

42 IAC 1-5-6 Conflict of interest; decisions and voting (IC 4-2-6-9)

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

An Assistant Director with the State Budget Agency was informed by a university that financial positions may become available and inquired whether the Director would be interested in discussing any such opportunities. Because the Director was responsible for processing claims vouchers and signing off on contracts that may involve the university, he sought advice from the SEC. SEC found negotiations had commenced for purposes of IC 4-2-6-9, and the Director needed to be screened off any further participation in the processing of the claims and signing of the contracts. However, since no offer of employment had been extended, the rule on Postemployment restrictions did not yet apply.

May 2012

No. 12-I-9

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

The Assistant Director is employed with the State Budget Agency (“SBA”) and reports to the Deputy Budget Director and the Budget Director. The Assistant Director’s unit consists of himself and three of his direct reports. The following agencies are assigned to his unit: Department of Agriculture, Lieutenant Governor’s Office, Commission on Public Records, Public Access Counselor, Office of Technology, Department of Local Government Finance, Indiana Board of Tax Review, Worker’s Compensation Board, Department of Labor, Indiana Economic Development Corporation, Indiana Finance Authority, Housing and Community Development Authority, Education Employment Relations Board, Department of Workforce Development, School for the Blind and Visually Impaired, School for the Deaf, Department of Education, Indiana Commission on Propriety Education, Indiana Arts Commission, State Student Assistance Commission, Commission for Higher Education, State Workforce Innovation Council, Indiana State Library, Indiana Historical Bureau, Medical Education Board and the seven state supported universities.

On Monday, March 26, 2012 a representative from a university (“University”) informed the Assistant Director that a few financial positions may become available at another university in Indianapolis. The representative inquired if the Assistant Director’s resume was up to date and if he would be interested in discussing opportunities with the University. The Assistant Director informed him that he would and submitted his resume. As of March 30, 2012, the date he submitted his request for an advisory opinion, the Assistant Director has not received a specific employment offer or, a job description for a specific position with the University, nor has he been contacted for an interview.

As an Assistant Director, he processes monthly claim vouchers from each of the seven state supported universities. The amount of these claim vouchers is calculated by dividing the operating appropriation into twelve monthly payments. The Assistant Director confirms that the funds are available and then forwards the claim vouchers to accounting staff at the SBA who process those claim vouchers and forward them on to the Auditor of State for payment. He has reassigned the processing of claim vouchers to another member of his staff until the Commission

determines if his involvement in the processing of claim vouchers is considered to be participation in a decision.

In addition to processing monthly claim vouchers, on occasion, the Assistant Director signs contracts between one of his assigned agencies and one the of the seven state supported universities. All state contracts must be signed by both parties to the contract, the Indiana Department of Administration (“IDOA”), the SBA, and the Attorney General’s Office (“AG”). The Assistant Director does not negotiate the terms of these contracts or monitor the services provided under them. His signature confirms that funds are available to the contracting agency to obtain the services they are contracting for. The Assistant Director has reassigned the duty of signing contracts to a member of his staff until the Commission determines if his signing of the contracts on behalf of the agency is considered to be participation in a decision.

ISSUE

What rules in the Code of Ethics would apply to the Assistant Director’s intended employment opportunity with the University, and would his acceptance of an 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 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 Assistant Director's potential employment with the University invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The Commission has determined in Advisory Opinion 12-I-2 that employment at a state university triggers the consideration of the post-employment rule. The application of each provision to the Assistant Director is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Assistant 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, it does not appear the University has extended an offer of employment to the Assistant Director. Accordingly, the Commission cannot determine at this time whether the Assistant Director's acceptance of an employment offer by the University would violate I.C. 4-2-6-6.

B. *Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Assistant Director 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. For purposes of this rule, “financial interest” is defined in I.C. 4-2-6-1(a)(10). This prohibition extends beyond merely making the decision or vote on the matter to encompass any *participation* in that decision or vote. Moreover, the Commission has determined that negotiations commence for purposes of this rule as soon as an employer contacts a state employee to discuss potential employment. See Advisory Opinion [10-I-7](#). Negotiations commence regardless of what party initiates the contact and/or what party subsequently responds. The formal submission of an application or resume is not required. In this case, it would appear that employment negotiations have commenced for the Assistant Director. Specifically, a representative from the University contacted the Assistant Director to inform him of a few positions that were becoming available and the Assistant Director submitted his resume in response. Accordingly, the Assistant Director would be prohibited from participating in any decision or vote in which he or the University would have a “financial interest” in the outcome of the matter. The Assistant Director indicates that he is responsible for processing monthly claim vouchers from each of the seven state supported universities. Specifically, the amount of the claim vouchers is calculated by taking the operating appropriation approved by the General Assembly in the biennial budget and dividing the annual appropriation into twelve monthly payments. The Assistant Director confirms that the funds are available and then forwards the claim vouchers to accounting staff at the SBA who process those claim vouchers and forward them on to the Auditor of State for payment. Based on this information it would appear that the University would have a financial interest in these claim vouchers, namely whether they are paid. It is the opinion of the Commission that the Assistant Director’s involvement in processing these claim vouchers would amount to participating in any decisions or votes. Accordingly, the Assistant Director would be prohibited from participating in anything related to those claim vouchers including their processing while employment negotiations with the University are ongoing.

In addition, the Assistant Director is responsible for signing contracts between one of the state agencies assigned to him and one of the seven state supported universities. All state contracts must be signed by both parties to the contract, the Indiana Department of Administration, the SBA, and the Attorney General’s Office. While he does not negotiate the terms of the contracts or monitor the services provided under those contracts, the Assistant Director’s signature confirms that funds are available to the contracting agency. It is the opinion of the Commission that the Assistant Director should be screened from participation in any contracts with or relating to the University while employment negotiations with the University are ongoing.

Having found that the Assistant Director’s participation in the processing of claim vouchers and/or contracts involving the University would constitute participation in decision(s) or vote(s), a conflict of interest would arise for the Assistant Director if he were to participate in such decision(s) or vote(s) since he has begun negotiating employment with the University. I.C. 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 Assistant Director requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his appointing authority. Accordingly, the Commission finds that he would not be in violation of this portion of the rule.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the Assistant Director indicates that he has reassigned the duty of signing contracts to a member of his staff until the Commission determines if his signing of the contracts on behalf of the agency is considered to be participation in a decision. He has also reassigned the processing of claim vouchers to another member of his staff until the Commission determines if his involvement in processing of claim vouchers is considered to be participation in a decision. Having found that a conflict of interest would arise for the Assistant Director if he was to sign a contract involving the University or participate in the processing claim vouchers for the University, the Commission recommends that the current procedures to screen the Assistant Director from involvement in the aforementioned matter(s) continue while employment negotiations are ongoing.

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 Assistant Director from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Assistant Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Second, the Assistant 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. Third, the Assistant 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. Fourth, the Assistant 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. Finally, the Assistant Director is subject to the Post-employment rule’s “particular matter” prohibition in his potential employment. This restriction prevents him from working 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.

In this case, the Assistant Director has indicated that the University has not extended an offer of employment to him for any specific position(s). Accordingly, the Commission cannot determine at this time whether the Assistant Director's acceptance of an employment offer by the University would violate I.C. 4-2-6-11.

CONCLUSION

It is appropriate for the Assistant Director to explore employment with the University; however, he must be screened from participation in any decision or vote involving the University, including participation in the processing of claim vouchers and/or signing of contracts until he leaves state employment to pursue employment with the University or he decides to discontinue pursuit of a job opportunity with the University. The Assistant Director may seek post-employment advice if and when a specific employment offer materializes.