

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

An ALJ for the IURC sought employment with a water company whose subsidiary is regulated by the IURC. SEC found the one-year cooling off required in 42 IAC 1-5-14 applied to the ALJ's intended employment with the water company because, according to a policy adopted by the IURC, the ALJ made regulatory or licensing decisions affecting the company in executing his duties as an ALJ. Consequently the ALJ was prohibited from accepting an employment position with the water company until after the expiration of 365 days from the last date of leaving state employment. SEC further determined that the Postemployment rule's particular matter restriction applied to the two matters involving the water company's subsidiary in which the ALJ personally and substantially participated and that the ALJ was prohibited from assisting the water company or any other person on these matters.

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No. 14-I-4

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 state employee has served as an administrative law judge ("ALJ") for the Indiana Utility Regulatory Commission ("IURC") since September 2010. In this position, he advises the five IURC commissioners on legal procedures in cases pending before them. He also drafts orders at the direction of the IURC or an individual commissioner assigned to a case for action by the five voting members.

The ALJ submitted a resume to American Water Works Company, Inc. ("American Water") on March 19, 2014 seeking employment for an opening as Director of Government Affairs with the company. Indiana American Water Company, Inc. ("Indiana American") is a subsidiary of American Water that provides water and waste water services in Indiana, the majority of which falls within the jurisdiction of the IURC. On March 28, 2014, the ALJ received an email from American Water's human resources department inquiring about his availability for a telephone screening. That same day he notified his supervisor, the IURC's Chief ALJ and the IURC's General Counsel/Ethics Officer that American Water had contacted him and asked to be screened off of all cases involving Indiana American. American Water emailed him on April 1, 2014, and scheduled a screening for April 4, 2014. On April 4, 2014, he participated in the telephone screening and an in-person interview was scheduled for April 25, 2014 at the offices of Indiana American.

The ALJ is not a voting member of the IURC. He has not been involved in the negotiation or administration of any contracts while employed by the IURC. The position with American Water, if offered to him, would not require him to lobby the executive branch of state government for the first 365-days of employment. Neither Indiana American nor American Water has tried to influence the performance of the ALJ's duties with the state. In his position as an ALJ for the IURC, the ALJ does not have the statutory authority to make regulatory or

licensing decisions relating to Indiana American or American Water. However, on or about October 5, 2010, then Governor Daniels' General Counsel sent a memo to all executive branch agency heads. The memo provided background on a recent controversy involving the IURC's former Chief ALJ and General Counsel and announced that the one-year cooling off period for decision makers should include ALJs.

As a result of the issuance of that memo, the IURC Chairman signed internal policy number 11-P4 (hereinafter referred to as the "Policy") on September 21, 2011. The Policy indicated that in compliance with Indiana law and opinions of the State Ethics Commission, it was intended to address and clarify the position of the IURC regarding commissioners and staff and employment with utilities under the jurisdiction of the IURC. The Policy states that commissioners and ALJs have been determined to be decision makers under IC 4-2-11(b) and as such are prohibited from lobbying for or accepting employment with a utility regulated by the IURC until the elapse of at least 365 days from the date the commissioner or ALJ ceases to be an IURC employee.

During his tenure at the IURC, the ALJ has only provided advice to or drafted orders for the agency in two cases involving Indiana American. The first was cause number 43991 involving the accounting treatment of expenses relating to specified capital improvement projects in which an Order was issued by the IURC on May 11, 2011. The second was cause number 44200 involving an appeal of a finding made by the consumer affairs division of the IURC regarding a consumer complaint against Indiana American in which an Order was issued by the IURC on December 24, 2012. The ALJ was assigned to cause number 44456 on February 26, 2014, another appeal of a finding made by the consumer affairs division of the IURC that involved a customer of Indiana American, but was screened off of the case once he notified both his supervisor and the IURC ethics officer that he had been contacted by American Water to schedule an initial screening. Any initial hearing in the cause has yet to be held.

ISSUE

What rules in the Code apply to the ALJ's potential post-employment opportunity with American Water? Would the ALJ be prohibited from accepting employment with American Water if the company extends him an offer of employment?

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

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.

