

**42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)**

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

A former state employee who previously worked for INDOT and DNR sought advice whether their work on a public works project constitutes personal and substantial participation in the project such that the post-employment rule's particular matter restriction would prohibit their potential involvement with a new employer. The Commission finds that the former employee's work on the public works project does constitute both personal and substantial participation such that the Code prohibits them assisting their new employer or any other person with the particular matter in their post-state employment activities unless a post-employment waiver is granted by DNR.

September 14, 2023

2023-FAO-009

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, a former state employee whose proposed post-state employment activities serve as the basis for the request.

**BACKGROUND**

A former state employee (Former Employee), previously served in the Indiana Department of Natural Resources' (DNR) Division of Historic Preservation and Archaeology (DHPA) from January 2001 to April of 2023. In her role at DNR, the Former Employee was responsible for the planning, implementing and execution of the Indiana Historic Sites and Structures Inventory.

During her tenure at DNR, the Former Employee started the planning for a Marion County survey that DNR planned for 2025. Prior to leaving state employment, she worked for approximately three months on preliminary mapping of current historic districts in Marion County's Center Township and noted areas where further investigation would be necessary to identify new historic districts. She did not progress to the point of identifying proposed new historic districts.

After the Former Employee's preliminary work on Marion County's Center Township survey, but prior to leaving state employment, the Indiana Department of Transportation (INDOT) approached DNR about funding and coordinating a potential 2024-2026 Marion County survey project (Project), identifying existing and new historic districts in Marion County. The Former Employee did no further work on Marion County historic district mapping at DNR following INDOT's proposal.

After leaving state employment the Former Employee started employment in April of 2023 for Gray & Pape (Firm), a cultural resources management firm. She is employed as an architectural historian/principal investigator.

The Firm is likely to bid on the Project. This public works project will be offered for bid by the INDOT in October of 2023. The Project involves the completion of planning, surveying and

recording of historic resources in six Marion County townships, including Center Township. The Project will involve considerable interaction with DHPA. If the Firm bids and is selected for the Project, it will provide one qualified professional at DHPA for the duration of the Project to plan, oversee, review and approve records. The Firm and its qualified professional would identify potential historic districts in the six Marion County townships for DHPA review and approval and will coordinate extensively with INDOT and DHPA.

The Former Employee, as the sole architectural historian in the Firm working in Marion County, would play a key role in the Project if the Firm is selected.

The Former Employee requested the Commission's Formal Advisory Opinion on the application of the Code to her potential role at the Firm as it relates to the Project.

### **ISSUE**

Does the Former Employee's preliminary work on the Marion County survey during her employment at DHPA constitute both personal and substantial work on a public works project or any other particular matter such that the Code would prevent her from representing or assisting her new employer or any other person on the Project?

### **RELEVANT LAW**

#### **IC 4-2-6-11 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.

#### **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.

## ANALYSIS

The Former Employee's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Post-employment and Confidential Information. The application of each provision to the Former Employee's circumstances is analyzed below.

### *A. Post-employment*

IC 4-2-6-11 consists of two separate limitations: a "cooling off" period and a "particular matter" restriction.

#### 1. The "cooling off" period

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 she left state employment under various circumstances.

The Commission notes that the Former Employee left state employment in April of 2023 and began work at the Firm that same month.

As the Former Employee had already accepted employment at the Firm within the 365-day cooling-off period, the Commission declines to retroactively analyze the applicability of this provision of the post-employment rule.

#### 2. The particular matter restriction

The second prohibition under the post-employment rule, commonly referred to as the "particular matter" restriction, prevents a former state employee from working on the twelve types of matters listed in IC 4-2-6-11(a) if he/she personally and substantially participated in the matter as a state employee. These matters are 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*.

The Project is a public works project, and therefore a particular matter, as contemplated by the Code's post-employment rule. As such, the Former Employee would be prohibited from

assisting the Firm or any other party on the Project in her post-state employment activities if she personally and substantially worked on the same particular matter as a state employee.

The Former Employee provides that her participation in the preliminary work leading up to the Project was limited to the initial mapping of current historic districts in Marion County, Center Township and noting areas where further investigation would be necessary to identify new historic districts. The Former Employee worked on the Marion County, Center Township mapping for approximately three months during her state employment and did not work any further on the matter following INDOT's proposal to DNR to fund and coordinate the Project. The Project's scope extends beyond Center Township to include other townships in Marion County.

The Commission finds that the Marion County survey work that the Former Employee performed at DHPA is a part of the same particular matter as the Project. The expansion of the scope of the Marion County mapping to include additional townships and INDOT's assumption of funding and project coordination duties do not change the matter's character; therefore, the Marion County survey work is part of the same particular matter as the Project under the Code's post-employment rule.

The Commission further finds that the Former Employee's work on the Project as a state employee was both personal and substantial; therefore, she is prohibited from assisting the Firm or any other person with the Project, unless the Commission were to approve a waiver granted by DNR's Appointing Authority pursuant to IC 4-2-6-11(g). The Commission further notes that unless a waiver is issued and approved by the Commission, the Former Employee is prohibited from assisting the Firm or any other person with the Project in her post-state employment activities for the entire life of the Project.

#### *B. Confidential information*

IC 4-2-6-6 prohibits the Former Employee from accepting any compensation from any employment, transaction or investment that is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as the Firm. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

The Commission notes that if the Former Employee has acquired such confidential information obtained in her role at DHPA, she is prohibited not only from divulging that information but from ever using it to benefit any person, including the Firm, in any manner.

## **CONCLUSION**

The Commission finds that the Project is a public works project, and therefore a particular matter, as contemplated by the Code's post-employment rule. The Commission also finds that the Marion County survey work that the Former Employee performed at DHPA is a part of the same particular matter as the Project. The Commission further finds that the Former Employee's work on the Project as a state employee was both personal and substantial; therefore, she is prohibited from assisting the Firm or any other person with the Project for the entire life of the Project, unless the Commission approves a waiver granted by DNR's Appointing Authority pursuant to IC 4-2-6-11(g).

Respectfully Submitted,

Sean Gorman  
State Ethics Director