

**42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**

A Division Director with the OUCC was offered a position as a Senior Regulatory Analyst with a utility that had appeared in cases she had been involved with during her time with the state. SEC found that although the Director would not be subject to the 365-day "cooling off" restriction of the Postemployment rule, the cases she had been involved with constituted particular matters, and she would therefore be prohibited from representing or assisting the utility or any other person in any of the cases in which she had personally and substantially participated during her employment at the OUCC.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1).

**BACKGROUND**

A state employee has been employed by the Office of Utility Consumer Counselor ("OUCC") since January 2006. She currently serves as the Director of Resource Planning, Emerging Technologies and Telecommunications Division. In this capacity, the Director coordinates the technical staff's involvement in speaking on behalf of Indiana utility consumers in specific cases before the Indiana Utility Regulatory Commission ("IURC"). More specifically, the Director manages the OUCC's involvement in certain IURC dockets assigned to her division by developing case strategy; developing expert, technical opinions and litigation plans; and mentoring analysts to conduct research, present ideas through well written persuasive work products, and serve as case team leaders. She also manages and develops division staff through regular one-on-one meetings, coordinates "collaborative processes" with Indiana's utilities, and participates in settlement negotiations.

The OUCC regularly appears before the IURC on behalf of ratepayers, customers, and the public. The OUCC's management, legal, and technical staff routinely engage in settlement negotiations with public utilities before or after the filing of an IURC proceeding. All settlement agreements are signed by either the attorney who has entered an appearance in the case, by the Utility Consumer Counselor himself, or both. The settlement agreements do not themselves determine the utilities' regulatory obligations, but instead must be submitted to the IURC for approval. The Director has not signed any agreement or contract with Indianapolis Power & Light Company ("IPL") during her tenure with the OUCC.

The Director wishes to leave her state employment to accept a position as a Senior Regulatory Analyst with IPL. In this position, the Director would generally be responsible for reviewing and providing comments on proposed State and Federal legislation and proposed rules and regulations. She would also design tariffs and prepare testimony to be presented before the IURC. She would coordinate filings with and testify before the IURC. In this capacity, the Director would also provide financial, technical,

and regulatory analysis supporting senior management. She would also be responsible for assimilating technical and economic information into rate design.

The Director discloses that she has personally and substantially participated as a witness in the following IURC dockets involving IPL: Cause Numbers 43100, 43181, 43252, and 43426. Moreover, the Director discloses that her responsibilities at the OUCC for matters involving IPL were assigned to other OUCC employees on December 15, 2008.

### **ISSUE**

Does IC 4-2-6-11 prohibit the Director from accepting a post-employment opportunity with IPL as a Senior Regulatory Analyst before the expiration of three hundred sixty-five (365) days? If not, would IC 4-2-6-11 impose any restrictions upon the Director in her intended employment with IPL?

### **RELEVANT LAW**

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

#### **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 IC 4-22-2 to establish criteria for post employment waivers.

## ANALYSIS

### *A. Post-Employment Considerations: Restrictions Related to Lobbying, Negotiating, and Administering Contracts, and Making Regulatory or Licensing Decisions*

In this case, the three hundred sixty-five (365) “cooling off” period would not apply to the Director. Specifically, the Director will not be employed as a lobbyist by IPL. In addition, the Director neither engaged in the negotiation or administration of a contract with IPL nor made a regulatory or licensing decision that applied to the utility or its parent or subsidiary while she was employed by the OUCC. Finally, the facts presented

do not appear to suggest that IPL has offered her employment in an attempt to influence her in her official capacity with the OUCC.

*B. Post-Employment Considerations under IC 4-2-6-11(c): restrictions related to Particular Matters*

In addition to the “cooling off” period analyzed above, the Director would be subject to the “particular matter” restriction of the post-employment rule. The Director discloses that she has personally and substantially participated in the following "particular matters" as defined by IC 4-2-6-11(a) involving IPL:

Cause Numbers 43100, 43181, 43252, and 43426.

The Director would thus be prohibited from representing or assisting IPL or any other "person," as defined by IC 4-2-6-1(11), in any of the cases listed above. In addition to the cases listed above, the Director would further be prohibited from representing or assisting her prospective employer or any other "person" in any other particular matter set forth in IC 4-2-6-11(a) that she personally and substantially participated on during her tenure with the state.

**CONCLUSION**

Subject to the foregoing analysis and identified “particular matter” employment restrictions, the Director’s intended employment with IPL would not appear to violate IC 4-2-6-11.