

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

The Governor's Chief of Staff planned on forming a public affairs, strategic communication, political and campaign consulting business upon leaving state employment. SEC found that the Chief of Staff would not be restricted by the cooling off period of the Postemployment rule since he did not plan on lobbying the executive branch and any clients of the firm would not be considered "employers" as defined by the Code. SEC further found that the Chief of Staff would need to avoid representing or assisting any clients on particular matters in which he had personally and substantially participated while a state employee.

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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

A state employee is the Chief of Staff to the Governor. He has served in this position since January 14, 2013. Prior to assuming this position, the Chief of Staff served as then Congressman Chief of Staff from 2001 until 2012, at which time he took a leave of absence from his employment in the United States House of Representatives to serve as senior advisor for the Governor for Indiana gubernatorial campaign.

As the Governor's Chief of Staff, the employee is responsible for staffing, budgeting, directing and managing the work efforts of the 40 employees on the Governor's staff including policy specialists, communication staff, legislative liaisons, schedulers, travel support, lawyers, and constituent service staff. Additionally, the Chief of Staff interviews and participates in the selection of 29 cabinet members and several dozen executive personnel for other agencies. He also participates in the selection process for the members of the more than 225 State boards and commissions.

The Chief of Staff has general oversight responsibility for the Governor's staff involving public safety and corrections. He attends meetings of the Indiana State Fair Commission as a representative of the Governor, but he has no vote or statutory authority for membership on the State Fair Commission. He is merely a representative of the Governor's office with no official responsibilities or duties on the State Fair Commission.

As Chief of Staff, the employee devotes considerable resources and time to offering one-on-one advice and counsel for the Governor with respect to public policy matters, hiring, office administration, communication, travel and strategic planning. His responsibilities in this role have never included negotiating or administering a contract or grant or making regulatory or licensing decisions on behalf of any company or organization. His work has involved legislative, personnel, and policy recommendations of general applicability.

The Chief of Staff intends to resign from state employment at the close of business Friday, May 9, 2014. He further intends, as a sole proprietor and sole owner, to start a public affairs, strategic communication, political and campaign consulting business. He will not engage in executive branch lobbying for at least 365 days after May 9, 2014.

The Chief of Staff has not yet legally incorporated or otherwise formally organized the business. He has not entered in to any contract, scope of work, or commitment with respect to the business. It is likely that he will have some business opportunities with Governor's political campaign. Any potential services offered by his business to the Governor's campaign will be made on the basis of his nearly two decades of work as a key campaign advisor to, and friend of, the Governor. He has managed or advised six (6) of the Governor's U.S. House of Representative campaigns and Governor's 2012 gubernatorial campaign.

ISSUE

What rules in the Code apply to the Chief of Staff's intended pursuit to form, as a sole-proprietor, public affairs, strategic communication, political and campaign consulting business upon his departure from state employment? Would his intended business pursuit subject him to any post-employment restrictions under IC 4-2-6-11?

RELEVANT LAW

IC 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.

IC 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.

IC 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 Chief of Staff's intended post-employment opportunity implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Chief of Staff's opportunity is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Chief of Staff 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 the Chief of Staff would utilize confidential information in his intended consulting business. So long as any compensation the Chief of Staff receives does not result from confidential information, his intended consulting business would not appear to violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the Chief of Staff 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 him. In this case, the Chief of Staff would like to form, as a sole proprietor, a public

affairs, strategic communications, political and campaign consulting business. As the sole owner, the Chief of Staff would have a financial interest in the consulting business. Consequently, the Chief of Staff must abstain from participating in any decision or vote for the remainder of his employment with the State which would financially impact him or the consulting business he intends on forming to avoid violating IC 4-2-6-9. While unlikely to arise, he must ensure compliance with IC 4-2-6-9(b) if a potential conflict of interest arises.

C. Post-Employment

IC 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 Chief of Staff from accepting employment from an employer for 365 days from the date that he leaves state government under various circumstances.

First, the post-employment rule prohibits the Chief of Staff from accepting employment for 365 days from the last day of his state employment from an *employer* if he engaged in certain activities during his tenure with the State (emphasis added). The definition of the term “employer” specifically excludes a customer or client of a self-employed individual in a professional practice. In this case, the consulting business the Chief of Staff intends to form would appear to qualify as a professional practice. Accordingly, any customers or clients of the consulting business would not be considered employers for purposes of the application of the cooling off period.

The Chief of Staff would, however, still be 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. The Chief of Staff’s intended consulting business does not appear to require him to accept compensation as an executive branch lobbyist. To the extent he observes this restriction during the cooling off period, he would not be in violation this portion of the rule.

The Chief of Staff is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence him in his official capacity as a state employee. Because the Chief of Staff’s consulting business is not considered an employer as the term is defined, this restriction would not apply.

Finally, independent of the one-year cooling off restriction, the Chief of Staff is subject to the “particular matter” prohibition of the post-employment rule in his prospective post-employment. This restriction prevents him from representing or assisting a person 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.

While he does not identify any particular matters that he personally and substantially participated in as a state employee, the Chief of Staff would be prohibited from assisting any of his consulting business' clients with any particular matters that he personally and substantially participated in throughout his tenure with the State.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction against executive branch lobbying, the Commission finds that the Chief of Staff's intended pursuit to form, as a sole-proprietor, a public affairs, strategic communication, political and campaign consulting business upon leaving his state employment would not violate the post-employment restrictions found in IC 4-2-6-11 or any other rule of the Code of Ethics.