

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

The IDOA Deputy Commissioner of Procurement was offered employment as the Director of Government Solutions for a managed temporary service provider which held a contract with IDOA during the course of her state employment. Since the Deputy Commissioner represented that she was not involved to any extent on the contract or its amendments while at IDOA, SEC found she would not violate the Postemployment rule's cooling off provision by accepting employment with the provider immediately upon leaving 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 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 Deputy Commissioner of Procurement for the Indiana Department of Administration ("IDOA"). Prior to assuming this position, the Deputy Commissioner worked at IDOA as a Strategic Sourcing Analyst where her primary responsibilities included leading the Request for Proposal process on behalf of state agencies. In October 2010, the Deputy Commissioner was promoted to IDOA Director of Strategic Sourcing where she managed the team of five Strategic Sourcing Analysts. With her next promotion in July 2011 to Deputy Commissioner, the state employee transitioned from a management position to a leadership position which expanded her oversight to include IDOA's Fleet Services Division. She now has eight direct reports responsible for the management of their respective sections.

The Deputy Commissioner is leaving state employment and would like to work as the Director of Government Solutions for a managed temporary service provider. IDOA currently holds a contract with the managed temporary service provider (herein referred to as the "Contract"). This is the only contract IDOA has with the managed temporary service provider. The Deputy Commissioner indicates she had no involvement with the Request for Proposal from which the Contract resulted. In addition, the Deputy Commissioner represents the procurement process was substantially completed prior to the start of her employment with IDOA in May 2008. As is standard in all procurement contracts, the Contract was then established, managed, and administered within the vendor management team. As a Strategic Sourcing Analyst and Director of Strategic Sourcing, the Deputy Commissioner indicates that she was never engaged in the negotiation or administration of the Contract, nor was she in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the Contract.

Regarding IDOA's contract management structure, the Vendor Manager, specifically, is responsible for the negotiation and administration of the Contract, but is not in a position to make discretionary decisions. On the contrary, the IDOA Vendor Manager reports to the Director of Vendor Management who *is* the individual engaged in the negotiation or administration of contracts and is in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of those contracts. While the Deputy

Commissioner, too, is currently in a position to make discretionary decisions on such matters, she indicates that she has not made any discretionary decisions that would affect the outcome of a negotiation or nature of the administration of the Contract. Furthermore, while the Contract has been amended during the course of her employment at IDOA, the Deputy Commissioner indicates that she has had absolutely no involvement with those amendments. She also states that she has not had any participation or interaction with the Contract during her tenure with the State.

ISSUE

What rules in the Code apply to the Deputy Commissioner's intended post-employment opportunity with the managed temporary service provider? 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's intended post-employment with the managed temporary service provider invokes consideration of the provisions in the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Deputy Commissioner's post-employment opportunity 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 by the Deputy Commissioner to the Commission, it does not appear that her intended post-employment opportunity resulted from information of a confidential nature. Accordingly, it is the Commission's opinion that the Deputy Commissioner's acceptance of the managed temporary service provider employment offer would not 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. In this case, the Deputy Commissioner has received an employment offer from the managed temporary service provider. While she does not indicate when she commenced employment negotiations with the managed temporary service provider, the Deputy Commissioner

stated that she has never had any participation or involvement with the Contract. The Deputy Commissioner must continue to abstain from participating in the Contract or in any other decision or vote for the remainder of her employment with the State in which she or the managed temporary service provider has a financial interest in the outcome of the matter to ensure she 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, prevents 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. While the Deputy Commissioner states that she is not seeking employment with the managed temporary service provider as a lobbyist, she should contact the Office of Executive Branch Lobbying to ensure that her intended post-employment with the managed temporary service provider would not require her to register as an executive branch lobbyist. To the extent the Deputy Commissioner ensures compliance with this provision for the entirety of the cooling off period, she would not be in violation of 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. The Deputy Commissioner states that as a Strategic Sourcing Analyst and Director of Strategic Sourcing she was never engaged in the negotiation or administration of the Contract nor was she in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration. She also states that since becoming Deputy Commissioner she has not made any discretionary decisions that affected the outcome of a negotiation or nature of the administration of the Contract. Furthermore, while the Contract has been amended, the Deputy Commissioner indicates that she has had absolutely no involvement with those amendments. She also states that she has not had any participation or interaction with the Contract during her tenure with the State. Based on the Deputy Commissioner’s representation that she was not involved to any extent in matters involving the Contract or its amendments, it does not appear as though she was involved in the negotiation or administration of the Contract—even though she was in a position to make a discretionary decision on such matters—and that this restriction does not apply to her post-employment opportunity with the managed temporary service provider.

Third, the Deputy Commissioner is prohibited from accepting employment for 365 days from the last day of her state employment with an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or

subsidiary. This restriction does not apply to the Deputy Commissioner's intended post-employment with the managed temporary service provider because she did not make regulatory or licensing decisions as a state employee.

Fourth, the Deputy Commissioner is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The information presented to the Commission does not suggest that the managed temporary service provider's offer of employment was extended to the Deputy Commissioner in an attempt to influence her in her capacity as a state employee. Specifically, while the Deputy Commissioner in her current capacity has the ability to make discretionary decisions affecting the negotiation or administration of contracts, she represents that she has not made any decisions affecting the Contract. Moreover, she indicates that she had no involvement or participation in the Contract during her entire tenure with the State. Accordingly, this restriction does not apply to the Deputy Commissioner's intended post-employment with the managed temporary service provider.

Finally, the Deputy Commissioner is subject to the post-employment rule's "particular matter" prohibition in her proposed 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.

In this case, the Deputy Commissioner identified the Contract as a particular matter. While it would not appear that she personally and substantially participated in the Contract as a state employee based on her representation that she never had any involvement with the Contract during her tenure with the State, she has nevertheless voluntarily indicated that she will not work on or assist the managed temporary service provider with the Contract. Should any other particular matters arise in her post-employment with the managed temporary service provider, the Deputy Commissioner must continue to ensure compliance with this restriction.

CONCLUSION

Based on the Deputy Commissioner's representations to the Commission that she never had any involvement in or participated in any way in the Contract or its amendments during her tenure with the State, the Commission finds that her acceptance of the managed temporary service provider's employment offer would not be contrary to I.C. 4-2-6-11. The Deputy Commissioner must, however, continue to observe the one year lobbying restriction and abstain from participating in the Contract or in any other decision or vote for the remainder of her employment with the State in which she or the managed temporary service provider has a financial interest in the outcome of the matter to ensure she avoids violating I.C. 4-2-6-9.

