

**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 ICRC Executive Director was offered a position by a public school district. The Executive Director was not directly involved in any matters concerning the school district as a state employee. Because employment negotiations had begun, SEC found that the Executive Director should be screened from all matters related to the school district for the remainder of his state employment to avoid a conflict of interests under IC 4-2-6-9. SEC determined that the employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and that he could go to work immediately for the school district so long as he complied with the executive branch lobbying restrictions. SEC further found that the Executive Director must refrain from assisting or representing the school district 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 Executive Director of the Indiana Civil Rights Commission (“ICRC”). The former Governor originally appointed the Executive Director as a Senior Advisor in 2008 and subsequently appointed the state employee as the Executive Director of ICRC in 2010, the role he currently holds. As Executive Director the state employee has focused on ensuring the inclusion of Indiana’s most underrepresented populations. His responsibilities in this role include: establishing the overall strategic vision and focus of the ICRC, creating metrics to measure the effectiveness and efficiency of the agency as a whole, and ensuring the footprint of the agency is established statewide per its statutory obligations. Interaction with public schools is limited and revolved around general education and outreach efforts.

The Executive Director has recently begun negotiations for potential employment with the Indiana Public School district (“IPS”). The Executive Director filed a Conflict of Interest – Decisions and Voting Disclosure form on September 23, 2015, to disclose that his private company was negotiating a contract to provide services to IPS. The disclosure indicated that the Executive Director has been screened from any matters within the ICRC involving IPS. This screen includes the Executive Director being restricted from accessing all IPS files stored locally and electronically at the ICRC and while his regular duties at the ICRC do not regularly include dealing with IPS related issues, the screen requires that he delegate his authority to the ICRC Deputy Director and General Counsel should any IPS matters require his involvement. These contract negotiations have led to a potential full-time employment opportunity for the Executive Director with IPS.

The Executive Director’s prospective position with IPS would involve managing the district’s athletic programs. More specifically, the Executive Director would be managing the scheduling, equipment and facilities for these programs. The overall goal of this position is to create a culture of sport and extracurricular activity that involves more young people and supports the belief that

participation in sport and extracurricular activity positively impacts those involved. This position would not require the Executive Director to address any issues or cases pending before the ICRC or any state or federal courts.

The Executive Director has indicated that the potential employment position with IPS would not require him to register as an executive branch lobbyist. According to the Executive Director, the ICRC is charged with investigating and disposing of complaints of discrimination by educational institutions, such as IPS. The state employee, as Executive Director of the ICRC, is not involved in the investigation, decision-making, or voting to dispose of complaints of discrimination. The Executive Director has restricted access to discrimination cases with the exception of housing cases and has no involvement in the issuance of final determinations unless it is a cause finding in a housing case. The Deputy Director/Chief of Staff and General Counsel issues all final determinations (notices of finding) with the exception of cause findings for housing cases. Further, there are no existing contracts between the ICRC and IPS nor does the ICRC have any contracts with any other entity through which IPS received benefits, tangentially or otherwise.

### **ISSUE**

What rules in the Code apply to the Executive Director's post-employment opportunity with IPS? Would the Executive Director be prohibited from working for IPS 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 Executive Director's post-employment opportunity with IPS implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Executive Director's prospective employment with IPS is analyzed below.

#### *A. Confidential Information*

IC 4-2-6-6 prohibits the Executive Director from accepting any compensation from any employment, transaction, or investment that 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 Executive Director would utilize confidential information in his potential employment with IPS. So long as any compensation the Executive Director receives does not result from confidential information, his potential employment with IPS would not violate IC 4-2-6-6.

#### *B. Conflicts of Interest*

IC 4-2-6-9(a)(1) prohibits the Executive Director from participating in any decision or vote, or any matter related to such 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 Executive Director from participating in any decision or vote, or matter related to such 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 this case the Executive Director's employment negotiations with IPS have already begun. Accordingly, a conflict of interest would arise for the Executive Director if he participates in a decision or vote in which either he, by virtue of his employment negotiations with IPS, or IPS 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 Executive Director submitted a Conflicts of Interest – Decisions and Voting disclosure form pursuant to IC 4-2-6-9(b)(2) and has disclosed the potential conflict to his appointing authority, in this case the Governor's Office because of the state employee's position as the Executive Director of the ICRC.

As part of this disclosure, the Executive Director provided a description of the screening mechanism in place to exclude the Executive Director from any matters at the ICRC involving IPS. The Executive Director is restricted from accessing all IPS files stored locally and electronically at the ICRC and his authority on all matters concerning IPS has been delegated to the ICRC Deputy Director and General Counsel. This screen was first initiated when the Executive Director's private company was negotiating a contract with IPS and has remained in place since the negotiations evolved into employment negotiations for a full-time position with IPS.

The Executive Director's normal job responsibilities do not require him to be involved in matters concerning IPS. However, because a conflict of interest would arise for the Executive Director if he were to participate in a decision or vote, or matter related to such decision or vote, in which IPS has a financial interest, the Commission advises that the screen remain in place in case such a matter would arise during the remainder of the Executive Director's state employment.

### *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 Executive Director from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

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

Second, the Executive Director 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 Executive Director has indicated that he has not made any regulatory or licensing decisions regarding IPS or any of its subsidiaries during his tenure with the ICRC. Though the ICRC investigates and disposes complaints of discrimination by educational institutions, the Executive Director is not involved in the disposition of such complaints. The ICRC's Deputy Director makes the final determination in all cases involving discrimination complaints except for housing cases; the Executive Director issues the findings in housing cases. Consequently this provision would not prohibit the Executive Director from working for IPS immediately upon leaving state employment.

Third, the Executive Director 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 prohibition would not apply to the Executive Director as he indicated that the ICRC does not have any contracts with IPS and he has not negotiated or administered a contract with IPS on behalf of the State.

Fourth, the Executive Director 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 an offer of employment from IPS would be extended to the Executive Director in an attempt to influence him in his capacity as a state employee.

Finally, the Executive Director 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.

Although the Executive Director has not identified any particular matters in which he anticipates working on in his intended post-employment opportunity with IPS, he must continue to ensure compliance with this restriction and refrain from assisting any person in any particular matter(s) he personally and substantially participated in as a state employee.

### **CONCLUSION**

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the Executive Director's acceptance of an employment offer by IPS would not violate the post-employment restrictions found in IC 4-2-6-11 so long as he refrains from assisting or representing IPS in any particular matter(s) he personally and substantially participated in as a state employee.