

42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-9)
IC 4-2-6-6 Compensation resulting from confidential information
42 IAC 1-5-14 Post Employment (IC 4-2-6-11)

The Ethics Officer for the Indiana Department of Transportation (INDOT) sought advice on behalf of the INDOT Commissioner regarding a post-employment opportunity. The Commission finds that the post-employment opportunity would not be contrary to the Code of Ethics so long as the Commissioner files a Disclosure Statement with the Commission.

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2022-FAO-001

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 Ethics Officer for the Indiana Department of Transportation (INDOT) is requesting an advisory opinion on behalf of INDOT's Commissioner (Commissioner). The Ethics Officer's request includes a letter from the Commissioner with additional information supporting the request.

Governor Holcomb appointed the Commissioner as INDOT's Commissioner in January of 2017. As INDOT's Commissioner, he oversees the administration of INDOT and its implementation of state transportation policies. His role with INDOT primarily consists of establishing and implementing agency policy and interacting with the public and local units of government, including overseeing transportation and infrastructure operations for the State of Indiana, identifying and securing long-term road and bridge funding opportunities and preparing Indiana's infrastructure for the future of transportation.

The Commissioner has entered into employment negotiations to serve as the Chief Executive Officer of a startup company called Avenew, LLC (Avenew). Avenew is a newly formed Delaware limited-liability entity with no contracts or revenue; therefore, Avenew has no dealings of any kind with INDOT. Although Avenew is not yet operational, it will eventually seek to partner with local communities, universities and private-sector entities throughout Indiana to manage and maintain local roads, buildings and related infrastructure. The Commissioner will utilize his experience as the mayor of Franklin to help build Avenew's programming. As Avenew's CEO, the Commissioner's primary responsibilities will include developing a team of employees, raising capital and promoting Avenew's services to local governments, universities and private-sector companies throughout Indiana. Avenew's operations will not include contracting with or lobbying INDOT.

Avenew is majority-owned by HG Ventures, which in turn is majority owned by The Heritage Group (Heritage). Heritage is an Indianapolis-based company that manages a portfolio of more than thirty different companies, specializing in heavy construction and materials, environmental services and specialty chemicals. HG Ventures will provide Avenew with

initial start-up capital and be a majority owner of Avenew. Other stakeholders, including the Commissioner, will be minority owners. Heritage, through at least two of its other subsidiary companies, has entered into one or more contracts with INDOT during the Commissioner's tenure with INDOT.

Although the Commissioner has contracting authority for INDOT, he has consistently delegated that authority to other INDOT personnel. Consequently, during his tenure as INDOT's Commissioner, he has never negotiated, managed, administered, executed or reviewed any contracts with third-party contractors on behalf of INDOT. Furthermore, Avenew has no contracts with INDOT. Also, the Commissioner has made no licensing or regulatory decisions as INDOT's Commissioner. The Commissioner writes that he agrees to refrain from representing or assisting Avenew in any particular matter in which he personally and substantially participated. He also represents that he has not disclosed any confidential information in his employment negotiations with Avenew and that he understands that IC 4-2-6-6 applies indefinitely and prohibits him from ever receiving compensation as a result of confidential information.

The Commissioner explains that Avenew has no past, current or prospective matters before INDOT in which Avenew or the Commissioner has a financial interest. Out of an abundance of caution, the Commissioner disclosed his employment negotiations with the Ethics Officer, who executed and signed a formal screen. The screen became effective on January 14, 2022. It prevents the Commissioner from participating in any decision or vote, or matter related to a decision or vote, in which any Heritage company has a financial interest. The screen also prohibits the Commissioner from participating in any present or future contract or other matter involving a Heritage company and from assisting any future employers, including Avenew, with any matter he personally and substantially participated in while employed by INDOT. The Ethics Officer has filed the screen with INDOT and has indicated that he will file the disclosure statement and screen if the Commission determines that the Commissioner must a file a disclosure statement under IC 4-2-6-9.

INDOT is seeking the Commission's opinion regarding the application of any of the rules in the Code of Ethics to the Commissioner's post-employment opportunity with Avenew.

ISSUE

What rules in the Code apply to the Commissioner post-employment opportunity with Avenew?

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; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter related to that 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 member, 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 ethics officer in writing and do either of the following:

(1) 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:

- (A) 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
- (B) 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.

