

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

The former Director of the OMB was not subject to the 365-day postemployment restriction where he only voted on but did not negotiate or administer a contract on behalf of the State with the financial services company with whom he was seeking employment. SEC found he would be required, however, to abide by the particular matter restriction and not assist the financial services company on any issue in which he personally and substantially participated during his employment with the State including the determination to select the company to manage an Indiana-focused investment fund.

July 12, 2007  
No. 07-I-8

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6(b)(1).

### **BACKGROUND**

A former state employee served as the Director of the Indiana Office of Management and Budget (OMB). The former Director served as OMB Director from January 10, 2005, until June 1, 2007. By virtue of his position as OMB Director, the former Director was a voting, ex-officio board member of both the Public Employees Retirement Fund (PERF) and the Teacher's Retirement Fund (TRF). By Executive Order, the directors of both funds reported to the former Director to the extent allowed by law.

In the spring of 2006, the former Director participated, as part of a seven member group, in interviews of possible managers for a new Indiana focused investment fund (Indiana Fund) to be created by both PERF and TRF. He reviewed the recommendation by the management of both PERF and TRF to hire a financial services company to manage the new Indiana Fund and subsequently voted in favor of this recommendation. In both cases, the votes were unanimous.

The former Director indicated that he was not involved in negotiating the contract with the financial services company by PERF and TRF management or in supervising the financial services company after the selection. He states that those activities were performed by PERF and TRF investment professionals and management.

The former Director has been approached by the financial services company to become a paid consultant on a global infrastructure fund ("Global Fund") they are forming. The Global Fund will be raising money from insurance companies, pension funds, and other investors to be invested in various infrastructure funds and opportunities around the world. His role, while still fluid, appears to be to assist the financial services company New York based team in the following ways: (1) in raising money for the Global Fund from various customers in the U.S.; (2) participating in reviewing investment opportunities for the Global Fund; and (3) working with selected clients after they have become investors in the Global Fund. The former Director stated that financial services company could choose to approach PERF and TRF about being an investor in the Global Fund in the future. He states that to his knowledge, the financial services company has not made any such contract with PERF and/or TRF to date.

### **ISSUES**

The issue presented in this case is whether the former Director's acceptance of an employment opportunity with the financial services company would be contrary to IC 4-2-6-11, the post-employment statute.

### **RELEVANT LAW**

#### **IC 4-2-6-11**

#### **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 IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) does not apply to a special state appointee who:

(1) was a special state appointee before January 10, 2005; and

(2) is a special state appointee after January 9, 2005.

### **ANALYSIS**

In this case, the former Director would be prohibited from accepting an employment opportunity with the financial services company until the elapse of at least three hundred sixty-five (365) days of leaving state employment if he negotiated or administered a contract with the financial services company on behalf of the State. Whether the former Director negotiated or administered a contract with the financial services company depends upon whether his involvement with the financial services company during the selection of the Indiana Fund manager constitutes as the negotiation of a contract.

In this case, the Commission finds that the 365-day post-employment restriction set forth in IC 4-2-6-11(b) would not appear to apply to the former Director's intended employment with the financial services company. Specifically, the Commission finds that the financial services company neither negotiated nor administered a contract with the financial services company on behalf of the State.

Should he accept employment with the financial services company, however, the Commission finds that the former Director would be prohibited from representing or assisting the financial services company in any "particular matter" in which he personally or substantially participated in during his tenure with the State. In this case, while he did not negotiate the contract between the State and the financial services company to manage the Indiana Fund, the former Director was personally and substantially involved in the determination to select the financial services company as the manager of the Indiana Fund. In effect, the former Director would be prohibited from assisting the financial services company in anything related to that determination or any other particular matter that he personally and substantially participated in during his tenure with the State.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the former Director's acceptance of an employment opportunity with the financial services company would not be contrary to IC 4-2-6-11, the post-employment statute.