

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

The former Executive Director of the IBD was offered a position by a Bank. The Bank was required to provide collateral and the former Executive Director made the collateral determination and signed the required agreements. While the former Executive Director signed the pledge agreement and the custody and control agreement with the Bank, the SEC determined that his actions did not amount to the negotiation of a contract because both agreements were non-negotiable and had to be signed as-is. The SEC further found that the former Executive Director's determination that the Bank was required to provide 50% collateral did not amount to making a regulatory decision as the determination was made using the Thompson Reuter's Bank Insight ratings. Consequently, SEC found that the former Executive Director's acceptance of an employment offer by the Bank 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 Bank with the collateral requirement determinations as his participation in these matters as a state employee was personal and substantial.

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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 former state employee was the Executive Director for the Indiana Board for Depositories ("IBD" or "Board"). The IBD is responsible for protecting public funds, which includes a collateral program. The former Executive Director has been in discussions with a bank ("Bank") about possible employment. He is interested in an Information Technology position which would not likely be related to public fund investment or government relations. The Bank was required to provide collateral. The collateral determination was made using the Thompson Reuters' Bank Insight ratings. To determine collateral requirements, the former Executive Director first downloaded the bank insight rating from Thompson Reuters for each approved depository. Then he compared the ratings to the collateral requirement matrix. If a depository had a rating between 0 and 19 it was required to provide 100% collateral for the next quarter. If a depository had a rating between 20 and 39 it was required to provide 50% collateral for the next quarter. If a depository had a rating above 39 it was not required to provide collateral. The former Executive Director then sent a letter with his signature informing the depository of the collateral requirement. He sent an email to the depository if it was not required to provide collateral.

Once it was determined a depository was required to provide collateral the depository was also required to sign a pledge agreement and may have been required to sign a custody and control agreement depending on how it was going to provide the collateral. The former Executive Director signed both agreements. The agreements, however, were non-negotiable and had to be signed as-is. In addition, a depository could have provided a letter of credit through the federal home loan bank. There was no direct agreement between the depository and the IBD on the letter of credit. If a depository failed to adhere to either agreement the Board had the power to remove the depository from the list of approved depositories which made the depository ineligible to hold public funds. The former Executive Director does not believe the authority to remove a

depository from the list was ever delegated to the executive director position. Also, the former Executive Director did not have any other enforcement mechanism. The only action he could have taken independently was to contact the depository and discuss the situation.

The former Executive Director did not have the authority to waive, lower or increase the collateral requirement. The rules and process were created to rely on an outside rating agency so that there was no appearance of favoritism by the IBD or the Treasurer of State. The former Executive Director responded to questions about the collateral program and public funds investing rules, though nothing he said on coverage or legality of public funds investment carried the weight of law as coverage is determined by the Auditor of State and the Attorney General after a depository closed.

The former Executive Director sent communications via email or letter to the Bank indicating its collateral requirements for the quarter. In addition, he had at least one phone conversation with the Bank's President. The former Executive Director recalls the President had questions as to why the Bank was required to provide collateral and about the process involved. The Bank was required to provide 50% collateral at the time. He does not recall the timing of this conversation but it was at least 6 months ago.

ISSUE

What rules in the Code apply to the former Executive Director's post-employment opportunity with the Bank? Specifically, has the former Executive Director made a regulatory decision that directly applied to the Bank?

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. 4-2-6-11 (42 I.A.C. 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 former Executive Director's post-employment opportunity implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the former Executive Director's employment offer with the Bank is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the former Executive Director 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, since he is interested in an Information Technology position which would not likely be related to public fund investment or government relations, it does not appear that the former Executive Director would utilize confidential information in his employment with the Bank. So long as any compensation the former Executive Director receives does not result from confidential information, his employment with the Bank would not appear to violate I.C. 4-2-6-6.

B. 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 or revolving door period prevents the former Executive Director, under certain circumstances, from accepting employment from an employer for 365 days from the date he left state employment.

First, the former 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. It does not appear that the former Executive Director would serve as a lobbyist in his intended Information Technology position with the Bank. To the extent that the former Executive Director does not engage in executive branch lobbying for one year after he left state employment, his intended employment with the Bank would not violate this provision of the post-employment rule.

Second, the former 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 restriction does not apply in this case because the former Executive Director never negotiated nor administered a contract with the Bank on behalf of the State. Specifically, both the pledge agreement and the custody and control agreement were non-

negotiable and had to be signed as-is. Also, the former Executive Director had no authority to remove a depository from the approved list.

Third, the former 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 former Executive Director made collateral determinations using the Thompson Reuters' Bank Insight ratings. First, he downloaded the bank insight rating for each approved depository. Then he compared the ratings to the collateral requirement matrix. If a depository had a rating between 0 and 19 it was required to provide 100% collateral for the next quarter. If a depository had a rating between 20 and 39 it was required to provide 50% collateral for the next quarter. If a depository had a rating above 39 it was not required to provide collateral. The former Executive Director then sent a letter with his signature informing the depository of the collateral requirement. He sent an email to the depository if it was not required to provide collateral. Based on the information provided, the Commission finds that the former Executive Director's determination that the Bank was required to provide 50% collateral did not amount to making a regulatory decision.

Fourth, the former 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. Since the former Executive Director is no longer a state employee and did not begin employment discussions with the Bank until his state service ended, this restriction does not apply.

Finally, the former 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.

The former Executive Director participated in collateral requirements. These matters would qualify as determinations. Based on the information provided, it appears that the former Executive Director participation was personal and substantial in all collateral requirement decisions. Accordingly, he is prohibited from assisting the Bank in anything related to these matters.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the former Executive Director acceptance of an employment offer by the Bank would not violate the post-employment restrictions found in IC 4-2-6-11.