

**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 IDEM Section Chief was offered a position by a Company regulated by IDEM. While the Section Chief supervised an Inspector who performed an air compliance inspection at the Company, SEC determined that his involvement in the matters related to the Company did not amount to making a regulatory decision. Consequently, SEC found that the Section Chief's acceptance of an employment offer by the Company would not violate the post-employment rule's cooling off restrictions found in IC 4-2-6-11, but that he is prohibited by the post-employment rule's particular matters restriction from representing or assisting the Company with the inspection he supervised and the violation letters he signed.

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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 Section Chief for the Air Compliance and Enforcement Branch in the Office of Air Quality ("OAQ") of the Indiana Department of Environmental Management ("IDEM"). The Section Chief's staff consists of seven Compliance and Enforcement Managers (a.k.a. Inspectors) and two Administrative staff. He also co-manages five Inspectors assigned to regional offices.

Recently, Allison Transmission ("Allison") offered the Section Chief an Environmental Engineer position at its main campus in Speedway. The primary responsibility of this position is to ensure that Allison facilities operate in continuous compliance with its air operating permits.

**Compliance Inspection**

The Inspectors the Section Chief supervises conduct inspections at entities that hold air operating permits issued by IDEM. The purpose of the inspections is to determine if the permitted sources are operating in compliance with the provisions of their permits. Inspectors in IDEM's OAQ are assigned by county, and two Inspectors that report to the Section Chief are assigned to Marion County. One of these Inspectors is assigned to Allison's facilities.

Based on IDEM's agreement with the U.S. Environmental Protection Agency ("EPA"), facilities with a Title V permit, like Allison, are required to be inspected at a minimum of every two years. The Allison facilities were inspected in November of 2011 to comply with EPA requirements and a routine inspection was scheduled for October 30, 2013.

One of the performance measures for the Section Chief's position is a requirement to observe each Inspector conducting field activities one day per year, including inspections, surveillance and complaint response. To meet this requirement, the Section Chief accompanied the assigned Inspector during the air compliance inspection at Allison on October 30, 2013. The Section Chief's role during the inspection at Allison was only to observe and evaluate the Inspector's job

performance. As is his practice, he explained his role to the Allison representative who joined the inspection.

The Inspector's role was to decide whether Allison was complying with their air permit. This role is stated in the standard job description for an Inspector that states, in relevant part, "he/she makes independent compliance and enforcement decisions in the field by applying agency, office and branch guidelines and policies. Deviations from these guidelines and policies are discussed with the supervisor (Section Chief)." The job description also states that the "incumbent in this position is required to observe, analyze and evaluate public and environmental health conditions, then makes decision utilizing broad and extensive knowledge to determine compliance and suggest recommendations for action."

The Inspector's conclusions were that no violations of air pollution rules or of Allison's air permit were observed or determined. An inspection summary letter indicating that no violations were observed was sent to Allison on November 18, 2013. Prior to issuing the inspection summary letter, the Section Chief reviewed the letter and the Inspector's report for technical accuracy, completeness, and grammar.

### **Warning Letters**

On April 5, 2013, the OAQ received Allison's 2012 Annual Compliance Certification ("ACC"). In the ACC, Allison self-reported a deviation from the requirements of its Title V permit. In response, IDEM issued a violation letter to Allison which was prepared by the Inspector and signed by the Section Chief.

On March 13, 2014, the OAQ received Allison's 2013 ACC. In the ACC, Allison self-reported a deviation from the requirements of their Title V permit. In response, IDEM issued a violation letter which was prepared by the Inspector and signed by the Section Chief.

