

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

The INDOT Commissioner was offered employment as the Vice President of a state university and received a waiver of the postemployment rule from the Governor's Office. Because the University had recently requested assistance from INDOT with a parcel of land, however, the Commissioner sought further ethics advice on screening himself from the matter and any other matters involving the University during the remainder of his time with the State. SEC approved the procedure implemented by INDOT in which any University matters would be immediately referred to a Deputy Commissioner who would contact the Ethics Officer to ensure the Commissioner was not involved in any such matters.

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No. 13-I-27

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 the Commissioner of the Indiana Department of Transportation ("INDOT"). The Commissioner recently received an employment offer from Purdue University ("Purdue") to serve as their Vice President for Physical Facilities ("Facilities VP"). The Facilities VP is Purdue's chief facilities officer and manages and oversees a broad range of services and units including Administrative Support, Auxiliary Services, Buildings and Grounds, Engineering, Utilities and Construction for all four Purdue campuses. Purdue announced that it was conducting an expedited search for the Facilities VP on May 1, 2013. On May 2, 2013, the Commissioner became aware of the position and applied online on May 8, 2013. He was then contacted by Purdue on May 13, 2013 and subsequently interviewed for the position on May 16, 2013. Purdue offered the position to the Commissioner on May 31, 2013. The offer was conditioned on successful resolution/approval from the Commission.

The Commissioner's service with INDOT began in April of 2006 as Deputy Commissioner of the Traffic Management Business Unit ("TMBU"). This position reported directly to the Commissioner of INDOT, supervised approximately 60 people and was responsible for interstate traffic operations. In January 2007, the Commissioner became the Deputy Commissioner of Operations ("DCO"), which retained the Traffic Management staff, but added several additional INDOT business units, including Maintenance Management, Technical Services, Fleet and Facilities and District Operations. The DCO is a member of the executive staff and helps set the strategic direction of INDOT to safely maintain and operate INDOT's infrastructure. The DCO is responsible for budgeting and financial issues, setting department goals, policies and procedures, monitoring and reporting of agency performance and working with federal, state, and local agencies, as well as the community, business leaders, and organizations on transportation related issues.

The state employee was appointed Commissioner of INDOT in June 2010. In this position, the Commissioner oversees INDOT's efforts to construct, reconstruct, improve, maintain and repair the State's highways, toll roads and bridges. Pursuant to I.C. 8-23-2-5, INDOT has the responsibility to develop, continuously update and implement long range comprehensive

transportation plans “to assure the orderly development and maintenance of an efficient statewide system of transportation.” This responsibility includes identifying state transportation needs and developing plans to address those needs.

The Commissioner has identified one issue relating to Purdue that has arisen since the Facilities VP position opened. The issue relates to a request from Purdue for INDOT to assist with a parcel of land. Specifically, on May 7, 2013, the Vice President for Public Affairs at Purdue, emailed the Commissioner and requested INDOT’s help regarding a 6.53 acre parcel of land that Purdue occupied and utilized for the past 50 years. Immediately after receiving the email, the Commissioner assigned the matter to a Deputy Commissioner at INDOT, to handle and advised him that he would not attend the meeting in which this matter would be discussed. He assigned the matter to the Deputy Commissioner before applying for the position and prior to the commencement of any negotiations with Purdue regarding prospective employment.

Given the Commissioner’s intended employment with Purdue, INDOT proposes implementing the following screening procedure in the event Purdue submits any issue or matter to INDOT:

1. The matter will immediately be referred to the Deputy Commissioner;
2. The Deputy Commissioner will be solely responsible for handling the issue, including any communications and necessary decision-making associated with the issue or matter; and
3. The Deputy Commissioner will immediately notify the acting Ethics Officer at INDOT, who will verify that the Commissioner will not have interaction with Purdue on any matters.

Regarding post-employment restrictions, the Office of the Governor has provided a written waiver of I.C. 4-2-6-11(b)(2), pursuant to I.C. 4-2-6-11(g), to the Commissioner.

ISSUE

Would a conflict of interest arise for the Commissioner if he participates in decision(s) and/or vote(s) in which Purdue has a financial interest since he has an arrangement concerning prospective employment with Purdue?

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 Commissioner 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 Commissioner 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 Commissioner 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 clearly commenced in this case. Specifically, the Commissioner has applied for and received an employment offer from Purdue. Since employment negotiations have commenced and the Commissioner has received an offer of employment from Purdue, a conflict of interest would arise for him if he were to participate in a decision or vote in which Purdue would have a financial interest. The Commissioner has indicated that there is one matter involving Purdue currently pending at INDOT involving a parcel of land that Purdue has occupied and utilized for many years. Since the Commissioner has an interest by virtue of his prospective employment at Purdue, he is prohibited from participating in any decisions or votes related to the matter.

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 Commissioner 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, INDOT proposes the following screening procedure to avoid and address any potential conflicts of interest that may arise for the Commissioner regarding Purdue throughout the remainder of his employment with the State:

1. Any matter involving Purdue will immediately be referred to the Deputy Commissioner;
2. The Deputy Commissioner will be solely responsible for handling the issue, including any communications and necessary decision-making associated with the issue or matter; and
3. The Deputy Commissioner will immediately notify the acting Ethics Officer at INDOT, who will verify that the Commissioner will not have interaction with Purdue on any matters.

CONCLUSION

Because the application of I.C. 4-2-6-11(b)(2) has been waived to the extent that it applies to the Commissioner, the Commission will not consider the application of the post-employment rule in this case. Regarding conflicts of interest, the Commission finds that a potential conflict of interest arises for the Commissioner under I.C. 4-2-6-9 if he participates in any decision or vote in which he or Purdue would have a financial interest in the outcome of the matter because he has commenced employment negotiations with that entity and has conditionally accepted Purdue's employment offer. Moreover, it is the Commission's opinion that the screening mechanism proposed by INDOT is appropriate and must remain in place until the Commissioner leaves his state employment to begin working with Purdue.