

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

A Deputy Secretary of State and former Executive Secretary of the ATC was interested in accepting employment with a government affairs firm in a position that could potentially entail serving as the Executive Director of a beer brewing industry trade association. Based on the Deputy's representations that he did not administer or negotiate any contracts with the Firm or make any regulatory or licensing decisions that applied to the Firm in his time with the State, SEC found he would be permitted to accept employment with the Firm immediately upon leaving the Secretary of State's office so long as he did not engage in any executive branch lobbying until the elapse of 365 days from the date he left state employment. In addition, the Deputy would need to ensure to not represent or assist the Firm, the Association or any other person on any contract, determination, enforcement proceeding, license or other particular matter in which he personally and substantially participated during the course of his state employment.

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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 currently the Deputy Secretary of State. He was appointed to this position on March 24, 2012. As Deputy Secretary of State, he serves as the agency's appointing authority and has decision-making authority over human resources, communications, budgeting, legislative priorities and spending. He does not have decision-making authority over matters related to violations of the Indiana Uniform Securities Act or matters related to violations of the motor vehicle dealer statutes. Those decisions, including decisions to appoint special counsel, a hearing officer or recommendations to a prosecutorial authority, rest with the Securities Commissioner. While the Deputy Secretary of State consults with the Secretary of State Election Division ("Division") staff, decision-making for the Division rests almost entirely with the Division's co-directors.

Immediately prior to beginning his role as Deputy Secretary of State, the state employee served as the Executive Secretary of the Alcohol and Tobacco Commission ("ATC"). He assumed this role on June 29, 2011. In that capacity, he served as the ATC's hearing officer for all administrative matters related to the agency. This included administrative appeals of actions by the ATC on the approval or denial of applications for alcoholic beverage permits and approval or denial of punitive actions for individual violations of Indiana Code § 7.1-4 *et seq.* The Executive Secretary is not the agency's appointing authority, nor does the Executive Secretary make any determinations regarding the approval or denial of applications for alcoholic beverage permits. The Executive Secretary does make a determination about whether the agency followed the proper protocol in approving or denying a permit during the appeal process but does not opine about the original approval or denial.

The Deputy Secretary of State would like to accept employment with a government affairs firm ("Firm"). A trade association ("Association") that represents Indiana's beer brewing industry

could be a client of the Firm, depending on whether the Association accepts the Firm's proposal. The Association would be the Deputy Secretary of State's only client. He would serve as the Association's Executive Director. His primary responsibilities in this role would entail top-to-bottom management of the Association including governance, member recruitment/retention, marketing and internal/external communications. This position would also entail legislative branch lobbying.

The Deputy Secretary of State has never acted on behalf of the Association at any point during his state employment. He has not reviewed, approved or denied any Association member's application or other matters in any of his positions with an agency or office.

ISSUE

What rules in the Code apply to the Deputy Secretary of State's employment opportunity with the Firm? 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 Deputy Secretary of State'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 Deputy Secretary of State's opportunity is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Deputy Secretary of State 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 Firm resulted from information of a confidential nature. Accordingly, the Deputy Secretary of State's intended employment with the Firm would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the Deputy Secretary of State 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 Advisory Opinion 10-I-7 the Commission determined that employment negotiations commence once an employer contacts a state

employee to discuss potential employment. In this case, the Deputy Secretary of State has been contacted by the Firm about serving as an employee representing the Association as its Executive Director. Consequently, a conflict of interest would arise for the Deputy Secretary of State if he participates in a decision or vote in which he or the Firm has a financial interest. The Deputy Secretary of State must abstain from participating in any decision or vote for the remainder of his employment with the State in which he or the Firm has a financial interest in the outcome of the matter to ensure he avoids violating IC 4-2-6-9. He must also ensure compliance with IC 4-2-6-9(b) if a potential conflict of interest arises.

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 Deputy Secretary of State from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Deputy Secretary of State 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. While the Deputy Secretary of State states that his duties as a Firm employee and as the Association’s Executive Director would entail legislative branch lobbying, he would be prohibited from engaging in executive branch lobbying for one year. To the extent that the Deputy Secretary of State would not lobby the executive branch during the cooling off period, he would not be in violation this portion of the rule.

Second, the Deputy Secretary of State 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 Deputy Secretary of State negotiated or administered a contract with the Firm on behalf of the State. Specifically, while the Deputy Secretary of State has contracting responsibilities in his capacity with the Secretary of State, he does not interact with the Firm. In addition, in his capacity with the ATC he did not have contracting responsibilities. Accordingly, this restriction does not apply to the Deputy Secretary of State’s intended employment with the Firm.

Third, the Deputy Secretary of State 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. It does not appear that this restriction applies to the Deputy Secretary of State. Specifically, while the Deputy Secretary of State served as a hearing officer for all administrative matters related to the ATC and made determinations about whether the agency followed the proper protocol in approving or denying a permit during the appeal process, he did not opine about the original approval or denial. None of the actions the Deputy Secretary of State took in any of these matters appear to have amounted to making regulatory or licensing decisions.

Fourth, the Deputy Secretary of State 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 Deputy Secretary of State in an attempt to influence him in his capacity as a state employee. Accordingly, this restriction does not apply to the Deputy Secretary of State's intended employment with the Firm.

Finally, the Deputy Secretary of State 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, it appears that the Deputy Secretary of State personally and substantially participated in contracts, determinations, enforcement proceedings and licenses. As a result, he is prohibited from representing or assisting any person, including the Firm and the Association, on any of these matters. This restriction would not apply to any future particular matters such a new license with which the Deputy Secretary of State was not involved while employed by the State.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction against executive branch lobbying, the Commission finds that the Deputy Secretary of State's intended employment does not violate the post-employment restrictions found in I.C. 4-2-6-11.