IDEM's Non-Rule Policy Document titled "Compliance and Enforcement Response Policy" ("CERP"), authorized by the IDEM Commissioner, defines three classes of violations and prescribes the appropriate enforcement response for each violation. The violations cited in the Allison violation letters are Class III violations. The CERP defines the role of the Section Chief in the enforcement process as follows:

- 5.2 The compliance and enforcement program section chiefs supervising compliance staff shall:
  - 5.2.1 Ensure appropriate class of violation is consistent with this policy;
  - 5.2.2 Monitor and ensure deadlines are met;
  - 5.2.3 Sign all inspection summary/violation letters of referrals and send within designated timeframes; and
  - 5.2.4 Sign off on all referral and route to appropriate branch chief.

Since Allison contacted the Section Chief about the position, he has had no involvement with the company in the course of his duties.

## ISSUE

What rules in the Code apply to the Section Chief's post-employment opportunity with Allison? Specifically, has the Section Chief made a regulatory decision that directly applied to Allison?

## 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 Section Chief's 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 Section Chief's employment offer with Allison is analyzed below.

#### *A. Confidential Information*

IC 4-2-6-6 prohibits the Section Chief 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. So long as any compensation the Section Chief receives does not result from confidential information, his employment with Allison would not appear to violate IC 4-2-6-6.

#### *B. Conflicts of Interest*

IC 4-2-6-9(a)(1) prohibits the Section Chief 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 Section Chief 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. Since there has been an offer of employment, employment negotiations have commenced in this case. Therefore, a conflict of interest would arise for the Section Chief if he participates in a decision or vote in which Allison would have a financial interest.

IC 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. In this case, the Section Chief requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his agency ethics officer. So long as he discloses the potential conflict to his appointing authority, he would be in compliance with this provision.

IC 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, the Section Chief stated that he has had no involvement with Allison in the course of his duties since being contacted about the position. Specifically, there were no pending matters related to Allison that the Section Chief would be required to be involved in. So long as he does not have any involvement in matters related to Allison for the remainder of his state employment, he would not be in violation of this provision.

### *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 Section Chief under certain circumstances, from accepting employment from an employer for 365 days from the date that he leaves state employment.

First, the Section Chief 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 Section Chief does not indicate whether his intended work with Allison would require him to engage in executive branch lobbying or register as an executive branch lobbyist. To the extent that the Section Chief does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with Allison would not violate this provision of the post-employment rule.

Second, the Section Chief 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. This restriction does not apply in this case because the Section Chief never negotiated nor administered a contract with Allison on behalf of the State.

Third, the Section Chief 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. In this case, the job description attached to his request for an advisory opinion indicates that the Section Chief's responsibilities include “manag[ing] compliance and enforcement of regulated entities consistent with state and federal laws and regulations, branch and agency policies, guidance, and SOPs” and “mak[ing]

independent compliance and enforcement decisions by applying state and federal laws and regulations, branch and agency policies, guidance, and SOPs.” In addition, the Section Chief observed and evaluated the Inspector during Allison’s October 30, 2013 inspection. He also reviewed the Inspector’s report and letter for technical accuracy and completeness and ultimately approved the Inspector’s findings and decision regarding Allison’s compliance with the applicable regulations. In addition, the Section Chief signed two violation letters to Allison as part of his duties to ensure the appropriate class of violation is issued pursuant to the CERP. Based on the information provided, the Commission finds that the Section Chief’s involvement in the matters related to Allison do not amount to making a regulatory decision.

Fourth, the Section Chief 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 offer of employment from Allison was extended to the Section Chief in an attempt to influence him in his capacity as a state employee. According to the Section Chief, the Environmental Engineer position was publicly advertised and six individuals were interviewed for the position. Furthermore, he asserts that he has had no involvement with Allison in the course of his duties since being contacted about the position.

Finally, the Section Chief 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.

There are at least three matters to consider. Specifically, the Section Chief was involved in Allison’s October 30, 2013 inspection. He also signed two violation letters issued to Allison. These matters would qualify as determinations. Based on the information provided, it appears that the Section Chief’s participation was personal and substantial in all three matters. Accordingly, he is prohibited from assisting Allison in anything related to these matters.

## **CONCLUSION**

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