

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)

An OUCC employee was offered a position by a utilities company based in North Carolina and Tennessee. During the employee's tenure at the OUCC, the company was involved in three cases before the IURC, the decision-making authority for utilities. SEC determined that the employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and that he could go to work immediately for the utilities company so long as he complied with the executive branch lobbying restrictions. SEC further found that the employee's participation in the identified lawsuits was personal and substantial enough that the post-employment rule's particular matter restriction would prohibit him from assisting or representing the utilities company in these lawsuits for the life of the matters.

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No. 15-I-12

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 Executive Director of Technical Operations ("EDTO") with the Indiana Office of the Utility Consumer Counselor ("OUCC"). Pursuant to I.C. 8-1-1.1-4.1, the OUCC is an independent state agency charged with the responsibility of advocating on behalf of residential, commercial, and industrial utility ratepayers (i.e. customers). According to its website, the OUCC is the state agency representing ratepayer interests in cases before state and federal utility regulatory commissions. As such, the OUCC does not serve as a decision-making authority or adjudicator. The Indiana Utility Regulatory Commission ("IURC") serves as the final administrative authority for Indiana's investor-owned water utilities, including corporations. The Executive Director has served as the EDTO for the OUCC since July 2013. Prior to joining the OUCC, the Executive Director worked at the Indiana Department of Environmental Management ("IDEM") as Assistant Commissioner of Compliance & Enforcement from March 2005 to December 2006 and as an Environmental Manager from 1994 to 2001.

As the EDTO for the OUCC, the Executive Director reports directly to the agency head and Utility Consumer Counselor. The Executive Director of Legal Operations ("EDLO") and Ethics Officer, oversees the attorneys within the OUCC. The Ethics Officer also reports to the Utility Consumer Counselor. The Executive Director's duties as EDTO include overseeing utility analysts (non-lawyers) within the Water/Wastewater Division of the OUCC. The Water/Wastewater Division is responsible for responding to petitions and other related matters filed by jurisdictional water and wastewater utilities, including investor-owned, municipal, and other water utilities.

The EDTO is a leadership and policy position and as such the Executive Director is typically not involved in the complexities of specific cases. When the Executive Director is required to get involved in cases, he is typically only involved in large scale or major cases and his involvement is usually limited to communicating broad policy issues such as strategic planning,

benchmarking, asset management, energy-water nexus, the smart grid, voluntary standards, and sustainability. The EDTO's role is one of broad leadership and policy direction to ensure that the OUCC's mission is carried out and that its annual goals are met. The day to day activities on cases are typically at the Division Director and Lead Attorney levels. Further, the EDTO is never counsel of record and does not possess authority to settle cases.

The OUCC assigns "rankings" to each case filed with the IURC. The rankings range from "1" (simple) to "5" (major). Broadly, the EDTO, EDLO, or the Utility Consumer Counselor are not automatically involved in lower-level cases ranked as 1, 2, or 3, unless the EDTO, EDLO, or Utility Consumer Counselor intentionally inserts themselves in the case. The EDTO's job description outlines the EDTO's responsibilities as including, in part, "oversee[ing] the Division Directors in developing case strategy, settlement positions . . ." Regarding overseeing "case strategy" or "settlement positions," those activities, in practice, are relegated to "complex" or "major" cases (i.e. cases ranked "4" or "5") or cases where the EDTO seeks to become otherwise involved in a case.

The EDLO or the Utility Consumer Counselor, not the EDTO, is responsible for the litigation, negotiation, and settlement of cases. The Executive Director is not and has never been "counsel of record," has a limited role in settlement discussions, and does not possess the authority to settle cases. The agency head as Utility Consumer Counselor possesses the sole authority to settle cases and has never delegated this authority to the Executive Director. Rather, in most cases, Utility Consumer Counselor has delegated this authority to the attorneys (Deputy Consumer Counselors), who are managed by the EDLO. There are cases in which the Executive Director will be involved in "settlement strategy" as opposed to "settlement negotiations" or signing "settlement agreements" (managed by the attorneys). These cases are typically the "complex" or "major" cases or, in a few instances, other cases in which the Executive Director has sought to become actively involved. In summary, as EDTO, the Executive Director is most often an "influencer" in the settlement strategy and settlement negotiation aspects of a case team's work in "complex" and "major" cases and rarely, if at all, in other types of cases.

The Executive Director is interested in leaving state employment and accepting a position with Utilities, Inc. Utilities, Inc. is a jurisdictional water and wastewater utility regulated by the IURC. Utilities, Inc. is a corporation headquartered in Illinois and owns and operates a few small water and wastewater utilities within Indiana, including Twin Lakes Utilities, Inc., Indiana Water Service, Inc., Water Service Company of Indiana, and Community Utilities of Indiana.

