

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

The Chief Operating Officer with the IFA accepted the offer of a law firm to join as a partner and intended to resign from state employment to pursue the opportunity. SEC found the COO's work on a prior contract between the firm and the IFA amounted to administering the contract and, as the IFA General Counsel at the time, he was in a position to make a discretionary decision affecting the nature of the contract's administration. As a result, the COO would either need to observe the 365 day cooling off period before joining the firm or seek a waiver of the Postemployment rule from his agency head. Furthermore, assuming the COO opted to accept the firm's offer under either of these conditions, he would also need to avoid representing or assisting the firm on engagement particular matters in which had had personally and substantially participated while at the IFA.

June 2013
No. 13-I-30

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 has been employed with the State of Indiana in various capacities since May 2003. He is currently employed by the Indiana Finance Authority ("IFA") as its Chief Operating Officer and Director of Environmental Programs. He has also previously served as the IFA's General Counsel.

The Chief Operating Officer has accepted a partnership position with a law firm (the "Firm") and intends to resign from his current position with the IFA. He was approached by the Firm about the partnership opportunity in late May, after resigning from his position as IFA's General Counsel. The Chief Operating Officer has accepted a partnership position with the Firm's municipal finance practice group to be effective on or before August 15, 2013. His responsibilities will include the representation of various Indiana cities and towns with respect to their issuance of municipal securities, as well as providing them general legal advice. In addition, while he will not work on any particular matters he was involved in during his employment with the State, he may be asked to work on matters for which state agencies and/or the IFA engage the Firm. In addition, the Chief Operating Officer may represent clients before various executive branch agencies. However, he will avoid any activity that would require him to register as an executive branch lobbyist prior to the expiration of the one-year cooling off period.

The IFA has engaged the Firm from time to time for representation on certain matters. The terms of each engagement are subject to the approval of the Public Finance Director ("Director") and are memorialized in a legal services agreement by and between the IFA and the Firm, which is executed by the Public Finance Director on behalf of the IFA. The Chief Operating Officer supervised the work of the Firm from time to time while he was employed as the IFA's General Counsel. In this position he would be able to make discretionary decisions relating to the supervision of the work.

All of the IFA's Legal Services Agreements with all law firms expired on December 31, 2012. In April, 2013, the IFA solicited Requests for Qualifications to pre-qualify law firms to be eligible for future engagements with the IFA. The Chief Operating Officer did not participate in the decision making process to pre-qualify any law firms. All decisions were made by the Director.

Regarding regulatory and licensing decisions, the state employee indicates that he has never possessed the unilateral authority to make independent regulatory or licensing decisions in his capacity as Chief Operating Officer, Director of Environmental Programs and General Counsel.

The Chief Operating Officer identifies the following particular matters as matters that he will not represent or assist a person in any particular matter involving the State because he has personally and substantially participated in such matters as a state employee:

Conduit Financing (IFA approves financing – does not engage the Firm)

The Firm currently represents the following entities with respect to their request to issue debt through the IFA:

\$90,000,000 Greencroft Goshen, Inc.
\$40,500,000 Deaconess Hospital, Inc.
\$70,000,000 BHI Senior Living, Inc.
\$13,500,000 New NGC, Inc.
\$80,000,000 Citizens Energy Group
\$511,000,000 Indianapolis Power & Light Co.
\$10,500,000 University of Indianapolis

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The Firm is currently engaged by the IFA for the following matters:

\$1,000,000 Fatima Group Escrow Agreement
\$642,300,000 ITFA Highway Revenue Refunding Bonds, Series 2007A-IRS
Audit
\$5,000,000 IFA Parking Matter
\$13,500,000 New NGC, Inc.
I-69 Public Private Partnership Request for Proposal and Developer Agreement

ISSUE

What rules in the Code would apply to the Chief Operating Officer's intended employment opportunity with the Firm, and would his acceptance of the offered position 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. 4-2-6-9 (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 Chief Operating Officer's intended employment with the Firm invokes consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Chief Operating Officer is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Chief Operating Officer 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 the Firm's employment offer resulted from information of a confidential nature. Accordingly, the Commission finds that the Chief Operating Officer's intended employment with the Firm would not violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Chief Operating Officer 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 Chief Operating Officer has an arrangement for prospective employment with the Firm. Accordingly, the Chief Operating Officer would be prohibited from participating in any decision or vote in which he or the Firm would have a financial interest in the outcome of. To the extent that the Chief Operating Officer has complied with this provision since employment negotiations with the Firm commenced and he continues to abstain from participating in any decision or vote in which he or the Firm has a financial interest in the outcome of the matter for the remainder of his state employment, and ensures compliance with I.C. 4-2-6-9(b) if a potential conflict of interest arises, the Commission finds that the Chief Operating Officer's intended employment with the Firm would not violate I.C. 4-2-6-9.

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 Chief Operating Officer from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Chief Operating Officer 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 Chief Operating Officer indicates that while he may represent clients before executive branch agencies, he will not

engage in activities in his prospective employment with the Firm that would require him to register as an executive branch lobbyist. To the extent the Chief Operating Officer ensures compliance with this provision for the entirety of the cooling off period, it would not appear that his intended employment with the Firm would violate this provision.

Second, the Chief Operating Officer 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 prohibition would appear to apply in this case. Specifically, based on the information provided by the Chief Operating Officer, it would appear that the agreements between the IFA and the Firm are contracts. While it is unclear whether he was involved in the negotiation of the contracts the IFA had with the Firm, it is clear that the Chief Operating Officer was engaged in the administration of such contracts and was in a position to make discretionary decisions affecting the nature of the administration of those contracts. Specifically, the Chief Operating Officer indicates that he supervised the Firm's work pursuant to the agreements. Moreover, he states that he could make decisions affecting legal services agreements with the Firm. Accordingly, the Commission finds that the one year post-employment restriction would apply to the Chief Operating Officer and absent obtaining a waiver the Chief Operating Officer would be prohibited from accepting employment with the Firm until the expiration of 365 days from the last day of his state employment.

Third, the Chief Operating Officer 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 state employee indicates that he has never possessed the unilateral authority to make independent regulatory or licensing decisions while serving as Chief Operating Officer, Director of Environmental Programs and General Counsel for the IFA. While the rule does not require unilateral authority to make regulatory or licensing decisions, it does not appear that the Chief Operating Officer made regulatory or licensing decisions regarding the Firm during his tenure at the IFA. To the extent that this is accurate for the entirety of his employment with the State, this restriction would not apply to the Chief Operating Officer's intended employment with the Firm.

Fourth, the Chief Operating Officer 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 Firm's offer of employment was extended to the Chief Operating Officer in an attempt to influence him in his capacity as a state employee. Accordingly, it does not appear that this restriction would apply to the Chief Operating Officer.

Finally, should he obtain a waiver or wish to commence employment with the Firm after the expiration of the cooling off period, the Chief Operating Officer 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 Chief Operating Officer identifies various matters that may qualify as particular matters and that he indicates he would not represent or assist a person in because he has personally and substantially participated in such matters as a state employee:

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To the extent that he does not represent or assist any person with these matters, or any other matter that he may have personally or substantially participated in during his employment with the state, whether it involved the Firm or not, the Chief Operating Officer would not be in violation of this rule.

CONCLUSION

The Commission finds that the one-year cooling off period applies to the Chief Operating Officer's intended employment with the Firm. Accordingly, unless he obtains a waiver from his appointing authority, the Chief Operating Officer would be prohibited from accepting employment with the Firm 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 Conduit Financing and Finance Authority Engagement matters identified and discussed herein.