

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

An INDOT Commissioner and former Executive Director of the IURC was offered the position of President of Indiana's largest electric supplier ("Supplier") and sought advice on whether he would be prohibited by the Code of Ethics from accepting such employment. SEC examined confidential information, conflict of interest and postemployment provisions and determined none of those rules would prohibit the Commissioner from accepting employment with the Supplier immediately upon leaving his employment with the State.

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

BACKGROUND

A state employee has worked for the State of Indiana (State) since 2006 and currently serves as Commissioner of the Indiana Department of Transportation (INDOT). Prior to holding this position, the Commissioner served as the Executive Director of the Indiana Utility Regulatory Commission (IURC) from 2006 – February 2009.

The Commissioner has been offered a position as President of Indiana's largest electric supplier, providing electric service to approximately 780,000 customers in sixty-nine of Indiana's ninety-two counties. As President of the electric supplier, the Commissioner will be providing strategic direction and overseeing its overall operations throughout Indiana. He will not be required to register as an executive branch lobbyist for at least one year after leaving state employment.

According to the Commissioner, he has had contact with the electric supplier in both of the positions he has held with the State, though such contact or interaction is not of the type described by the post-employment restrictions in I.C. 4-2-6-11.

As Executive Director for the IURC, the Commissioner directed a staff of fifty members in support of the five commissioners. He was responsible for the general oversight of the Technical Divisions and interfacing with the regulated community within the limitations of the IURC's ex parte rules. In this position, the Commissioner neither negotiated nor administered a contract with the electric supplier. Additionally, the Commissioner asserts that he had no cases assigned to him. He did not direct the assignment of cases, and he had no ability to conduct a hearing, make a decision or cast a vote affecting regulated activities of any utility before the IURC.

With respect to INDOT, the only contractual relationship the agency has with the electric supplier or any utility (other than purchasing electricity for traffic signals, lights and buildings at the metered rate charged by the utility) is the requirement that INDOT reimburse utilities for their actual expenses when road construction forces a utility to move its facilities. The relocations are both required and governed by Indiana and Federal statute, rules and regulations. INDOT's district project managers and INDOT's Utility Section negotiate the utility relocation agreements. The deputy commissioner responsible for the Utility Section provides the final INDOT signature for the relocation agreements. As the appointing authority of the agency, these

staff members ultimately report to the Commissioner through the INDOT management chain of command. However, the Commissioner asserts that he has not been involved personally with any particular contract which INDOT has had with any utility, including the electric supplier.

With respect to permits, INDOT will occasionally issue a permit to allow a utility to place its facilities in INDOT's highway right of way. The INDOT staff closest to the actual right of way in question negotiates and executes these permits after consideration of traffic, safety, and other issues. The Commissioner indicates that he has not negotiated, signed or made a decision with respect to a permit for any utility, including the electric supplier.

Currently, INDOT's Railroad Section is considering a petition from the electric supplier for permits to allow a rail line to cross five local and one state road. Because INDOT regulates some 6,000 rail crossings in Indiana, the electric supplier is required to obtain an INDOT permit to cross the roads in question in order to provide rail service to the rail line facility. INDOT's Railroad Section is examining the crossings, line of sight, traffic patterns and counts, any safety issues and the need, if any, for crossing protection. INDOT's Railroad Section will make the determination and issue any crossing permit. The Commissioner has not and will not participate in this permit decision.

INDOT also works with the electric supplier and other utilities on matters of general applicability. Representatives from the electric supplier attend a monthly "Team Indiana" meeting along with representatives from the highway construction, engineering, consulting, and design industries. The purpose of Team Indiana is to exchange policy suggestions and ideas between the industries that are instrumental in building Indiana highways and INDOT staff. The electric suppliers' representatives also participated in the development of INDOT's utility relocation rule, 105 IAC 13. However, INDOT promulgated this rule prior to the Commissioner's appointment as INDOT's Commissioner.

ISSUE

What rules in the Code of Ethics would apply to the Commissioner's employment opportunity to serve as President of the electric supplier, and would his acceptance of the offered position subject him to any post-employment restrictions under I.C. 4-2-6-11?