In early December 2014, the Executive Director informed the Executive Director, the Water/Wastewater Division Director and the Ethics Officer of his intention to leave state employment. He requested that he be screened from all current and future cases involving the Indiana-American Water Company and Aqua Indiana. In February 2015, the Executive Director requested that the screen be expanded to include all investor-owned water utilities, including Utilities, Inc. This screen is still in place within the agency.

The Executive Director's prospective position with Utilities, Inc. would consist of oversight of the following water and wastewater utilities in North Carolina and Tennessee: (1) Carolina Water Service, Inc. of North Carolina; (2) CWS Systems, Inc.; (3) Bradfield Farms Water

Company; (4) Carolina Trace Water Utilities, Inc.; (5) Transylvania Utilities, Inc.; and (6) Tennessee Water Service. To the best of the Executive Director's knowledge, none of these companies have a relationship with the state of Indiana (other than the fact that they are all owned by Utilities, Inc., which has separate, jurisdictional water and wastewater utilities within Indiana). The Executive Director would not have any oversight of water or wastewater utilities in Indiana. The Executive Director's prospective responsibilities would not involve lobbying the State on behalf of Utilities, Inc., nor would it require him to be involved in any of Utilities Inc.'s Indiana operations.

During the Executive Director's tenure as EDTO at the OUCC, Utilities, Inc. filed the following cases with the IURC: (1) Case No. 44388 – Twin Lakes Utilities, Inc. (filed on or about September 5, 2013); (2) Case No. 42743 – (DSIC -2) – Indiana Water Service, Inc. (filed on or about March 31, 2014); and (3) Case No. 44587 – Community Utilities of Indiana (filed on or about January 27, 2015). The last case is pending. The first two cases were ranked as “2” or “standard,” not the level of cases that the EDTO would typically be involved in.

The Executive Director does not believe his involvement in any of these three cases was personal or substantial. Other than being aware of the case filings in Case No., 42743 (DSIC-2) and Case No. 44587, the Executive Director had no involvement in these cases. Regarding Case No. 44388, the Executive Director was involved to a small degree. While the Executive Director did not address any of the issues raised by Utilities, Inc. in this case, he did raise a new, minor issue related to the management of Twin Lakes. Specifically, approximately one week before the OUCC's filing deadline, the Executive Director suggested to the Water/Wastewater Division Director that the OUCC advocate for Twin Lakes to begin or otherwise improve upon its benchmarking efforts, consistent with the American Water Works Association benchmarking standards (due to the outcome of a prior independent management audit of Twin Lakes). The Executive Director believes that the case was ultimately settled, but he does not recall being part of any settlement discussions in the case nor does he recall reviewing any testimony.

The Executive Director has not negotiated or signed any other type of contract or other agreements with Utilities, Inc. while a state employee. In addition, the Executive Director has no recollection of any interactions with Utilities, Inc., or any of its subsidiaries while he was employed at IDEM. During his tenure as Assistant Commissioner of Compliance & Enforcement at IDEM from March 2005 until December 2006, he oversaw environmental enforcement actions, including water enforcement actions. The only “hit” reflected “Twin Lakes” mobile home park in Posey County (southwest Indiana), which is not the same entity as Twin Lakes Utilities, Inc., a subsidiary of Utilities, Inc.

During his tenure as an Environmental Scientist 3/Environmental Manager 2 within the Hazardous Waste Section of the Office of Enforcement from July 1994 until January 2001, the Executive Director managed hazardous waste enforcement actions, and not water enforcement actions. The Executive Director searched the IDEM Enforcement Database from 1995 through January 2001 (the database does not allow searching prior to 1995) and he did not find any “hits” for Utilities, Inc. or its related companies. Therefore, based on the results of his searches within the IDEM Enforcement Database, the Executive Director was not involved in any Utilities, Inc. matters while at IDEM.

ISSUE

What rules in the Code apply to the Executive Director's post-employment opportunity with Utilities, Inc.? Would the Executive Director be prohibited from working for Utilities, Inc. immediately upon leaving state employment?

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 Executive Director's post-employment opportunity with Utilities, Inc. implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Executive Director's prospective employment with Utilities, Inc. is analyzed below.

A. Confidential Information

IC 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 the Executive Director would utilize confidential information in his potential employment with Utilities, Inc. So long as any compensation the Executive Director receives does not result from confidential information, his potential employment with Utilities, Inc. would not appear to violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9(a)(1) prohibits the Executive Director from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits the Executive Director 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 IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

In this case employment negotiations have already begun as the Executive Director indicated that Utilities, Inc. has expressed an interest in hiring him. Accordingly, a conflict of interest would arise for the Executive Director if he participates in a decision or vote in which either he, by virtue of his employment negotiations with Utilities, Inc., or Utilities, Inc. would have a financial interest.

