

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

The IDOC's former Executive Director of Youth Services sought advice to determine if he was permitted to seek a contract position with his former agency in addition to maintaining his current employment with a company which owns and operates a juvenile detention center monitored and audited by IDOC. SEC determined that the post-employment rule's "cooling off" period would not apply as the former Executive Director would not engage in executive lobbying activities and the employment with IDOC would be through a contract. SEC further determined the "particular matter" restriction would not prohibit the former Executive Director from entering into an employment contract with the IDOC in addition to maintaining his employment with the company because the term "person" does not include an agency in the executive branch of state government.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The former Executive Director for the Division of Youth Services of the Indiana Department of Corrections ("IDOC") resigned from the IDOC on October 6, 2014, and is currently employed with Youth Opportunity Investments, LLC ("YOI") located in Carmel, IN. YOI is a privately operated company that owns and operates the Muskegon River Youth Center ("MRYC-IN") in Ladoga, IN, which is a secure juvenile detention center. YOI also owns and operates the Muskegon River Youth Home (MRYH) in Evart, MI. MRYPH is a secure juvenile detention and residential facility. YOI also has detention and residential service contracts with various counties in other States including Ohio, Michigan, and Minnesota. Although IDOC monitors and audits private juvenile facilities, the former executive director does not take part in any reviews or audits of MRYC-IN or any other privately operated facility. In addition he does not participate in any matters or decisions which involve MRYC-IN or any other privately operated facility.

It is possible that the IDOC would be interested in filling the state employee's former role by hiring an individual on a contract basis. The former Executive Director seeks advice to determine whether he could seek this contract position with IDOC in addition to maintaining his employment with YOI.

ISSUE

Does the post employment restriction set forth in IC 4-2-6-11 prohibit the former Executive Director from entering into an employment contract with the IDOC to perform the services he used to perform as a state employee?

RELEVANT LAW

IC 4-2-6-11

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 IC 4-22-2 to establish criteria for post employment waivers.

IC 4-2-6-1

Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

....

(12) "Person" means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.

ANALYSIS

IC 4-2-6-11 is the ethics rule that governs post-employment for members of the Executive Branch of state government. This rule outlines various restrictions that apply to a former state employee that may limit the type of work the former state employee may engage in after leaving their employment with the state. Generally, IC 4-2-6-11 provides for a one-year "cooling-off" period before the former state employee may perform certain work. The waiting period may be longer in cases that involve a "particular matter" as defined by the statute.

In this case, the former Executive Director's intended contractual employment with the IDOC invokes consideration of IC 4-2-6-11(b)(2) and IC 4-2-6-11(c). IC 4-2-6-11(b)(2) sets forth the one-year "cooling off" period requirement for state officers wishing to engage in certain types of work. This cooling off restriction would not apply to the former Executive Director because the State would be his employer through a contract. He would not be lobbying the executive branch. Moreover, because the State does not contract with, regulate, or license itself, the one-year cooling off restrictions would not apply.

The restriction set forth in IC 4-2-6-11(c) is separate and applies to a "particular matter." This prohibition generally lasts for the life of the particular matter involved, which could be greater than or less than 365 days. The particular matters subject to this restriction are enumerated in IC 4-2-6-11(a)(1)-(12).

This restriction states that a state employee may not represent or assist a person in a particular matter involving the State if the state employee personally and substantially participated in the matter as a state employee. In Formal Advisory Opinion [10-I-2](#), the Commission found that the particular matter restriction did not apply in that case since an agency in the executive branch of state government did not qualify as a “person” pursuant to the definition of the term in IC 4-2-6-1(a)(13). Specifically, the Commission interpreted the term “governmental agency,” included in the definition of “person,” as excluding an agency in the executive branch of state government. Because the IDOC is an agency in the executive branch of state government, it would be excluded as a “person.” Therefore, the particular matter restriction would not apply to the IDOC and the former Executive Director would be permitted to work on matters he worked on as a state employee.

CONCLUSION

Because the term “person” does not include an agency in the executive branch of state government, the Commission finds that the particular matter restriction set forth in IC 4-2-6-11(c) would not prohibit the former Executive Director from entering into an employment contract with the IDOC in addition to maintaining his employment with YOI.