

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

An archaeologist with the DNR sought employment with a cultural resource management company for which the archaeologist had previously reviewed reports, plans and permits and made recommendations to his superiors regarding approval of the matters. SEC found the archaeologist's involvement in these matters amounted to making a regulatory or licensing decision and would require him to wait until the elapse of 365 days from the time he leaves state employment before accepting a position with the company or to seek a waiver of this provision from his appointing authority. Furthermore, the archaeologist would be prohibited from representing or assisting the company on those particular matters in which he personally and substantially participated while with the DNR.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 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 an archaeologist for the Indiana Department of Natural Resources ("DNR"), Division of Historic Preservation & Archaeology ("Division"). In his capacity at the Division, the Archaeologist reviews 1) reports on archaeological resources, 2) effects of undertakings on archaeological resources, 3) plans for work (investigations of archaeological resources), and 4) permits to conduct archaeological work. Approval of the Archaeologist's work is formally signed by the Division's Director or Assistant Director or DNR's Director or Deputy Director. The Archaeologist's opinions/recommendations, however, are considered by the person reviewing his work before signature of the formal letter. The Archaeologist's duties also include public education and information about archaeology in Indiana, investigation of discoveries of archaeological and burial sites and providing advice about archaeology.

A cultural resource management company with an archaeological component would like to employ the Archaeologist as a Principal Investigator. In this capacity, the Archaeologist would direct the cultural resource management company's archaeology department and be in charge of all field work, laboratory analysis, and report preparation, including scheduling and participating in decisions relating to hiring field crew.

The following is a list of the cultural resource management company's archaeological reports and plans reviewed by the Archaeologist:

- 2007: IndyGo Transit Center, Indianapolis, Indiana (the cultural resource management company subcontracted the archaeology)
- 2008: Fourth Street Reconstruction, Columbus, Indiana
- 2010: Floyd Bridge No. 60, Floyd County, Indiana
- 2010: Georgia Street Reconstruction, Indianapolis, Indiana
- 2010: Union Chapel Road Interchange with I-69, Allen County, Indiana
- 2011: State Road 56 Mitigation Site, Ohio County, Indiana
- 2011: Edgewood Intersection Improvements, Marion County, Indiana

- 2011: Northfield Road Connector, Hendricks County, Indiana
- 2012: Boatman Road Improvement Project, Scott County, Indiana
- 2012: Greencastle Stellar Street Improvement, Greencastle, Indiana

All of the projects have been completed with the exception of Boatman Road, which may require further work. The cultural resource management company understands that the Archaeologist is not permitted to work for the cultural resource management company on that project because of the particular matter restriction.

Finally, the Archaeologist would not be working as a lobbyist for the cultural resource management company nor would he be working on a State grant as the cultural resource management company has not received an archaeological grant or contract from the DNR for any archaeological work. The cultural resource management company, however, might ask the Archaeologist to attend meetings with his former Division employees, but he would not attend alone nor would he lead discussions. His role would be to answer questions.

ISSUE

What rules in the Code apply to the Archaeologist's employment opportunity with the cultural resource management company? Would accepting the position subject him to any post-employment restrictions under IC 4-2-6-11?

RELEVANT LAW

IC 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.

IC 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.

IC 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 Archaeologist's intended post-employment opportunity implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Archaeologist's opportunity is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Archaeologist 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 the cultural resource management company resulted from information of a confidential nature. Accordingly, the Commission finds that the Archaeologist's intended employment with the cultural resource management company would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the Archaeologist 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, it appears that the Archaeologist has an arrangement for prospective employment with the cultural resource management company. Consequently, the Commission finds that a conflict of interest would arise for the Archaeologist if he participates in a vote or decision in which he or the cultural resource management company has a financial interest. The Archaeologist must abstain from participating in any decision or vote for the remainder of his employment with the State in which he or the cultural resource management company has a financial interest in the outcome of the matter to ensure he avoids violating IC 4-2-6-9. He must ensure compliance with IC 4-2-6-9(b) if a potential conflict of interest arises for the remainder of his state employment as long as employment negotiations are ongoing with the cultural resource management company.

C. Post-Employment

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

First, the Archaeologist 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 Archaeologist’s intended employment opportunity with the cultural resource management company would not require him to accept compensation as an executive branch lobbyist. To the extent he observes this restriction during the cooling off period, he would not be in violation of this portion of the rule.

Second, the Archaeologist 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 with that employer 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 Archaeologist negotiated or administered a contract with the cultural resource management company on behalf of the State. Accordingly, this restriction does not apply to the Archaeologist’s intended employment with the cultural resource management company.

Third, the Archaeologist 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. The Archaeologist’s duties at DNR include reviewing permits, plans and reports. Approval of the Archaeologist’s work is formally signed by the Division’s Director or Assistant Director or DNR’s Director or Deputy Director. The Archaeologist’s

opinions/recommendations are considered by the person reviewing his work before signature of a formal letter. In this case, The Archaeologist discloses that he has reviewed numerous cultural resource management company's plans and reports. He has also reviewed, on at least one occasion, a permit issue for the cultural resource management company. Based on this information, it is the opinion of the Commission that the Archaeologist's review of the cultural resource management company's plans, reports, and permit constitutes making a regulatory or licensing decision. Accordingly, the one-year cooling off period would apply.

Fourth, the Archaeologist 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 the cultural resource management company's offer of employment was extended to the Archaeologist in an attempt to influence him in his capacity as a state employee. Accordingly, this restriction does not apply to the Archaeologist's intended employment with the cultural resource management company.

Finally, should the Archaeologist pursue employment with the cultural resource management company upon the expiration of the one-year cooling off period or obtain a waiver from his appointing authority, he would be 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 Archaeologist personally and substantially participated in reviewing permits, reports and plans which could be classified as applications, investigations or determinations. Specifically, he lists ten (10) matters in which he reviewed reports and plans for the cultural resource management company, one of which is pending. As a result, he is prohibited from representing or assisting any person, including the cultural resource management company, on all ten (10) matters, not just the Boatman Road matter that is pending. This restriction would not apply to any future permits, reports or plans with which the Archaeologist was not involved while employed by the State.

CONCLUSION

The Commission finds that the one-year cooling off period applies to the Archaeologist's intended employment with the cultural resource management company. Accordingly, unless he obtains a waiver from his appointing authority, the Archaeologist would be prohibited from accepting employment with the cultural resource management company until after the expiration of one-year from the day he leaves state employment. Furthermore, the Commission finds that the particular matter restriction would apply to the ten matters identified and discussed herein.