IC 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 ALJ's potential post-employment opportunity implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the ALJ's potential employment with American Water is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the ALJ 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 provided, it does not appear that the ALJ would utilize confidential information in his potential employment with American Water. So long as any compensation the ALJ receives does not result from confidential information, his potential employment with American Water would not appear to violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 (a)(1) prohibits the ALJ from participating in any 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 ALJ from participating in any 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 I.C. 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In Advisory Opinion 10-I-7, the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment. Employment negotiations have commenced in this case. Specifically, American Water has corresponded with and actually conducted a phone interview with the ALJ. Since employment negotiations have commenced, a conflict of interest would arise for the ALJ if he participates in a decision or vote in which American Water would have a financial interest. Because Indiana American is a subsidiary of American Water, American Water would appear to have a financial interest in the outcome of decisions or votes involving Indiana American. Accordingly, a conflict of interest would also arise for the ALJ if he participates in a decision or vote in which Indiana American would have a financial interest.

IC 4-2-6-9(b) provides that a state employee 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. In this case, the ALJ requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his agency ethics officer. So long as he discloses the potential conflict to his appointing authority, he would be in compliance with this provision.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the ALJ has indicated that he has been screened from all matters related to Indiana American. Specific details regarding the screening process have not been disclosed.

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 ALJ from accepting employment from an employer for 365 days from the date that he leaves state government under various circumstances.

First, the ALJ 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. The ALJ indicates that any post-employment opportunity with American Water would not require him to engage in or register as an executive branch lobbyist. To the extent that the ALJ ensures compliance with this provision for the entirety of the cooling off period, his intended employment with American Water would not violate this provision of the post-employment rule.

Second, the ALJ 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. This restriction would not apply in this case. Specifically, the ALJ never negotiated nor administered a contract with American Water on behalf of the state during the course of his entire tenure with the state.

Third, the ALJ 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. This provision would appear to be triggered by the ALJ’s work at the IURC. Specifically, the IURC has adopted a policy indicating that ALJs have been determined to be decision makers under IC 4-2-11(b) and as such are prohibited from lobbying for or accepting employment with a utility regulated by the IURC until the elapse of at least 365 days from the date the ALJ ceases to be an IURC employee. The ALJ has made decisions regarding American Water on two separate occasions during his tenure as a state employee. Accordingly, absent a waiver of this rule being issued by his appointing authority, this provision would prohibit the ALJ from accepting employment from American Water until after the expiration of 365 days from his last date as an IURC employee.

Should he obtain a post-employment waiver from his appointing authority to commence employment with American Water immediately upon leaving his IURC employment or accept employment with American Water after the expiration of the one-year cooling off period, the ALJ is still subject to the post-employment rule’s “particular matter” prohibition. 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.

There are at least three matters to consider. Specifically, the ALJ has been involved in at least two matters, Cause Nos. 43991 and 44200, involving Indiana American. These two matters would qualify as particular matters. Based on the information provided, it would appear that the ALJ's participation was personal and substantial in both of those matters. Specifically, he provided advice and drafted orders for the IURC in those causes. Accordingly, he would be prohibited from assisting any post-employer, including American Water, in anything related to these matters. The third matter, Cause No. 44456, would also appear to qualify as a particular matter. However, based on the information provided, it does not appear that the ALJ has personally and substantially participated in this matter since he was screened off this case soon after he was assigned to the case.

CONCLUSION

The Commission makes the following findings:

- 1) Employment negotiations have begun between the ALJ and American Water. Therefore, the ALJ must be screened from any matter in which he or American Water would have a financial interest for the remainder of any such employment negotiations.
- 2) The one-year cooling off period applies to the ALJ's intended employment with American Water because, according to the Policy adopted by the IURC, the ALJ made a regulatory or licensing decisions affecting American Water in executing his duties as an ALJ. Accordingly, subject to the foregoing analysis, the ALJ would be prohibited from accepting an employment position with American Water until after the expiration of 365 days from the last date of leaving state employment or until a waiver is received.
- 3) The ALJ personally and substantially participated on Cause Nos. 43991 and 44200. Accordingly, he is prohibited from assisting American Water or any other person on these matters for the life of these matters.