

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 OUCC employee was offered a position with a utility company. During the employee's tenure at the OUCC, the only matter she participated in was the review of financial data submitted by the company in a rate case before the IURC, the decision-making authority for utilities. SEC determined that the employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and that she could go to work immediately for the utility company so long as she complied with the executive branch lobbying restriction. SEC further found that the employee's participation in the rate case was personal and substantial enough that the post-employment rule's particular matter restriction prohibited her from assisting or representing the utility company in this rate case for the life of the matter.

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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 a Utility Analyst II with the Natural Gas Division of the Office of Utility Consumer Counselor ("OUCC"). The Utility Analyst began this position with the OUCC in June of 2012. The Utility Analyst's responsibilities include reviewing and analyzing natural gas utilities' Gas Cost Adjustment petitions and flex filings filed with the Indiana Utility Regulatory Commission ("IURC"). The Utility Analyst also participates as a team member in the review of base rate, certificate of public necessity, alternative regulatory plan, pipeline safety adjustment, and other natural gas utility cases. The Utility Analyst does not have the authority to set or influence rates charged by utility companies.

In early 2015, the Utility Analyst participated in the review of financial data submitted by the Indianapolis Power and Light Company ("IPL") in its current rate case. According to the Utility Analyst, her participation in this case was limited to reconciling and obtaining support from IPL for certain general ledger accounts, such as Other Customer Charges, Real Estate and Personal Property Taxes, Materials and Supply Inventory, and other miscellaneous items. The Utility Analyst's work was subject to the review of two team leaders on the case and the Utility Analyst specifically discussed her results with one of those leaders. The Utility Analyst's last participation on the IPL case occurred on March 4, 2015, when she attended a case team meeting.

Prior to joining the OUCC, the Utility Analyst worked for AES Corporation, which is IPL's parent company. On or about May 1, 2015, the Utility Analyst was contacted by her former AES manager. He mentioned to the Utility Analyst that two positions for Sarbanes-Oxley reviewers would be added to the IPL website. The Utility Analyst notes her former manager clearly stated that his notification of the openings to her was not an indication that she would be the individual selected for either position. The Utility Analyst submitted her resume to AES/IPL and her former supervisor on Monday, May 4, 2015.

The Utility Analyst was contacted by AES/IPL Human Resources on May 22, 2015. At that time, they informed the Utility Analyst that she had been selected to move forward in the selection process and that she was invited to complete an online application. The Utility Analyst completed the online application on May 25, 2015, but did not hear anything from AES/IPL until July 16, 2015, when she was contacted by the Director of AES/IPL's Human Resource Operations. The Director indicated to the Utility Analyst that AES/IPL would like her to come in for an interview but that she would not be able to do so until she had an opinion from the Commission stating that discussing a potential position with AES/IPL would not violate the Code. The Utility Analyst obtained an informal advisory opinion ("IAO") from the Indiana Office of Inspector General. Since receiving the IAO, the Utility Analyst interviewed with AES/IPL personnel and has been offered a position subject to a formal advisory opinion from the Commission that such employment would not violate the Code. The Utility Analyst has not worked on any projects related to AES/IPL, or any other subsidiary, since the team meeting on the IPL case in early March.

As a Sarbanes-Oxley Specialist, the Utility Analyst would be working on Sarbanes-Oxley testing related to the control system that underlies the integrity of the financial statements. She would not have influence on regulatory matters with the State of Indiana. The Utility Analyst does not anticipate engaging in any lobbying activities as part of her prospective job duties as a Sarbanes-Oxley Specialist. Further, the Utility Analyst would not be working on IPL's rate case in her prospective position with AES/IPL.

ISSUE

What rules in the Code apply to the Utility Analyst's post-employment opportunity with AES/IPL? Would the Utility Analyst be prohibited from working for AES/IPL immediately upon leaving state employment?

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; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter related to that 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 member, 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 ethics officer in writing and do either of the following:

(1) 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:

(A) 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

(B) 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.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed no later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) 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; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

(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.
- (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) 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 the individual's 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) consultation by;
- (3) representation by; or
- (4) 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 the following:

- (1) A special state appointee who serves only as a member of an advisory body.

- (2) A former state officer, employee, or special state appointee who has:
 - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
 - (B) any contract that:
 - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
 - (ii) is no longer active.