(2) File a written disclosure statement with the commission that:

- (A) details the conflict of interest;
- (B) describes and affirms the implementation of a screen established by the ethics officer;
- (C) is signed by both:
 - (i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and
 - (ii) the agency ethics officer;
- (D) includes a copy of the disclosure provided to the appointing authority; and
- (E) is filed no later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) 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; 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

The Ethics Officer's request for a formal advisory opinion on behalf of the Commissioner invokes consideration of the provisions of the Code pertaining to Confidential Information, Conflicts of Interests and Post-employment. The application of each provision to the Commissioner is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Commissioner 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. The Commissioner represents that he has disclosed no confidential information in his employment negotiations with Avenew and that he understands the rule applies indefinitely and prohibits him from ever receiving compensation as a result of confidential information. So long as any compensation the Commissioner receives does not result from confidential information, his potential employment with Avenew would not violate IC 4-2-6-6.

B. Conflict of Interests

IC 4-2-6-9(a)(1) prohibits the Commissioner from participating in any decision or vote, or matter related to that 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 Commissioner from participating in any decision or vote, or matter related to that 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. Accordingly, the Commissioner would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which he, by virtue of his employment negotiations with Avenew, or his prospective employer would have a financial interest in the outcome of the matter.

IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify his agency’s appointing authority and ethics officer and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the Commission.

Based on the information provided, the Commission finds that the Commissioner has a potential conflict of interests due to his role as the INDOT Commissioner and Heritage’s subsidiary companies’ contracts with INDOT. As a result, the Commission finds that the Commissioner must file a disclosure statement with the Commission. The disclosure statement must include a notification to the Commissioner’s appointing authority and include a description of the screen that INDOT has implemented to ensure that the Commissioner does not participate in any votes, decisions or other matters in which any Heritage company has a financial interest during the remainder of his state employment. As part of the conflict of interests disclosure statement and screen, the Commission advised INDOT to include a specific provision screening the Commissioner from certain post-employment activities involving INDOT.

The Commissioner also must ensure he continues to refrain from participating in any decisions or votes, or matters relating to any such decisions or votes, in which he or any Heritage company has a financial interest in the outcome of the matter for the remainder of his 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 Commissioner from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the Commissioner 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, the Commissioner would not be engaging in any lobbying activities in his prospective employment with Avenew. To the extent that the Commissioner does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with Avenew would not violate this provision of the post-employment rule.

Second, the Commissioner 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.

The Commissioner represents that he has never personally engaged in the negotiation or administration of any contracts between INDOT and outside contractors. Furthermore, Avenew has no contracts with INDOT. Accordingly, the Commissioner would not be subject to the cooling off period's contracting provision because he was not involved in the negotiation or administration of a contract between Avenew and INDOT.

Third, the Commissioner 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.

The Commissioner provides that he has not made any regulatory or licensing decisions in his position with INDOT that directly applied to Avenew, Heritage or any of Heritage's subsidiaries. Accordingly, this provision of the cooling off restriction would not prohibit the Commissioner from accepting a position with Avenew.

Fourth, the Commissioner 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 does not suggest that Avenew has extended an offer of employment to the Commissioner in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to his intended employment opportunity with Avenew.

Finally, the Commissioner 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.

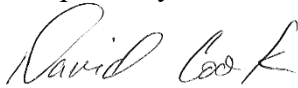
In this instance, the Commissioner would be prohibited from representing or assisting Avenew, as well as any other person, in a particular matter in which he personally and substantially participated as a state employee.

The Commissioner agrees that he must refrain from representing or assisting Avenew on any particular matter in which he personally and substantially participated. So long as he refrains from representing or assisting Avenew or any other person on any particular matter in which he personally and substantially participated, the particular matter restriction would not prohibit the Commissioner from working for Avenew.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that Commissioner's post-employment opportunity with Avenew, LLC would not violate the post-employment restrictions found in IC 4-2-6-11. Furthermore, the Commission finds that so long as the Commissioner files a conflict of interests disclosure statement with the Commission, his post-employment opportunity would not be in violation of IC 4-2-6-9.

Respectfully Submitted,



David Cook
Inspector General
Acting on behalf of the State Ethics Director (position currently vacant)