

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 Deputy Chief of Staff in the Governor's Office had previously served as Senior Policy Director in the Governor's. She received Advisory Opinion No. 13-I-26 from the SEC in 2013 approving her intention to return to work at a law firm. The Deputy Chief of Staff, however, decided to remain in state employment. SEC found that the Deputy Chief of Staff had not been involved in any matters within her duties as Deputy Chief of Staff that would change the original analysis and reaffirmed its findings in Advisory Opinion No. 13-I-26 that none of the postemployment restrictions found in IC 4-2-6-11 would apply to the Deputy Chief of Staff's employment opportunity with the Firm.

July 2014
No. 14-I-9

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 is the Deputy Chief of Staff in the Office of the Governor ("Governor's office"). The Deputy Chief of Staff previously served as Senior Policy Director in the Governor's office from January 13, 2013 through June 30, 2013. She appeared before the Commission on June 13, 2013 and received approval to return to a local law firm. After receipt of Advisory Opinion No. 13-I-26 from the Commission, the Deputy Chief of Staff decided to remain in state employment and serve in her current capacity.

Prior to accepting employment with the State on January 13, 2013, the Deputy Chief of Staff was a member of the local law firm for sixteen years, most recently a partner in its Tax Group. While at the local law firm, the Deputy Chief of Staff represented charitable and governmental clients, focusing on corporate governance and tax issues. The Deputy Chief of Staff's position at the local law firm did not involve any lobbying of either the executive or legislative branch.

The local law firm has extended a general offer to the Deputy Chief of Staff to return to the firm as a partner. She has accepted the offer subject to the condition that the Commission approves her return to the local law firm. Her return would also be subject to an affirmative vote of the local law firm's equity partner which occurred on July 7, 2014. The Deputy Chief of Staff's duties at the local law firm would include the provision of legal, consulting and tax advice to the local law firm's clients, primarily its charitable and governmental clients. She will not engage in either executive or legislative branch lobbying.

As Deputy Chief of Staff, the state employee's duties included (a) oversight and management of executive agencies, cabinet, boards and commissions; (b) management of personnel process for selection of agency heads and performance evaluation process; and (c) input regarding policy, legislative and communications strategies for the Governor and executive agencies. Her responsibilities with the Governor's Office never included negotiating or administering a

contract or grant or making regulatory or licensing decisions on behalf of any company or organization, including the local law firm.

As Deputy Chief of Staff, the state employee was responsible for overseeing and managing the executive branch agencies. In this capacity, she oversaw the creation of the Center for Education and Career Innovation, served as a liaison to the Department of Education and State Board of Education, and provided oversight for other executive branch education agencies including the Commission on Higher Education, Department of Workforce Development, Education Roundtable, and Indiana Charter School Board (collectively, the “Education Agencies”). The Deputy Chief of Staff provided input on education policy and related legislation, staffing decisions, and fiscal, operational and communication strategies. While her participation was personal and substantial, it did not involve any of the twelve particular matters enumerated I.C. 4-2-6-11(a)(1)-(12).

Throughout her service with the Governor’s office, the Deputy Chief of Staff has not participated in any decisions or votes that would financially benefit the local law firm directly. The vast majority of her work involved policy recommendations of general applicability or management of executive agencies on issues that were internal to the operation of state government. She has participated in four issues that might be construed as particular matters that the local law firm has had some involvement with during her tenure with the State. Those issues are: 1) SEA 510, 2) SEA 91, 3) the Healthy Indiana Plan (“HIP”)/Medicaid Expansion, and 4) general K12 education matters.

In its 2013 Advisory Opinion, the Commission ruled that the following three matters did not constitute a “particular matter” for purposes of restricting the Deputy Chief of Staff’s participation upon returning to the Local law firm: 1) SEA 510, 2) SEA 91 and 3) the Healthy Indiana Plan (“HIP”)/Medicaid Expansion. In addition, the Commission ruled that the Deputy Chief of Staff would not be precluded from providing legal, consulting or tax services to the State or its agencies, should the opportunity arise.

The local law firm has numerous contracts with the State to perform a variety of legal work. The Deputy Chief of Staff, however, has not been involved in the negotiation or administration of any contracts between the local law firm and the State or any of its agencies while working with the Governor’s Office. The Governor’s General Counsel handles all contracts or engagements with outside law firms, and the Deputy Chief of Staff was not involved in any discussions with him on these matters. The Deputy Chief of Staff was involved in a few meetings with representatives from the local law firm and their clients during the legislative session to give or receive input on pending legislation. However, the Deputy Chief of Staff was never involved in any contract, grant, regulatory or licensing decision that involved the local law firm or any of its clients while in her state role.

