

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

The Director of the OMB was offered employment with a local non-profit organization and sought advice on what rules in the Code of Ethics applied to his postemployment opportunity. SEC found the Director's signature on the contracts he identified as being involved in was a statutory requirement and did not amount to having negotiated or administered the contracts, a task that had been performed by the IFA staff. In addition, SEC determined the Director's involvement in those matters was not personal and substantial. As a result, SEC concluded neither the cooling off period nor the particular matters restrictions of the Postemployment rule would apply to the Director's prospective employment.

September 2010  
No. 10-I-10

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

#### **BACKGROUND**

An employee is the Director of the Indiana Office of Management and Budget (OMB) and has worked for the State of Indiana (State) since January 2005. Prior to holding this position, the Director led the Indiana Finance Authority (IFA) as the State Public Finance Director from January 2005 until June 1, 2007. As the Public Finance Director, the employee's responsibilities included leading the IFA staff and serving as Vice Chair of the Indiana Health and Educational Facility Financing Authority (IHEFFA). The IHEFFA was merged into the IFA on July 1, 2007 (hereinafter referred to as IFA). The Director serves as Chairman of the IFA in the capacity of OMB Director pursuant to the statutory requirement set forth in I.C. 4-4-11-4.

The Director was approached by a non-profit organization and was offered an employment opportunity. The non-profit organization is based in Indianapolis and is comprised of multiple hospitals and health centers throughout Indiana.

During the Director's tenure with the State, the non-profit has had five dealings with the IFA. Such dealings involve various bond issuances and a lease-sublease purchase agreement (collectively referred to as Resolutions). Three of those dealings involved the issuance of bonds that occurred in 2005 and 2006 while the Director served as the Public Finance Director. A separate dealing in 2008, related to Resolution 08-F-06 (2008 Resolution) which involved a bond issue and occurred when the Director served as the Chairman of the IFA. The final dealing relates to Resolution 10-F-1 (2010 Resolution), which authorizes a form of lease-sublease purchase agreement.

With regard to the Resolutions, the Director explains that he participated in the votes, but that the requirements for these matters are statutorily outlined. I.C. 5-1-16 establishes the criteria that an applicant must satisfy. The Director explains that he is not aware of any applications being turned down by the IFA as long as the entity met the statutory criteria. The non-profit organization regularly applies to the entity in the State that issues tax-exempt bonds and has never had an application disapproved. In addition, it is the IFA staff that worked directly with the applicants. The Director did not have any involvement in the application process leading up to the Board meetings until the day of the meetings when the applications were up for a vote.

The Director explains that while he signed the Resolutions, he was not involved in negotiating or administering these instruments. His signature on the Resolutions was included to satisfy the statutory requirement set forth in I.C. 5-1-16-19(a) that such documents include the signature of the chairman of the Board and/or the Public Finance Director. The Director clarifies that the extent of his interaction with the non-profit organization on these matters was limited to his vote, as opposed to actually negotiating or administering the Resolutions.

The Director will not be serving as an executive branch lobbyist for at least one year after leaving state employment and has not made a regulatory or licensing decision that directly applied to the non-profit organization.

### ISSUE

What rules in the Code of Ethics would apply to the Director's employment opportunity with the non-profit organization, and would his acceptance of the offered position subject him to any post-employment restrictions under I.C. 4-2-6-11?

### RELEVANT LAW

#### **I.C. 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.

#### **I.C. 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.

#### **I.C. 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 Director's intended employment with the non-profit organization invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Director is analyzed below.

### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the 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 the Director provided, it does not appear that non-profit organization's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Director's acceptance of the non-profit organization's employment offer would not be in violation of I.C. 4-2-6-6.

### *B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Director from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the Director has an arrangement for

prospective employment with the non-profit organization. Accordingly, the Director is prohibited from participating in any decision or vote during the remainder of his state employment in which the non-profit organization has a financial interest in the outcome of the matter. The Director indicates that he is aware of this provision and has not participated in any decision or vote affecting the non-profit organization since he became aware of the prospective employment opportunity. To the extent that the Director continues to observe this provision and abstains from participation in any decision or vote affecting the non-profit organization, the Commission finds that the Director would not be in violation of I.C. 4-2-6-9.

### *C. Post-Employment*

I.C. 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 period, prevents the Director from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Director is prohibited from accepting employment as an executive branch lobbyist pursuant to I.C. 4-2-7-1(5) for the entirety of the cooling off period. Based on the information provided, the Commission finds that this provision does not apply to the Director. Specifically, he indicates that he will not be required to register as an executive branch lobbyist for at least one year after leaving state employment.

Second, the Director is prohibited from accepting employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of his 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. In this case, the Director participated in votes and signed five Resolutions that qualify as contracts involving the non-profit organization. In opinion 07-I-8, the Commission issued an advisory opinion to the former Director of the OMB finding that the 365-day postemployment restriction did not apply to the Director’s intended postemployment opportunity because the Director had voted on, but had not negotiated or administered a contract on behalf of the State with the intended employer. More recently, in opinion 10-I-6, the Commission found that the 365-day post-employment restriction did not apply to the Commissioner of INDOT because the agency staff had engaged in the negotiation and administration of the contract with his intended employer, not the Commissioner himself. According to the information provided, the Director was not involved in the negotiation or administration of the Resolutions either as Public Finance Director or Chairman of the IFA. Instead, it is the IFA staff that interacts with applicants. While the Director participated in the votes involving Resolutions and the various agreements associated with the Resolutions bear his signature, the Commission finds that the Director neither negotiated nor administered such agreements. Accordingly, the Commission finds that the 365-day post-employment restriction would not apply to the Director’s intended employment with the non-profit organization.

Third, the Director is prohibited from accepting employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its

parent or subsidiary. This provision would not appear to apply in this case since the Director did not make any regulatory or licensing decisions that applied to the non-profit organization.

Fourth, the 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. None of the facts provided suggest that the non-profit organization's offer of employment to the Director was extended in an attempt to influence him in his capacity as the IFA Chairman or in his former position of Public Finance Director.

Finally, the Director is subject to the post-employment rule's "particular matter" prohibition in his potential employment. This restriction prevents him from working on any of the following twelve matters for an employer 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. It appears that the Resolutions would each qualify as particular matters in so far as each is considered to be a contract. As a result, the Director would be prohibited from working on these contracts if he personally and substantially participated in those matters while he was employed by the State. In opinion 06-I-17, the Commission issued an advisory opinion to a former staff attorney of the IFA. In that opinion, the Commission opined that "[a]bsent an individual's disclosure to the Commission that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the Commission will make a case-by-case determination as to whether an individual would be subject to the particular matter restriction set forth in IC 4-2-6-11(c)." In this case, the Director's only contact with the non-profit organization or consideration of the non-profit organization's applications regarding the Resolutions was limited to the Board's consideration of the matters on those meeting dates. The Commission finds that the Director's involvement in the Resolutions was minimal and that he did not personally and substantially participate in the Resolutions. Consequently, the Commission finds that the Director would not be prohibited from working on these matters in his employment with the non-profit organization.

### **CONCLUSION**

The Commission finds that the Director's intended employment opportunity with the non-profit organization would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the Director's intended employment with the non-profit organization would not violate I.C. 4-2-6-11.