

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

An IDOI Deputy Commissioner co-lead a team of IDOI employees and contractors responsible for informing, advising and working with IDOI staff on pertinent issues regarding the federal Patient Protection and Affordable Care Act (“ACA”). The Deputy Commissioner sought employment with a contractor performing work on her team’s ACA projects. SEC determined the Deputy Commissioner would need to be screened from any decisions or votes involving the contractor during her state employment while employment negotiations ensue. SEC further found the Deputy Commissioner would be subject to the required cooling off period of the Postemployment rule since she administered a contract between IDOI and the contractor; therefore, in the absence of a waiver from her agency, the Deputy Commissioner would be prohibited from working for the contractor for a period of 365 days from the date she leaves state employment. Moreover, the SEC determined that the Deputy Commissioner would be prohibited by the Postemployment rule’s particular matter restriction from representing or assisting the contractor with the two contracts between IDOI and the contractor.

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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 Deputy Commissioner of Accident & Health at the Indiana Department of Insurance (“IDOI”). In this capacity she reports to the Chief Deputy and together, they lead a team of IDOI employees and contractors that are responsible for remaining informed regarding the federal Patient Protection and Affordable Care Act (“ACA”), advising the Commissioner regarding policy matters pertaining to the ACA, and performing any necessary review of companies’ filings related to the ACA. The Deputy Commissioner’s team’s projects involve federal funding and work performed by contractors. One of these contractors is Ingardus, an independently operated and managed affiliate of a local law firm. Prior to performing work for the health care reform team, Ingardus had served as market conduct examiners for the IDOI.

Ingardus’ first contract with IDOI became effective October 21, 2011 and was originally set to expire May 22, 2012, but was extended to May 22, 2013. A new contract between Ingardus and IDOI was recently approved. The contracting process was handled by a team of two IDOI employees. When the ACA team determined that Ingardus was the best choice to provide the contract services, one of the two employees corresponded with the Indiana Department of Administration (“IDOA”) to receive approval of a sole source contract, rather than going through the competitive bidding process. The other employee determined the total amount of funds that were available under the federal grant for the contract services and set the maximum contract remuneration. One IDOI employee sought information about the project’s scope and duties from the Deputy Commissioner to draft the additional ACA needs as related to a navigator certification program (the “Certification Program”) and to amend existing rate review responsibilities in the contract. The Deputy Commissioner had no involvement with the contract negotiations, but merely conveyed information as directed by her supervisor, the Chief Deputy.

The maximum remuneration under the new contract, which would run through September 30, 2014, would be \$270,000.

On approximately May 8, 2013, the Deputy Commissioner informed her agency ethics officer that she was considering leaving IDOI and possibly pursuing a position with Ingardus. She further informed the ethics officer that she had started considering leaving IDOI in March and approached Ingardus in April after hearing about a potential opening. According to the Deputy Commissioner, Ingardus indicated that they might be interested in discussing employment opportunities within their organization if the Deputy Commissioner decided to leave IDOI. The Deputy Commissioner would like to stay with IDOI for a couple of months to assist with some major aspects of the health care reform project, but she has also indicated that she would like to move forward in her potential employment discussions with Ingardus. The IDOI Commissioner is aware of this situation and has indicated that he would be willing to waive any postemployment restrictions that the Deputy Commissioner may be subject to under the Code of Ethics (“Code”) should she decide to leave state employment and seek employment with Ingardus.