IC 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 Executive Director requested an advisory opinion from the Commission as provided in the rule and had disclosed the potential conflict to his appointing authority.

IC 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, in early December 2014, the Executive Director informed his appointing authority as well as the Ethics Officer and the Water/Wastewater Division Director that he intended to leave state employment and requested to be screened from all current and future cases involving potential employers, at that time Indiana-American Water Company and Aqua Indiana. Accordingly, an internal screen was implemented to ensure that the Executive Director did not participate in any matters related to cases involving the potential employers. Later, in February 2015, the Executive Director requested that the screen be expanded to include all investor-owned water utilities, including Utilities, Inc.

Because a conflict of interest would arise for the Executive Director if he participates in a decision or vote in which Utilities, Inc. has a financial interest, the Commission approved the screen and advised that it should remain in place for the remainder of the Executive Director's state employment.

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 Executive Director from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, 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. The information provided by the Executive Director indicates that his intended work with Utilities, Inc. would not require him to engage in lobbying activities or register as an executive branch lobbyist. To the extent that the Executive Director does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with Utilities, Inc. would not violate this provision of the post-employment rule.

Second, the Executive Director is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

In this case, the Executive Director indicated that the OUCC does not serve as an administrative authority or decision maker and that the IURC is the final administrative authority over water

and wastewater utilities such as Utilities, Inc. In addition, the Executive Director's position with OUCC, as the EDTO, is a broad-based policy position and he does not have the authority to settle cases, be a "counsel of record" or otherwise participate in the day to day events of most cases that go before the IURC. In other words, he is not involved in decision-making regarding individual utilities. While he identified three cases involving Utilities, Inc. subsidiaries that arose during his tenure at the OUCC, the Executive Director had no involvement in two of these cases and only made a suggestion to the Water/Wastewater Division Director in the remaining case that was not related to the main issues of the case. The Executive Director does not recall having any further involvement in this case.

The Executive Director was involved in water enforcement actions during his employment as Assistant Commissioner of Compliance & Enforcement at IDEM. However, he conducted a search of the IDEM Enforcement Database to confirm that he never oversaw an enforcement action involving Utilities, Inc. or any of its subsidiaries during the period of time he served in this position.

In the Executive Director's previous position within the Hazardous Waste section of IDEM's Office of Enforcement, he managed hazardous waste enforcement actions, and not water enforcement actions. The Executive Director still completed a search of the Enforcement Database and confirmed there were no enforcement actions involving Utilities, Inc. or its subsidiaries during his tenure in this position.

Based on the information provided, the Commission finds that the Executive Director did not make a regulatory decision that directly applied to Utilities, Inc. during the course of his state employment. Consequently this provision does not apply to the Executive Director.

Third, the Executive 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. This provision does not appear to apply to the Executive Director as he indicated that he had no involvement in the negotiation or administration of any contracts with Utilities, Inc. on behalf of the State.

Fourth, the Executive Director 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. The information presented to the Commission did not suggest that the offer of employment from Utilities, Inc. was extended to the Executive Director in an attempt to influence him in his capacity as a state employee.

Finally, the Executive Director is subject to the post-employment rule's "particular matter" prohibition 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.

Utilities, Inc. has had three cases before the IURC while the Executive Director has been employed at the OUCC: (1) Case No. 44388 – Twin Lakes Utilities, Inc. (filed on or about September 5, 2013); (2) Case No. 42743 – (DSIC -2) – Indiana Water Service, Inc. (filed on or about March 31, 2014); and (3) Case No. 44587 – Community Utilities of Indiana (filed on or about January 27, 2015). Besides being aware of the case filings in Case No. 42743 (DSIC-2) and Case No. 44587, the Executive Director had no involvement in these cases. Regarding Case No. 44388, the Executive Director indicated that his involvement was limited to offering a suggestion to the Water/Wastewater Division Director, on a matter that was not related to the central issues of the case.

The Commission finds these lawsuits to be particular matters and that the Executive Director's participation in these matters appeared to be personal and substantial enough that he is prohibited from assisting or representing Utilities, Inc. in these three lawsuits for the life of the matters.

In addition, the Executive Director should keep in mind that he is prohibited from assisting Utilities, Inc. or any other person on any of the particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves Utilities, Inc.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the Executive Director's acceptance of an employment offer by Utilities, Inc. would not violate the post-employment restrictions found in IC 4-2-6-11 so long as he refrains from assisting or representing Utilities, Inc. in the identified particular matters for the life of these matters.