

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

A former IDHS Executive Director accepted employment with the American Red Cross to serve as a multi-state Division Director. Since the Director had already accepted employment and begun working with the Red Cross, SEC did not advise him regarding the propriety of accepting the employment opportunity; however, SEC did advise the Director to avoid any executive branch lobbying activity during his cooling off period as well as any particular matters in which he personally and substantially participated during his time at IDHS, should any arise.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) 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 a former Indiana Department of Homeland Security (“IDHS”) employee. He served as the Director of Preparedness and Training from October 2005 to March 2008 and as the Executive Director from March 17, 2008 to January 11, 2013.

The Executive Director was offered and accepted an employment opportunity by the American Red Cross (“Red Cross”) to serve as the Division Disaster State Relations Director for their Crossroads Division, which consists of Indiana, Michigan, Ohio, Kentucky and West Virginia. His position will serve as a primary interface for the disaster cycle, working with state, federal and local governmental entities, organizations and other leadership entities in the field of emergency services, disaster policy and operations and community resiliency. He will work under the Red Cross National Headquarters, not a local chapter or region.

The IDHS regulates local Indiana chapters of the Red Cross through at least three regulatory programs. For example, the IDHS issues permits to the Indiana Red Cross chapters who have elevators and other lifting devices as well as boilers and pressure vessels. In addition, the Indiana Red Cross chapters have obtained design releases (a type of permit) for construction projects that they have undertaken allowing them to construct and/or modify Red Cross structures.

All of the decisions related to the IDHS’s regulatory activities concerning the Red Cross were handled by agency staff. The Executive Director did not participate in any of these decisions.

In 2011, IDHS’s lead Public Information Officer worked with the Red Cross on the printing of an emergency preparedness publication. As part of this project, the Public Information Officer contacted at least three potential vendors, including the Red Cross, and requested quotes for preparing Emergency Preparedness Guides (282,000 newspaper inserts and 250,000 commercial booklets). The Red Cross was the winning vendor, with a bid of \$30,000 and IDHS issued a purchase order to the Red Cross on September 27, 2011. The Public Information Officer advised that he went through his emails regarding this project and found that the Executive Director was not included on those emails. He did, however, brief the Executive Director on the status and progress of his project.

ISSUE

What rules in the Code apply to the Executive Director's post-employment opportunity with the Red Cross? Does this opportunity 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. 4-2-6-11 (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 Executive Director's intended post-employment opportunity implicates provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the Executive Director's arrangement is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Executive 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 that his intended post-employment with the Red Cross resulted from information of a confidential nature. Accordingly, the Commission finds that the Executive Director's work with the Red Cross would not violate I.C. 4-2-6-6.

B. 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 or revolving door period prevents the Executive Director from accepting employment under various circumstances for 365 days from the date that he left state government. In this case, the Executive Director has already accepted and commenced employment with the Red Cross. Because the Commission’s advice is intended to apply prospectively, this opinion does not address whether it was permissible under the Code for the Executive Director to begin employment with the Red Cross before the lapse of 365 days from when he left state employment.

The Executive Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. Based on the information provided, it does not appear that the Executive Director’s intended work for the Red Cross would require him to engage in executive branch lobbying activity. To the extent that it would not, the Commission finds that the Executive Director would not be in violation of this provision.

The Executive Director is also subject to the rule’s “particular matter” prohibition. 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.

The Executive Director discloses that the IDHS’s lead Public Information Officer worked with the Red Cross on the printing of an emergency preparedness publication in 2011. While it is unclear whether this qualifies as a particular matter, this publication project has concluded and is not expected to be revisited. Even though he does not identify any particular matters that he anticipates working on in his post-employment with the Red Cross, the Executive Director remains subject to this restriction. To the extent that the Executive Director continues to observe this restriction in matters he may be involved in during his employment with the Red Cross, whether they involve the Red Cross or not, he would not be in violation of this rule.

CONCLUSION

Subject to the foregoing analysis, the Executive Director’s employment with the Red Cross would not violate I.C. 4-2-6-6 or the post-employment restrictions found in I.C. 4-2-6-11(b)(1) or I.C. 4-2-6-11(c).