ISSUE

- 1) What rules in the Code would apply to the Deputy Chief of Staff’s intended employment opportunity with the local law firm, and would her acceptance of the offered position subject her to any post-employment restrictions under I.C. 4-2-6-11?

- 2) Are the Commission's findings in Advisory Opinion No. 13-I-26 reaffirmed in light of the state employee's additional duties as Deputy Chief of Staff?

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 Chief of Staff's intended employment with the local law firm invokes consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Deputy Chief of Staff is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Deputy Chief of Staff 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, including the Deputy Chief of Staff's contention that the local law firm's offer was extended on the basis of her past employment relationship with the local law firm, it does not appear that the local law firm's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Deputy Chief of Staff's intended employment with the local law firm does not violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Deputy Chief of Staff 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, it appears that the Deputy Chief of Staff has an arrangement for prospective employment with the local law firm. Accordingly, the Deputy Chief of Staff would be prohibited from participating in any decision or vote in which she or the local law firm would have a financial interest in the outcome of the matter. The state employee indicates that she has not participated in any vote or decision in which the local law firm has a financial interest during her tenure as Deputy Chief of Staff. To the extent that the Deputy Chief of Staff has complied with this provision and continues to abstain from participating in any decision or vote in which she or the local law firm has a financial interest in the outcome of the matter for the remainder of her state employment, and ensures compliance with I.C. 4-2-6-9(b) if a potential conflict of interest arises, the Commission finds that the Deputy Chief of Staff's intended employment with the local law firm does not violate 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 Deputy Chief of Staff from accepting employment for 365 days from the date that she leaves state government under various circumstances.

First, the Deputy Chief of Staff 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 Deputy Chief of Staff does not anticipate engaging in any lobbying activities in her prospective employment with the local law firm. To the extent the Deputy Chief of Staff ensures compliance with this provision for the entirety of the cooling off period, the Commission finds that the Deputy Chief of Staff’s intended employment does not violate this provision.

Second, the Deputy Chief of Staff 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. In this case, the Deputy Chief of Staff indicates that she has never negotiated or administered a contract with the local law firm on behalf of the State. Accordingly, the Commission finds that this restriction does not apply to the Deputy Chief of Staff’s intended employment with the local law firm.

Third, the Deputy Chief of Staff is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The Commission finds that this restriction does not apply to the Deputy Chief of Staff’s intended employment with the local law firm because she did not make regulatory or licensing decisions affecting the local law firm at any time during her tenure with the State.

Fourth, the Deputy Chief of Staff 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 local law firm’s offer of employment was extended to the Deputy Chief of Staff in an attempt to influence her in her capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the Deputy Chief of Staff’s intended employment with the local law firm.

Finally, the Deputy Chief of Staff is subject to the post-employment rule’s “particular matter” prohibition in her prospective 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 Advisory Opinion 13-I-26, the Deputy Chief of Staff identified three different matters that could have qualified as particular matters. Specifically, she identified SEA 510 and SEA 91. The Commission found that both matters were exempt from the application of the particular matter restriction. There have been no changes in the state employee's duties as Deputy Chief of Staff since the issuance of that opinion that would change this analysis. The third matter the Deputy Chief of Staff identified in her previous advisory opinion pertained to the HIP/ Medicaid Expansion. Similarly, the Commission found that the particular matter restriction did not apply to that matter because the Deputy Chief of Staff's involvement was limited and that the HIP/ Medicaid Expansion matter did not qualify as a particular matter. Again, the state employee has not been involved in anything within her duties as Deputy Chief of Staff since the opinion was issued that would change this analysis. Accordingly, the Commission now reaffirms these findings.

Moreover, while the Deputy Chief of Staff was involved in the creation of the Center for Education and Career Innovation, she served as a liaison to the Department of Education and State Board of Education, and provided oversight for the Education Agencies. The Deputy Chief of Staff primarily provided input on education policy and related legislation, staffing decisions, and fiscal, operational and communication strategies. This did not involve any of the twelve particular matters enumerated I.C. 4-2-6-11(a)(1)-(12). Accordingly, the particular matter restriction would not apply to these matters.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Deputy Chief of Staff may accept employment with the local law firm immediately upon leaving state employment. Moreover, the Commission finds that the particular matter restriction would not prevent the Deputy Chief of Staff from working on any of the matters identified and discussed herein. Finally, because the post-employment restrictions set forth in I.C. 4-2-6-11 apply to the local law firm and not its clients, the Deputy Chief of Staff would not be prohibited from performing work for the State or its agencies in her intended employment with the local law firm.