

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)

The Chairman of the ATC was offered a position as an Ivy Tech campus President. During the Chairman's tenure, the ATC issued alcohol permits to three Ivy Tech campuses as well as Ivy Tech students and allowed Ivy Tech students to obtain alcohol serving permits at a reduced rate. SEC determined that the Chairman must refrain from participating in any decisions or votes in which Ivy Tech has a financial interest for the remainder of his state employment in order to avoid a conflict of interest. SEC further determined the Chairman would not violate the post-employment restrictions found in IC 4-2-6-11 so long as he refrained from lobbying the executive branch for one year after leaving state employment and did not assist or represent Ivy Tech in any particular matters he personally and substantially participated in as a state employee.

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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 the Chairman of the Indiana Alcohol and Tobacco Commission ("ATC"). He wishes to accept an offer of employment extended by Ivy Tech Community College ("Ivy Tech") to serve as President of its Marion, Indiana Campus.

The Chairman has served as the ATC Chairman from May 2011 to the present. By statute, the Chairman is responsible for presiding over ATC meetings and, along with the ATC secretary, is charged with preparing, certifying, and authenticating all ATC proceedings, minutes, records, rules, and regulations. Immediately prior to his tenure as Chairman, the Chairman served as the Superintendent of the Indiana State Excise Police ("Superintendent") for 7 years, from 2004 until May 2011. As Superintendent, he was the chief law enforcement executive for the ATC.

The Chairman has had the following interactions with Ivy Tech during his tenure with the State:

1. **Server Training Program** – While he was Superintendent, during the 2007-2008 legislative session, the General Assembly established a state-wide training program for servers. The Chairman and other ATC representatives had preliminary discussions with Ivy Tech about the college providing such training for all servers. However, the discussions were not successful and ended without any formal action or agreement. Except for these limited discussions and because Ivy Tech did not obtain its first alcohol-related permit until February 2012, the Chairman did not have any other official interactions with Ivy Tech during his tenure as Superintendent.
2. **ATC Memorandum of Understanding ("MOU") with Ivy Tech** - As ATC Chairman, the state employee entered into and signed an MOU with the Ivy Tech President. The MOU, dated November 26, 2012, provides in relevant part that the ATC will allow students enrolled in the Hospitality Curriculum at Ivy Tech campuses throughout the State to apply for and obtain Volunteer Permits at a cost of \$15. Under the statute, a \$15

fee is assessed for applicants seeking to perform volunteer services benefitting a non-profit organization, while other applicants working in the private sector must pay \$45. The MOU was set for a term of two years and is eligible for renewal for additional one year periods under the same terms and conditions unless either party notifies the other that the agreement is not being renewed.

Alcohol Permits to Ivy Tech Campuses - Alcohol permits were issued to the Indianapolis, Muncie, and Ft. Wayne Ivy Tech campuses. In order for a business or entity to obtain a permit to serve alcohol, it must comply with IC 7.1-3-19 *et seq.* Once an entity submits an application, the application is assigned to the local county board to determine the fitness of the applicant and the propriety of granting the application for the particular permit. After completing its investigation, the local board votes on the application and sends its recommendation to the ATC. The relevant statute indicates that the ATC shall follow the recommendation of the local board. The statute also provides that the ATC can reject the finding of the local board if the ATC determines that the recommendation is 1) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law; 2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedures required by law; or 5) unsupported by substantial evidence. To determine if an exception applies, the local board's recommendations are assigned to one of four ATC Commissioners to review. The Chairman did not review any of the Ivy Tech campus permits. The permit recommendations are scheduled for approval at each bi-monthly ATC meeting He did participate in all the votes pertaining to the Ivy Tech campus permits.

Ivy Tech's Ft. Wayne campus' application was approved by the ATC on November 20, 2012. That permit was renewed by the ATC on December 3, 2013.

Ivy Tech's Indianapolis campus permit was approved by the ATC on March 20, 2012, and the ATC voted to renew the permit on March 18, 2014.

