

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

An IDOI Staff Attorney was contacted by a holding company of entities regulated by the agency regarding potential employment. Due to the attorney's interest in talking with the company about the opportunity, IDOI implemented a screen that directed any matters involving the regulated entities to the attorney's supervisor. SEC found the screening mechanism developed by IDOI was sufficient to address the potential conflict of interest created by the attorney's employment negotiations with the company.

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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). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is currently a Staff Attorney for the Indiana Department of Insurance ("IDOI"). The staff attorney was recently contacted by a holding company with entities regulated by IDOI, about a possible employment position. The staff attorney expressed an interest in discussing the position with the holding company. Specific details were not discussed and, to date, no further conversations have occurred.

As staff counsel for the IDOI, his primary responsibilities involve performing and managing market conduct examinations of insurance companies. The only market conduct examination currently open regarding the holding company is the Conseco-Lifetrends Examination ("Lifetrends Examination"). The Lifetrends Examination has multiple issues. The staff attorney has had minimal involvement in this examination and has not been involved in the "PIQ" process. He has sat in on various meetings regarding the Lifetrends Examination over the past few years, mainly for training purposes, but has not made any decisions or performed any work related to this examination.

The staff attorney was also involved in a corrective action plan involving a subsidiary of the holding company. In February 2012, IDOI entered into a corrective action plan with Conseco Senior Health ("Company") as the result of a market conduct examination performed by Virginia ("Virginia Examination"). During the course of the Virginia Examination, it was discovered that certain cancer claims were being denied or paid incorrectly and that this was likely occurring in multiple states. In lieu of a multi-state examination, IDOI and the Company entered into a corrective action plan, where the Company would identify the claims impacted, remediate those claims, and issue and develop a plan to address the underlying cause of the issue. Only fifteen (15) states were affected by this issue and Indiana was not one of them. However, as the Company's domestic regulator, IDOI agreed to lead and monitor the corrective action plan. The remediation is complete and all policy-holders owed additional benefits have been paid. The Company is currently testing the validity of the claims review process, which should be completed at the end of the month. The staff attorney was involved, along with the staff attorneys' supervisor, in drafting this corrective action plan and monitoring the compliance of the plan.

Given the employment potential, IDOI has implemented internal screens for the staff attorney. Specifically, his supervisor will be the sole IDOI point of contact for the Lifetrends Examination. The staff attorney will no longer have any involvement with the matter. Also, the matter involving the Company's corrective action plan will be transferred to his supervisor and the staff attorney will no longer have any involvement in that matter.

The staff attorney would only accept a position if the IDOI appointing authority waives any applicable post-employment restrictions.

ISSUE

Would a conflict of interest arise for the staff attorney if he participates in decision(s) and/or vote(s) in which the holding company and/or any of its subsidiaries have a financial interest since the holding company has expressed an interest in discussing employment opportunities with him?

RELEVANT LAW

I.C. 4-2-6-9

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.

ANALYSIS

As a state employee, the staff attorney is subject to the Code of Ethics including the conflicts of interest provision set forth in I.C. 4-2-6-9. I.C. 4-2-6-9 (a)(1) prohibits the staff attorney from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, I.C. 4-2-6-9(a)(4) prohibits the staff attorney from participating in any decision or vote in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in I.C. 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In Advisory Opinion 10-I-7, the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment. Employment negotiations have commenced in this case. Specifically, the holding company has corresponded with the staff attorney regarding an employment opportunity with their company. Since employment negotiations have commenced, a conflict of interest would arise for the staff attorney if he were to participate in a decision or vote in which the holding company would have a financial interest. The staff attorney has indicated that two matters involving the holding company are currently open with IDOI. Because the staff attorney has commenced employment negotiations with the holding company, he would have a financial interest in the outcome of those matters and would therefore be prohibited from participating in decisions or votes related to those matters or any other matters related to the holding company.

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 staff attorney requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his appointing authority.

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, IDOI proposes a screening mechanism where the staff attorney would be shielded from participating in any decision that affects the holding company or any of its companies. The Lifetrends Examination and monitoring the Company's corrective action plan will be transferred to the supervisor, another market conduct staff member and the staff attorney's minimal involvement will be reduced to zero. Any new matters concerning the holding company will be assigned to someone else.

CONCLUSION

The Commission finds that a potential conflict of interest arises for the staff attorney under I.C. 4-2-6-9 if he participates in any decision or vote in which the holding company would have a financial interest in the outcome of the matter because employment negotiations have commenced. Moreover, it is the Commission's opinion that the screening mechanism proposed by IDOI is appropriate.