSION**

The Commission finds that a potential conflict of interest would arise for the Chairman if he participates in decisions and/or votes related to the Corporation because employment negotiations with that entity have commenced. It is the Commission's opinion that the screening mechanism proposed by IEERB is appropriate and should be implemented with respect to matters involving the Corporation or any other employer the Chairman may begin employment negotiations with.

Regarding post-employment, the Commission finds that subject to the foregoing analysis, the Chairman would not be prohibited from accepting an employment opportunity with the Corporation immediately upon leaving state employment should an offer of employment materialize. The Commission further finds that while the particular matter restriction set forth in I.C. 4-2-6-11(b) does not apply to the three matters involving the Corporation that are currently pending before the Board, the Chairman should, out of an abundance of caution, avoid working on those matters upon leaving state employment.