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 employer'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 Commissioner's intended employment with the electric supplier invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Commissioner is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 would prohibit the Commissioner 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 the Commissioner has provided, the Commission finds that the electric supplier's offer of employment did not result from information of a confidential nature. Accordingly, the Commissioner's acceptance of the electric supplier's employment offer would not be in violation of I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Commissioner from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the Commissioner has an arrangement for prospective employment with the electric supplier. Accordingly, the Commissioner is prohibited from participating in any decision or vote during the remainder of his state employment in which the electric supplier has a financial interest in the outcome of the matter. The Commissioner indicates that he is aware of this provision and has not participated in any decision or vote affecting the electric supplier since he became aware of the prospective employment opportunity. To the extent that the Commissioner continues to observe this provision and abstains from participation in any decision or vote affecting the electric supplier, the Commission finds that the state employee would not be in violation of I.C. 4-2-6-9.

C. Post-Employment

I.C. 4-2-6-12 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 Commissioner from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Commissioner would be prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Based on the information provided, the Commission finds that this provision does not apply to the Commissioner. Specifically, he indicates that he will not be required to register as an executive branch lobbyist for at least one year after leaving state employment.

Second, the Commissioner would be prohibited from accepting employment from an employer with whom (1) he engaged in the negotiation or administration of a contract on behalf of his 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 Commissioner disclosed that INDOT has or has had contract(s) with the electric supplier. As Commissioner of INDOT, it would appear that the Commissioner could meet the second prong of this restriction. Namely, that as the appointing authority of the agency, he is in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of a contract. However, the application of this restriction to the Commissioner depends upon whether he engaged in the negotiation or administration of a contract on behalf of INDOT with the electric supplier. The Commissioner explains that while he was Commissioner for the agency, he was not personally involved with or engaged in the negotiation or administration of any contract with the electric supplier on behalf of INDOT. Also, the Ethics Officer and Prequalification's Director for INDOT, and the Chief Legal Counsel and Deputy Commissioner for INDOT, testified and filed a written opinion with the Commission stating that the Commissioner did not engage in the negotiation or administration of any contract(s) with the electric supplier on behalf of INDOT, and instead, the negotiation and/or administration of such contract(s) occurred at lower levels. The Commission accordingly finds that the Commissioner did not engage in the negotiation or administration of contracts on behalf of INDOT with the electric supplier and this provision would therefore not apply to the Commissioner.

Third, the Commissioner would be prohibited from accepting employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. While the Commissioner's last day of employment with the IURC was over a year ago, he maintained his status as a state employee. Consideration of the post-employment rule is invoked when an employee leaves the state's employ, not when the employee moves from one agency to the next. Also, the Deputy General Counsel and Ethics Officer for IURC testified and filed an opinion with the Commission that the Commissioner was not in violation of this provision. Accordingly, the Commission finds that this provision would not be triggered by the Commissioner's work at the IURC as he was neither a commissioner nor a voting member of the regulatory body that may have made license or permit decisions regarding the electric supplier.

Fourth, the Commissioner would also be 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 Commission finds that none of the facts provided suggest that the electric supplier's offer of employment to the Commissioner was done in an attempt to influence him in his capacity as INDOT Commissioner or in his former capacity as Executive Director of the IURC.

Finally, the Commissioner may be subject to the Postemployment rule's "particular matter" prohibition in his potential employment. This restriction prevents him from working on any of the following twelve matters for an employer 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 Commissioner does not disclose any "particular matters" on which he may have worked while employed with the State. To the extent that the Commissioner's future employment activities with the electric supplier would have the potential to implicate a "particular matter" as contemplated by I.C. 4-2-6-11, the Commissioner should request advice for review prior to representing or assisting the electric supplier with any "particular matter."

CONCLUSION

Subject to the foregoing analysis, the Commissioner's intended employment with the electric supplier would not be in violation of the State Code of Ethics, including I.C. 4-2-6-6, I.C. 4-2-6-9 and I.C. 4-2-6-11.