(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. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.
 - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
 - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

- (1) be signed by the former state officer, employee, or special state appointee;
 - (2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and
 - (3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.
- (j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

ANALYSIS

The Utility Analyst's post-employment opportunity with AES/IPL implicates the provisions of the Code pertaining to confidential information, conflict of interests, and post-employment. The application of each provision to the Utility Analyst's prospective employment with AES/IPL is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Utility Analyst 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 Utility Analyst would utilize confidential information in her potential employment with AES/IPL. Accordingly the Commission finds that the Utility Analyst's intended employment with AES/IPL does not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9(a)(1) prohibits the Utility Analyst from participating in any decision or vote, or matter related to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the Utility Analyst from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom she 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 this case employment negotiations have already begun as the Utility Analyst indicated that AES/IPL has offered her the Sarbanes-Oxley Specialist position. Accordingly, the Utility Analyst would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which she, by virtue of her employment negotiations with AES/IPL, or AES/IPL would have a financial interest in the outcome of the matter.

The Utility Analyst indicates that she last worked on a matter involving AES/IPL on March 4, 2015. She did not begin employment negotiations until May of 2015. To the extent that the Utility Analyst has fully complied with this provision and continues to abstain from participating in any decision or vote, or matter related to any such decision or vote, in which she or AES/IPL has a financial interest in the outcome of the matter for the remainder of her state employment, and ensures compliance with IC 4-2-6-9(b) if a

potential conflict of interest arises, the Commission finds that her intended employment with AES/IPL does not violate IC 4-2-6-9.

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 Utility Analyst from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances.

First, the Utility Analyst 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 Utility Analyst does not anticipate engaging in any lobbying activities in her prospective employment with AES/IPL. To the extent the Utility Analyst ensures compliance with this provision for the entirety of the cooling off period, the Commission finds that the Utility Analyst’s intended employment does not violate this provision.

Second, the Utility Analyst 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. Nothing in the information provided indicates that the Utility Analyst ever made any regulatory or licensing decisions that directly applied to AES/IPL at any time during her state employment. Specifically, while she participated in the review of financial data in IPL’s rate case and provided a report on the matter to her supervisors, the Utility Analyst did not make any regulatory decisions in this process as decision-making power lies with the IURC. Further, her position with the OUCC does not afford her any authority to set or influence rates charged to IPL or any other utility’s customers. The Commission finds that this restriction does not apply to the Utility Analyst’s intended employment with AES/IPL because she did not make regulatory or licensing decisions affecting AES/IPL at any time during her tenure with the State.

Third, the Utility Analyst 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 Utility Analyst indicates that she has never negotiated or administered a contract with AES/IPL on behalf of the State. Accordingly, the Commission finds that this restriction does not apply to the Utility Analyst’s intended employment with AES/IPL.

In addition, IC 4-2-6-11(h) extends the post-employment rule’s cooling off period to an employee who made decisions as an administrative law judge or presided over information gathering or order drafting proceedings that directly applied to the employer or to a parent or subsidiary of the employer in a material manner. Though the Utility

Analyst had limited involvement in the financial data review aspect of a case before the IURC, the Utility Analyst does not make decisions as an administrative law judge or preside over information gathering or order drafting proceedings. Therefore, the Commission finds that this provision does not apply to the Utility Analyst.

Fourth, the Utility Analyst 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 offer of employment from AES/IPL was extended to the Utility Analyst 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 Utility Analyst's intended employment with AES/IPL.

Finally, the Utility Analyst 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.

The Utility Analyst participated in IPL's rate case. The Utility Analyst has indicated that her prospective job responsibilities with AES/IPL will not include any work on this matter. The Commission finds this case to be a particular matter and that the Utility Analyst's participation in these matters appeared to be personal and substantial enough that she is prohibited from assisting or representing AES/IPL in this case for the life of the matter.

In addition, the Utility Analyst should keep in mind that she is prohibited from assisting AES/IPL or any other person on any of the particular matters listed above that she may have personally and substantially worked on during her state employment regardless of whether it involves AES/IPL.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the Utility Analyst's acceptance of an employment offer by AES/IPL would not violate the post-employment restrictions found in IC 4-2-6-11 so long as she refrains from assisting or representing AES/IPL in the identified particular matter for the life of this matter.