ISSUE

- 1) Whether a conflict of interest would arise for the Deputy Commissioner in her employment with IDOI if she participate in decisions or votes in which she and/or Ingardus has a financial interest in? If so, would a screening procedure be appropriate?
- 2) Would her acceptance of the offered position subject her 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 Deputy Commissioner intended employment with Ingardus 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 Deputy Commissioner is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Deputy Commissioner 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 any offer of employment that may be extended to the Deputy Commissioner by Ingardus would be as a result of information of a confidential nature. Accordingly, it does not appear that the Deputy Commissioner's intended employment with Ingardus would violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Deputy Commissioner from participating in any decision or vote if she has knowledge that various persons may have a “financial interest” in the outcome of the matter, including herself or any person or organization with whom she is negotiating or has an arrangement concerning prospective employment. The Commission has previously determined that employment negotiations commence, for purposes of this rule, as soon as an individual begins discussing employment with a potential employer regardless of who initiates the contact. In this case, it appears that the Deputy Commissioner has commenced employment negotiations with Ingardus. Specifically, she has contacted Ingardus to inquire about potential post-employment with the company and they have responded by indicating that they might be interested in discussing employment opportunities with her. Accordingly, the Deputy Commissioner would be prohibited from participating in any decision or vote in which she or Ingardus would have a financial interest in the outcome. In this case, it appears that the Deputy Commissioner’s duties at the IDOI would require her to interact with Ingardus and potentially participate in decisions and/or votes in which Ingardus may have a financial interest in.

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. The Deputy Commissioner has requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to her 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, IDOI should impose a screening mechanism that would shield the Deputy Commissioner from participating in any decision or vote in which Ingardus or the Deputy Commissioner would have a financial interest in. The screen should remain in effect until the Deputy Commissioner leaves her state employment to pursue employment with Ingardus or the employment negotiations with Ingardus otherwise terminate.

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 Deputy Commissioner from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Deputy Commissioner 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 IDOA. To the extent the Deputy Commissioner ensures compliance with this provision for the entirety of the cooling off period, it would not appear that her intended employment with Ingardus would violate this provision.

Second, the Deputy Commissioner is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she 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. This restriction would appear to apply in this case. While the Deputy Commissioner did not negotiate the contract between IDOI and Ingardus, it does appear that she did administer the contract *and* was in a position to make discretionary decisions affecting the administration of that contract. Specifically, the Deputy Commissioner worked directly, along with other members of the IDOI, with Ingardus to fulfill the company's duties/deliverables that were set forth in the contract. Moreover, as a Deputy Commissioner, she was in a position of authority to make discretionary decisions, such as escalating matters to the IDOI Commissioner, regarding the administration of the contract between IDOI and Ingardus. Accordingly, the Deputy Commissioner would be prohibited from accepting employment from Ingardus until after the expiration of 365 days from the last day of her state employment.

To the extent that the Deputy Commissioner would commence employment with Ingardus after the expiration of the one-year cooling off period or obtain a waiver from her appointing authority, it must be noted that she would still be subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents her from representing or assisting a person on any of the following twelve matters if she 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.

The Deputy Commissioner has identified at least three matters to consider in this case, the two contracts between the IDOI and Ingardus and the Certification Program. Contracts are particular matters. It appears that the Deputy Commissioner's participation in the two contracts between IDOI and Ingardus was personal and substantial. Accordingly, while the first contract has already expired, she would be prohibited from working on or assisting Ingardus with the second contract upon leaving her state employment. The Certification Program, however, would not appear to qualify as a particular matter. Specifically, this matter appears to be a matter of "general application." Matters of general application are not considered "particular matters." Accordingly, the Deputy Commissioner would not be prohibited from working on the Certification Program after leaving state employment.

CONCLUSION

The Commission finds that a conflict of interest would arise for the Deputy Commissioner in her employment with IDOI if she participates in decisions or votes involving Ingardus since she has commenced employment negotiations with that company. Accordingly, the Deputy Commissioner should be screened from any decisions or votes involving Ingardus during her state employment while those negotiations ensue.

The Commission further finds that the Deputy Commissioner administered a contract between IDOI and Ingardus during her state employment. Accordingly, absent a waiver, the one-year cooling off restriction would prohibit her from accepting employment with Ingardus until the expiration of 365-days from the last day of her state employment. Regarding particular matters, the Commission finds that the Deputy Commissioner would be prohibited from working on the two contracts discussed herein between the agency and Ingardus upon leaving state employment. She is not prohibited from working on the Certification Program.