

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

In advisory opinion 10-I-12, the General Counsel and EO for IEDC sought ethics advice on behalf of three IEDC employees who might potentially leave state employment to work for a nonprofit corporation on a research and technology fund. After discussing a proposed arrangement with the nonprofit, IEDC decided instead to establish a new nonprofit with a statewide charter to oversee the fund. The EO returned to the SEC for advice on this new proposed arrangement. SEC examined again the three rules in the Code of Ethics that are implicated in postemployment situations and determined none of them would appear to apply in the new circumstances described by the IEDC EO.

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No. 11-I-1

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

An employee is the Vice President and General Counsel for the Indiana Economic Development Commission (IEDC). The General Counsel also serves as the Ethics Officer for the IEDC. On September 9, 2010, the General Counsel requested an advisory opinion from the Commission seeking post-employment advice on behalf of three employees of the IEDC. Specifically, the IEDC was exploring the possibility of engaging in a potential partnership with an Indiana nonprofit corporation to provide additional services to Indiana's entrepreneurial community and create new jobs for Hoosiers. As part of the transition, it was anticipated that the Indiana nonprofit corporation would hire three current IEDC employees and key members of an Indiana research and technology fund (Fund) team, in order to assist with the implementation of these strategies.

In response, the Commission issued advisory opinion No. 10-I-12 to the General Counsel finding that the three current IEDC employees' intended employment with the Indiana nonprofit corporation would not violate I.C. 4-2-6-6, I.C. 4-2-6-9, or I.C. 4-2-6-11.

Upon receiving the Commission's opinion, the IEDC entered into discussions with the Indiana nonprofit corporation and other stakeholders regarding the proposed arrangement. Through those discussions, the IEDC has determined that it would be in the best interest of the State and its economic development partners for a new nonprofit with a statewide charter to be established for this initiative. Accordingly, a new Indiana nonprofit has been established and the IEDC now desires to partner with the new Indiana nonprofit, which is governed by a board of directors wholly independent of the IEDC. The three IEDC employees did not participate in the discussions with the Indiana nonprofit corporation or the negotiations with the new nonprofit for this initiative. As a new entity, the IEDC has no other relationship with the new nonprofit.

The General Counsel now requests a supplemental advisory opinion from the Commission to determine whether the three IEDC employees would be permitted to seek employment with the new nonprofit should they desire to do so.

As was noted in the prior advisory opinion, the IEDC administers the Fund for the purpose of providing grants or loans to support the development and commercialization of new technologies and ideas that fuel economic growth. IEDC would like to partner with the new nonprofit to implement its innovation and entrepreneurship strategies. The Fund has developed extensive business and technical due diligence processes to assess the potential of early-stage technology development and commercialization efforts of promising small businesses. All applicants are screened using these processes, and applicants are provided constructive feedback regardless of whether awards are provided. All award recommendations are provided to a committee made up of IEDC's Board of Directors for approval. All approved awards are further reviewed by the State Appropriations Committee. All professional services agreements are approved and executed by the Chief Executive Officer of the IEDC.

IEDC would enter into a professional services agreement with the new nonprofit to provide for the continuation of due diligence and portfolio management services on a contract basis. As the new nonprofit's capabilities expand, the IEDC may enter into a grant agreement, in partnership with the new nonprofit and other economic development partners to provide additional support to early state entrepreneurs.

ISSUE

What rules in the Code of Ethics would apply to the three IEDC employee's intended employment opportunity with the new nonprofit, and whether their acceptance of a position with the new nonprofit would subject them 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 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 three IEDC employees' intended employment with the new nonprofit 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 three IEDC employees is analyzed below. The Commission emphasizes that the analysis below is intended to apply only to the three IEDC employee's intended employment with the new nonprofit. It is not intended to apply to the three IEDC employee's potential employment with any other employers or the employment of other IEDC employees with the new nonprofit.

A. Confidential Information

I.C. 4-2-6-6 would prohibit the three IEDC employees 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 would appear that the acceptance of an offer of employment by the three IEDC employees from the new nonprofit would not be made as a result of information of a confidential nature. Accordingly, the Commission finds that, the three IEDC employee's acceptance of employment from the new nonprofit would not be in violation of I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the three IEDC employees from participating in any decision or vote if they have knowledge that various persons, including themselves or a potential employer, may have a "financial interest" in the outcome of the matter. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes the interest an employee has that arises from employment or prospective employment for which negotiations have begun. In this case, the three IEDC employees may have an arrangement for prospective employment with the nonprofit. Accordingly, the three IEDC employees would be prohibited from participating in any decision or vote during the remainder of their state employment in which they themselves or the new nonprofit would have a financial interest in the outcome of the matter. The General Counsel indicated that all three employees have been screened from any decisions or votes involving the new nonprofit. To the extent that the three IEDC employees continue to observe this provision and abstain from participation in any decision or vote in which they or the three IEDC employees would have a financial interest in the outcome of the matter, the Commission finds that the three IEDC employees would not be in violation of I.C. 4-2-6-9.

C. 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 period, would prevent the three IEDC employees from accepting employment for 365 days from the date that each leaves state government under various circumstances.

First, the three IEDC employees are prohibited from accepting employment as lobbyists for the entirety of the cooling off period. Based on the information provided regarding the potential duties the individuals would perform for the new nonprofit, the Commission finds that, pending their continued compliance with this provision, this restriction would not apply to the three IEDC employees.

Second, the three IEDC employees are prohibited from accepting employment from an employer with whom they (1) engaged in the negotiation or administration of a contract on behalf of IEDC and (2) were 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 three IEDC employees have never negotiated or administered a contract with the new nonprofit on behalf of the IEDC. Specifically, the new nonprofit is a newly created entity and the three employees have been screened from any involvement in negotiations with the new nonprofit for this initiative. Accordingly, the Commission finds that this restriction does not apply to the three IEDC employees in their prospective employment with the new nonprofit.

Third, the three IEDC employees are prohibited from accepting employment from an employer for whom they made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The Commission finds that this provision would not apply in this case because the three IEDC employees have never made a regulatory or licensing decision that applied to the new nonprofit or its parent or subsidiary.

Fourth, the three IEDC employees are also prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence any of these individuals in their official capacity. The General Counsel indicates that the three IEDC employees have had no involvement in IEDC's decision to partner with a nonprofit organization for this initiative. Accordingly, it is the opinion of the Commission that the new nonprofit would not be extending an offer of employment to the three IEDC employees in an attempt to influence them in their official capacity.

Finally, the three IEDC employees may be subject to the post-employment rule's "particular matter" prohibition in their potential employment. This restriction prevents these individuals from working on any of the following twelve matters if they personally and substantially participated in the matters 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. While the General Counsel does not identify any particular matters in which the three IEDC employees would have been personally and substantially involved while with the IEDC that they would be required to assist the new nonprofit on, the three IEDC employees must continue to ensure compliance with this restriction in their intended employment with the new nonprofit.

CONCLUSION

Subject to the forgoing analysis, the Commission finds that the three IEDC employees' intended employment with the new nonprofit would not violate I.C. 4-2-6-6, I.C. 4-2-6-9 or I.C. 4-2-6-11.