

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

The Deputy Commissioner of Capital Management for INDOT was offered a position at a consulting firm to which he had approved the award of three contracts on behalf of the INDOT Commissioner. SEC determined that the Postemployment rule's cooling off requirement applied to the Deputy Commissioner because his involvement with the three contracts awarded to the consulting firm amounted to negotiation of the contracts. Specifically, the SEC opined that the Deputy Commissioner had the discretion to question the selection of the consulting firm prior to affixing the Commissioner's signature and that the contracting process with the consulting firm would not have moved forward but for the Deputy Commissioner's actions. Consequently the Deputy Commissioner was prohibited from accepting employment with the consulting firm until after the expiration of 365 days from the last date of leaving state employment. SEC further determined that the Postemployment rule's particular matter restriction applied to the three contracts awarded to the consulting firm in which the Deputy Commissioner personally and substantially participated. Accordingly, he is prohibited from assisting the consulting firm or any other person on these contracts for the life of these matters.

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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

An employee is the Deputy Commissioner of Capital Program Management for the Indiana Department of Transportation ("INDOT"). The Deputy Commissioner recently became aware of a potential employment opportunity at an engineering and construction consulting firm that INDOT does business with regularly. He came before the Commission on July 10, 2014 and received opinion No. 14-I-11 which provided approval for INDOT's procedures to screen the Deputy Commissioner from matters regarding the consulting firm. Since the Commission meeting, the consulting firm has extended an employment offer to the Deputy Commissioner.

The Deputy Commissioner began his employment with INDOT in 2005. Since that time, the Deputy Commissioner has served in a few capacities including Director of the Vincennes District and Deputy Commissioner of Major Programs. He has served in his current capacity since January 2013. In his position as Deputy Commissioner of Capital Program Management he is responsible for supervising all capital project managers, the construction management and inspection staff as well as all utility and rail road coordination staff and activities. As of February 2013, one of his job duties is to approve the final selection of all consultant selection contracts and sign the final approval of the ultimate award to INDOT's consultants on behalf of the Commissioner of INDOT. While he previously reported he had not considered or approved the award of any contracts to the consulting firm since acquiring this new duty, he has discovered that he approved the award of three contracts to the consulting firm on behalf of the INDOT Commissioner in the past. The approval process does not involve the evaluation of the selected companies, their response to the agency's request for qualifications or the scoring of such by INDOT staff. It does not involve the negotiations of the contract, its work products or payment schedule. The Deputy Commissioner has not worked directly with the consulting firm during his tenure with INDOT.

ISSUE

What rules in the Code apply to the Deputy Commissioner's potential post-employment opportunity with the consulting firm? Would the Deputy Commissioner be prohibited from accepting employment with the consulting firm?

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 Commissioner's potential 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 Commissioner's potential employment with the consulting firm is analyzed below.

A. Confidential Information

IC 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 the Deputy Commissioner would utilize confidential information in his potential employment with the consulting firm. So long as any compensation the Deputy Commissioner receives does not result from confidential information, his potential employment with the consulting firm would not appear to violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 (a)(1) prohibits the Deputy Commissioner from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the Deputy Commissioner from participating in any decision or vote in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

The Deputy Commissioner appears to be in compliance with this provision. Specifically, the Deputy Commissioner notified his appointing authority of the potential conflict of interest that would arise if he were to participate in decisions or votes regarding the consulting firm. He also sought and obtained Advisory Opinion 14-I-11, in which the Commission approved the procedures INDOT put in place to screen him from matters regarding the consulting firm since he was going to begin employment negotiations with the company.

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 Commissioner from accepting employment from an employer for 365 days from the date that he 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 the Indiana Department of Administration. The information provided by the Deputy Commissioner does not indicate whether his intended work with the consulting firm would require him to engage in or register as an executive branch lobbyist. To the extent that the Deputy Commissioner does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with the consulting firm would not violate this provision of the post-employment rule.

Second, the Deputy Commissioner 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 provision does not appear to apply to the Deputy Commissioner because he has never made regulatory or licensing decisions that would affect the consulting firm.

Third, the Deputy Commissioner 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. It appears that this restriction applies to the Deputy Commissioner's intended employment with the consulting firm. Specifically, the Deputy Commissioner discloses that his involvement in the three contracts INDOT awarded to the consulting firm since February 2013 was limited to applying the Commissioner's signature to provide the final approval of the selection of the consulting firm for the contract. The term "negotiations" in the Code is not defined. In this case the contracting process with the consulting firm would not have moved forward but for the Deputy Commissioner's actions. It is the Commission's opinion that this involvement is part of the negotiations of the contracts. Moreover, although he did not exercise it, the Deputy Commissioner had the discretion to question the selection of the consulting firm prior to affixing the Commissioner's signature. Accordingly, the one year restriction applies to the Deputy Commissioner intended employment with the consulting firm.

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 him in his official capacity as a state employee. The information presented to the Commission did not suggest that the offer of employment from the consulting firm extended to the Deputy Commissioner was an attempt to influence him in his capacity as a state employee. Specifically, he was screened from any involvement regarding the consulting firm before employment negotiations even began.

Finally, should the Deputy Commissioner gain employment with the consulting firm after the expiration of the one-year cooling off period or obtain a waiver to commence employment with the consulting firm prior to the expiration of the cooling off period, the Deputy Commissioner is still subject to the post-employment rule's "particular matter" prohibition. This restriction

prevents him from representing or assisting a person, including the consulting firm, 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.

There are at least three matters to consider that concern the consulting firm. Specifically, the Deputy Commissioner has been involved in at least three contracts involving the consulting firm. These three matters would qualify as particular matters. His approval of the contracts would appear to be personal and substantial. Accordingly, he would be prohibited from assisting the consulting firm on those three contracts for the life of the contracts.

CONCLUSION

The Commission makes the following findings:

- 1) The one-year cooling off period applies to the Deputy Commissioner's intended employment with the consulting firm.

- 2) The Deputy Commissioner personally and substantially participated in the three contracts he approved between the consulting firm and INDOT. Accordingly, he is prohibited from assisting the consulting firm or any other person on these contracts for the life of these matters.