Ivy Tech's Muncie campus permit was approved by the ATC on June 24, 2014. This permit is not yet up for renewal.

3. **Student Permits** – The ATC issues employee-server permits to Ivy Tech students. Applications are completed by Ivy Tech students and reviewed by one of four ATC employees known as bartender processors. The Chairman was not involved in the employee-server permit process and had no involvement in the permits received by any Ivy Tech students.

ISSUE

What rules in the Code apply to the Chairman's potential post-employment opportunity with Ivy Tech? Would the Chairman be prohibited from accepting employment with Ivy Tech?

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 Chairman'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 Chairman's potential employment with Ivy Tech is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Chairman 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 Chairman would utilize confidential information in his potential employment with Ivy Tech. So long as any compensation the Chairman receives does not result from confidential information, his potential employment with Ivy Tech would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 (a)(1) prohibits the Chairman 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 Chairman 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."

In Advisory Opinion 10-I-7, the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment. Employment negotiations have commenced in this case. Since employment negotiations have commenced, a conflict of interest would arise for the Chairman if he participates in a decision or vote in which Ivy Tech would have a financial interest. The Chairman disclosed that employment negotiations commenced with Ivy Tech in May 2014. On June 27, 2014, the Chairman participated in a vote to issue the alcohol permit to Ivy Tech's Muncie campus. The Commission does not issue opinions based on past actions. The Commission can only advise the Chairman that he is prohibited from participating in any future decision(s) or vote(s) in which Ivy Tech may have a financial interest, i.e. the MOU with Ivy Tech that is up for renewal in November of this year. While specific screening proposals have not been identified, the Chairman must ensure compliance with the provisions set forth in IC 4-2-6-9(b) for the remainder of his state employment or as long as employment negotiations are pending with Ivy Tech, whichever ceases to occur first.

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 Chairman from accepting employment from an employer for 365 days from the date that he leaves state government under various circumstances.

First, the Chairman 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 Chairman indicates that he is likely to have interactions with the executive branch in his intended employment with Ivy Tech. To the extent that the Chairman’s interactions with the executive branch do not amount to executive branch lobbying for one year after leaving state employment, his intended employment with Ivy Tech would not violate this provision of the post-employment rule.

Second, the Chairman 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 apply to the Chairman despite his participation in the votes to issue alcohol permits to three of Ivy Tech’s campuses. Specifically, because of the various steps associated with the permitting process, the ATC, by statute, must adopt the recommendation made by a local board on whether to issue a permit. Accordingly, it is the Commission’s opinion that, given the specific facts of this permitting process, the Chairman did not personally make regulatory or licensing decisions that directly applied to Ivy Tech.

Third, the Chairman 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. The Commission considers various instruments such as MOUs and grants to be “contracts” for purposes of the Code. In this case, the Chairman negotiated, entered into, and signed an MOU with Ivy Tech. Furthermore, he attended at least one meeting at Ivy Tech to discuss/observe the implementation of the MOU’s substance. Nevertheless, after examining the contents and effect of the MOU, it is the Commission’s opinion that this “MOU” was merely a document that memorialized the ATC’s interpretation of a statute and did not constitute a contract for purposes of the post-employment rule. Accordingly, the one-year restriction would not prohibit the Chairman from accepting employment with Ivy Tech.

Fourth, the Chairman 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 does not suggest that the offer of employment from Ivy Tech was extended to the Chairman in an attempt to influence him in his capacity as a state employee.

Finally, the Chairman is still 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.

The Chairman is prohibited from assisting Ivy Tech or any other employer on any of the particular matters, such as applications or contracts, listed above that he may have personally and substantially worked on during his state employment regardless of whether such matter(s) involved Ivy Tech.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction against executive branch lobbying, the Commission finds the Chairman's acceptance of an employment offer by Ivy Tech would not violate the post-employment restrictions found in IC 4-2-6-11.