

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

The Indiana Systems Administrator for the Indiana State Library was offered employment by a technical support company that contracted with the Library. The contract was specifically for technical support to back up the Administrator's work for the Library, and the Administrator had been involved in the RFP process that led to the company receiving the contract. Because the Administrator represented that he did not negotiate the contract with the company, nor was he in a position to make any discretionary decisions regarding the contract, SEC found that he would not be prohibited under the Postemployment rule's "cooling off" provision from accepting employment with the company immediately upon leaving state employment. However, because the Administrator personally and substantially participated in the contract with the Library, he would be prohibited from representing or assisting the company on that matter.

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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 currently serves as the Indiana Systems Administrator for an international software/hardware program (Program) for the Indiana State Library ("Library"). The Systems Administrator's responsibilities in administering the Program for the Library include keeping the software/hardware functional at all times for the Library's 100+ member libraries and providing technical support.

The Systems Administrator is interested in accepting employment with a technical support company, a vendor with which the Library currently has a contract. The contract is for technical support to back up the Systems Administrator's work for the Library. The technical support company has offered the Systems Administrator a position in which he would be responsible for providing technical support, maintenance, and administration of the Program for the hardware and software installations internationally. He would also participate in non-Program, non-State related software/hardware maintenance for the technical support company. In addition, the technical support company might require the Systems Administrator to work on development projects for the international Program community from which the Library might benefit. The Systems Administrator does not anticipate engaging in any lobbying activities in his potential employment with the technical support company.

The Systems Administrator was required to participate in the Request for Proposal ("RFP") process regarding the technical support company current contract with the Library. Specifically the Systems Administrator participated in the vendor presentations in August 2012 in which he was required to ask technical questions of each vendor and evaluate the accuracy of the technical claims made by the two vendors. The Systems Administrator asserts that his superiors made the decisions regarding the awarding of the contract and that he did not possess the authority to negotiate or administer this contract in any manner. In addition, the Systems Administrator has

not made any regulatory or licensing decisions that directly applied to the technical support company.

The Systems Administrator requested an Informal Advisory Opinion (“IAO”) from the Office of the Inspector General (“OIG”) on January 4, 2013. The OIG issued an IAO to the Systems Administrator on the same day indicating that he would be prohibited from representing or assisting the technical support company with the contract currently in effect with the Library which would be a particular matter under I.C. 4-2-6-11(a). The IAO also informed the Systems Administrator that if he were involved in the negotiation or administration of the current contract between the technical support company and the Library that he would not be able to work for the technical support company until the lapse of 365 days from the time he leaves state employment.

### **ISSUE**

What rules in the Code would apply to the Systems Administrator’s intended employment opportunity with the technical support company? Would his acceptance of the offered position 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 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 Systems Administrator's intended post-employment venture implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Systems Administrator's arrangement is analyzed below.

### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the Systems Administrator 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 technical support company would have resulted from information of a confidential nature. Accordingly, it would not appear that the Systems Administrator's employment with the technical support company would violate I.C. 4-2-6-6.

### *B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Systems Administrator 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 Systems Administrator appears to have an arrangement for prospective employment with the technical support company.

Consequently, a conflict of interest would arise for the Systems Administrator if he were to participate in a vote or decision in which he or the technical support company would have a financial interest. The Systems Administrator must abstain from participating in any decision or vote for the remainder of his employment with the State in which the technical support company has a financial interest in the outcome of the matter to ensure he avoids violating 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 Systems Administrator from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Systems Administrator 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 Systems Administrator does not anticipate engaging in any lobbying activities in his prospective employment with the technical support company. To the extent that his prospective employment with the technical support company would not require him to accept compensation as an executive branch lobbyist during the cooling off period, this restriction would not apply.

Second, the Systems Administrator 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. In this case, the Systems Administrator disclosed that he was involved in the RFP process that resulted in the technical support company’s current contract with the Library; however, he asserts that his participation was minimal in that he was only required to ask technical questions of each vendor and evaluate the accuracy of the technical claims made by the two vendors. The Systems Administrator contends that his superiors made the decision to award the contract to the technical support company and that he was not involved in the negotiation of the contract nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of its administration. Based on this information provided by the Systems Administrator, it does not appear that this restriction would apply to the Systems Administrator’s intended employment with the technical support company.

Third, the Systems Administrator 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 Systems Administrator’s intended employment with the technical support company because he did not make regulatory or licensing decisions affecting the technical support company at any time during his tenure with the State.

Fourth, the Systems Administrator 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 technical support company's offer of employment was extended to the Systems Administrator in an attempt to influence him in his capacity as a state employee. Accordingly, this restriction would not apply to the Systems Administrator's intended employment with the technical support company.

Finally, the Systems Administrator 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 Systems Administrator has identified one matter that may qualify as "particular matter," specifically the current contract between the technical support company and the Library through which the technical support company provides technical support services for the Library's Program installation. According to the Systems Administrator, the technical support company's services are intended to back up his work in serving as the administrator for this installation. Contracts are particular matters identified specifically in I.C. 4-2-6-11(a)(4). As a result, to the extent that the Systems Administrator personally and substantially participated in this matter with the Library, he would be prohibited from assisting or representing any person, including the technical support company, with this contract. In this case, the Systems Administrator indicates that he was personally and substantially involved with the contract the Library has with the technical support company to provide technical support for the Program. Accordingly, he would be prohibited from assisting or representing any person, including the technical support company, with the contract.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Systems Administrator's acceptance of the employment offer from the technical support company would not violate the one year cooling off restriction set forth in I.C. 4-2-6-11. The Commission further finds that the Systems Administrator would be prohibited from representing or assisting any person in any capacity on the contract that is currently in place between the technical support company and the Library.