

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

IC 4-2-6-6 Compensation resulting from confidential information

A former DNR Employee sought advice regarding a post-employment opportunity working as a Project Manager with an entity with whom DNR contracts. SEC determined that the former employee would not violate post-employment rules regarding particular matter restrictions with the new employer.

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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 former employee (“Former Employee”) of the Indiana Department of Natural Resources (DNR) served as an Inspector for DNR’s Division of Engineering. His last day with the State was October 6, 2018. In his role as an Inspector, he worked with Glenroy Construction (Glenroy). Glenroy serves as one of DNR’s Job Order Contracting (JOC) General Contractors. The Former Employee provides that he was responsible for inspecting the work that Glenroy’s subcontractor, Smither Roofing, completed at Turkey Run State Park, and he routinely approved Glenroy’s payment applications, which required his review to check for accurate numbers.

The Former Employee explains that JOC’s are typically composed of several “projects” or “jobs”; for example, a roof repair and road repair can be part of the same JOC. The Former Employee provides that all of these jobs are combined into one PO, as opposed to two separate contracts.

After becoming aware of this request, DNR’s General Counsel and Ethics Officer (“Ethics Officer”), sought further information on the Former Employee’s involvement with Glenroy from the employee’s former supervisor, the Director of the Division of Engineering (“Supervisor”). The Supervisor provides that each JOC contractor utilizes one contract, and each contract can have an unlimited number of individual projects. Each project has its own separate purchase order (PO). The PO that the Former Employee was working on has been closed out. The Supervisor further provided that he approves all of Glenroy’s invoices and that the Former Employee’s authority was limited to recommending approval of invoices.

The Former Employee has recently accepted a position as a Project Manager with Glenroy. He has learned that Glenroy executives intend for him to manage DNR projects that are assigned to them through the JOC process, thus presenting what the Employee views as a potential conflict of interests.

Additionally, the Former Employee provides that he is dating a DNR Division of Engineering employee who is responsible for writing JOC contracts after they have been awarded, but the

employee is not involved with any decision making and is not aware of (nor will ever be aware of) any proprietary information related to the contracts. The Former Employee notes that these contracts do not go out to bid and are handled by the Indiana Department of Administration.

The Former Employee requested an Informal Advisory Opinion (IAO) from the Office of Inspector General in September of 2019. The IAO suggested he seek a Formal Advisory Opinion from the Commission for a final determination as to the application of the post-employment restrictions to his opportunity with Glenroy. His cooling off period expired on October 6, 2019, so the Former Employee is seeking a Formal Advisory Opinion regarding the application of the post-employment rule's particular matter restrictions to the DNR projects on which Glenroy would like him to work.

ISSUE

Does the particular matter restriction apply to any of the DNR projects on which the Former Employee would be asked to work by his new employer, Glenroy?

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

One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

- (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.
- (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) 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 the individual's 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) consultation by;

(3) representation by; or

(4) 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 the following:

(1) A special state appointee who serves only as a member of an advisory body.

(2) A former state officer, employee, or special state appointee who has:

(A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer;

and

(B) any contract that:

- (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
- (ii) is no longer active.

(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. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.
 - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
 - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

- (1) be signed by the former state officer, employee, or special state appointee;
- (2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and
- (3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

ANALYSIS

As an initial matter, the Former Employee is no longer a state employee and thus is no longer subject to the rules on conflict of interests. Accordingly, these rules' application to the Former Employee due to his dating relationship with the current DNR employee will not be analyzed in this opinion.

A. Confidential Information

IC 4-2-6-6 prohibits the Former Employee from accepting any compensation from any employment, transaction, or investment that 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 Former Employee would utilize confidential information in his employment with Glenroy. So long as any compensation the Former Employee receives does not result from confidential information, his post-employment opportunity with Glenroy would not violate IC 4-2-6-6.

B. 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 Former Employee from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances. The cooling off period for the Former Employee expired on October 6, 2019; accordingly, the cooling off limitations of the post-employment rule no longer apply to the Former Employee.

The Former Employee is still subject to the post-employment rule's "particular matter" prohibition in his new position. 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.

In this instance, the Former Employee would be prohibited from representing or assisting Glenroy, as well as any other person (including subcontractors such as Smither Roofing), in a particular matter in which he *personally and substantially* participated as a state employee. This restriction would not prevent him from working on new matters or any matters in which he was not previously involved.

In his DNR position, the Former Employee worked with Glenroy, one of DNR's JOC General Contractors, and inspected the work performed by its subcontractor, Smither Roofing. Additionally, he was involved in approving their payment applications. Although he did not have the authority to approve their invoices, he recommended their approval to his supervisor. In his new position at Glenroy, he will be expected to manage DNR projects assigned to them through the JOC process. As his supervisor notes, each JOC contractor (such as Glenroy) utilizes one contract, and each contract can have an unlimited number of individual projects. Each project has its own separate purchase order (PO). The POs that included the projects on which the Former Employee worked and reviewed under Glenroy's contract with DNR have been closed out.

The Ethics Officer provided additional information related to DNR's contractual relationship with Glenroy. According to the Ethics Officer, Glenroy did and does have POs under an overarching JOC with DNR. The Former Employee worked on several PO-related projects underneath the previous version of that overarching contract. Those POs and related projects have been closed out since he left state employment, so he would not be working on anything for Glenroy that he had previously worked on for the State. Further, the overarching contract is not the same contract that was in effect when the Former Employee was an employee of DNR. The contract was renewed, with new provisions, after the Former Employee left state employment.

The Commission finds that a renewed contract with added or different provisions is a new contract and not the same contract as existed previously. Accordingly, the Commission finds that because the current overarching contract (JOC) was not in existence at the time the Former Employee left state employment, he is not prohibited by the particular matter restriction from working on any part of the current contract for Glenroy.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Former Employee's post-employment opportunity with Glenroy would not violate the particular matter restrictions found in IC 4-2-6-11(c).