

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

The Director of the DNR's Division of Reclamation was offered employment with a non-profit corporation affiliated with the coal industry and sought advice from the SEC on how the Code would implicate his postemployment opportunity in light of the fact that the Division did not regulate or otherwise have jurisdiction over the non-profit. SEC found there would be no violation of the Postemployment rule's revolving door provision but cautioned the Director to ensure his work for the non-profit would not implicate any Executive Branch Lobbying rules during his cooling off period. SEC similarly advised the Director to ensure he avoided working for the non-profit on any particular matters in which he personally and substantially participated while at the DNR, should any such matters 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 the Director of the Indiana Department of Natural Resources ("DNR") Division of Reclamation (the "Division"). The Division implements Indiana's surface mining law found at I.C. 14-34 and regulations found at 312 I.A.C. 25 concerning public health and safety and environmental issues. The Division also contains a program that remedies dangerous and environmentally degrading issues from mining that occurred prior to the federal Surface Mining Act of 1977.

The Division Director has been offered employment with a not-for-profit corporation. The not-for-profit corporation formed many years ago to foster, promote and defend the interests of Indiana coal producers, coal reserve holders, and other business entities related to the coal industry. The not-for-profit corporation serves as the focal point for the industry with government, business, community, and other organizations interested in Indiana's coal industry. The Division Director has been offered the Vice President – Safety position. This position reports directly to the President of the not-for-profit corporation. The duties of the position pertain to issues related to coal miner safety. These duties are not similar to the duties in his current position with the Division. Specifically, the Division does not have jurisdiction over coal miner safety. Moreover, the Division does not regulate the not-for-profit corporation. The position that has been offered will entail having interactions with safety representatives within the industry and other state and national mining groups. The not-for-profit corporation is comprised of over 100 member companies. About a dozen of these member companies hold permits related to coal mining and are subject to jurisdiction of the Division. Since going through the interview process, the Division Director has removed himself from any matter before the Division involving any member of the not-for-profit corporation.

ISSUE

What rules in the Code apply to the Division Director's post-employment opportunity with the not-for-profit corporation? 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. 4-2-6-9 (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 Division Director's intended post-employment opportunity implicates provisions of the Code pertaining to confidential information, conflicts of interest and post-employment. The application of each provision to the Division Director's arrangement is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the Division 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 employment with the not-for-profit corporation resulted from information of a confidential nature. Accordingly, the Commission finds that the Division Director's work with the not-for-profit corporation would not violate I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Division 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 himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In this case, it appears that the Division Director has an arrangement for prospective employment with the not-for-profit corporation. Accordingly, the Division Director would be prohibited from participating in any decision or vote in which he or the not-for-profit corporation would have a financial interest in the outcome. To the extent that the Division Director has complied with this provision since employment negotiations with the not-for-profit corporation commenced and he continues to abstain from participating in any decision or vote in which he or the not-for-profit corporation has a financial interest in the outcome of the matter for the remainder of his state employment, and ensures compliance with I.C. 4-2-6-9(b) if a potential conflict of interest arises, the Commission finds that the Division Director's intended employment with the not-for-profit corporation would not violate 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 or revolving door period prevents the Division Director from accepting employment under various circumstances for 365 days from the date that he leaves state government.

First, the Division 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 Division Director will be required to lobby the executive branch for the one year following his last day of state employment. To the extent this is accurate the Commission finds that this restriction does not apply.

Second, the Division 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 or for whom he made a regulatory or licensing decision. It does not appear that any of the one-year cooling off prohibitions applies in this case. Specifically, there is no information to indicate the Division Director engaged in the negotiation or the administration of a contract with the not-for-profit corporation on behalf of the State and was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration. Furthermore, while the Division issues permits to some member entities, the Division does not regulate or license the not-for-profit corporation itself.

Although it appears that the cooling off provision of the post-employment rule does not apply to the Division Director’s post-employment opportunity, he is still 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 Division Director has not identified any particular matters he anticipates working on in his intended post-employment opportunity. To the extent that he continues observing this restriction regarding any particular matters (i.e. licenses, applications, etc.) he personally and substantially participated in during his employment with the State, whether they involve the not-for-profit corporation or not, he would not be in violation of this rule.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Division Director may accept employment with the not-for-profit corporation immediately upon leaving state employment as his intended employment does not violate I.C. 4-2-6-11.