

ETHICAL CONSIDERATIONS
FOR EXITING STATE
GOVERNMENT SERVICE

Indiana Inspector General & State Ethics Commission
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Overview

- Conflict of Economic Interests
 - IC 4-2-6-9
- Post-employment
 - IC 4-2-6-11

Conflict of Economic Interest

Case Study



AO 06-I-3

- Purdue University employee on detail as Executive Director of the Indiana Department of Homeland Security through an Employee Interchange Program
- Existing relationship between IDHS & Purdue



- Active contracts
- Federal homeland security grants issued to Purdue by IDHS
- Purdue regulated by various IDHS sections

AO 06-I-3

- IC 4-2-6-9 Conflicts of interest; decisions and voting
- IC 4-2-6-9(b)



- Screened by Ethics Officer and Support Division Chief from all IDHS decisions benefitting Purdue
 - Contracts
 - Grants
 - Permits

AO 08-I-5

- IC 4-2-6-9(b) screen revisited
- IC 4-2-6-11 Postemployment restrictions reviewed



- Screening mechanism from AO 06-I-3 insulated Executive Director from revolving door provisions

What the rule actually prohibits

- A state employee may not participate in any decision or vote if the employee has knowledge that any of the following have a financial interest...

What the rule actually prohibits

- The employee him/herself
- A member of the employee's immediate family
- A business organization in which the employee is serving as an officer, a director, a trustee, a partner, or an employee
- Any person or organization with whom the employee is negotiating or has an arrangement concerning prospective employment

Negotiating employment

- Negotiations commence as soon as parties begin discussing potential employment, regardless of who initiates contact (AO 12-I-9)
 - ▣ Purpose is to reach an understanding regarding employment (AO 10-I-7)
 - ▣ Merely submitting a resume does not amount to negotiating but a formal submission is not a required element
 - ▣ One telephone call or email response could be enough to trigger application

Negotiating employment

- Indiana State Ethics Commission v. Scott Storms
 - ▣ Former Indiana Utility Regulatory Commission General Counsel and Chief ALJ
 - ▣ Left state employment to work for Duke Energy, a regulated entity
 - But this is not a post-employment case

Negotiating employment

- Complaint
 - ▣ Alleged Storms violated subsection (a) because he participated in a decision or vote in which an organization with whom he was negotiating or had an arrangement concerning prospective employment had a financial interest
 - ▣ Alleged Storms violated subsection (b) by failing to notify his appointing authority of a potential conflict and by failing from seeking an opinion from the Commission

Negotiating employment

- Facts indicating negotiations
 - ▣ Duke employee calls Storms notifying him the position was open and how to apply
 - ▣ Storms exchanged numerous phone calls and email messages over a period of four months with several Duke employees
 - ▣ While these communications were taking place, Storms was conducting hearings and participated as an ALJ in matters involving Duke

Penalty

- Monetary fine of \$12,120.00
 - ▣ Three times the amount of benefit he received in the two months he worked at Duke
- Banned from future state employment
- IURC still under a cloud of suspicion to this day

Safety provision

- An employee can be screened off from a potential conflict
 - ▣ Must notify appointing authority
 - ▣ Must seek an advisory opinion from the State Ethics Commission
 - With approval from the appointing authority, assign the particular matter to another person and implement a screen or
 - Determine the interest is not substantial i.e. no screen needed

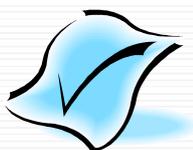
So what do you do?

- Be proactive!!!!
- Come before the Commission
 - ▣ AO 13-I-40
 - ▣ Department of Insurance Chief Deputy Commissioner
 - ▣ Two companies contacted him about possible employment
 - ▣ Immediately contacted his Ethics Officer which was before responding to the companies
 - ▣ Ethics Officer immediately instituted a screen so negotiations could move forward

So what do you do?

- ▣ Ethics Officer notified IDOI staff that the employee should have no involvement or participate in any discussions involving the companies
- ▣ Ethics Officer took the extra step of contacting the companies and notifying them of the screens

Exiting State Government Service



Exiting Government Service

- ▣ Executive Branch is the only branch with post-employment restrictions
- ▣ History-Where have we been?
 - ▣ Before 2005...
 - There was nothing to restrict a state employee from going to work for a company that did business with the employee's agency
 - The particular matter restriction was only for 365 days
 - Only applied to former state officers and employees
 - Executive Branch lobbying restrictions were minimal

Exiting Government Service

- Other States
 - 43 states have some form of a post-employment restriction
 - Only 11 states have restrictions regarding regulated entities

Exiting Government Service

- Other considerations
 - Constitutional limits
 - Brinkman v. Budish
 - Involved a one year revolving door statute for members and employees of the General Assembly regarding lobbying activity
 - Argued it infringed on First Amendment rights of free speech

Exiting Government Service

- Compelling interests
 - Prevent unethical practices of public employees and officials
 - Promote, maintain, and bolster the public's confidence in the integrity of state government
 - Prevent unequal access to the General Assembly by outside organizations
- Federal Court determined that the Ohio post-employment law violated the government workers' constitutional rights and issued a permanent injunction against the statute's enforcement

Exiting Government Service

- Other considerations
 - ▣ Indiana appellate scrutiny in civil jurisdictions
 - Covenants not to compete
 - Indiana Supreme Court has said
 - "it is to the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract."
 - "noncompetitive covenants in employment contracts are in restraint of trade and disfavored by law."

Exiting State Government Service

Code of ethics



Postemployment restrictions

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

- IC 4-2-6-11(b)
 - ▣ Lobbying
 - ▣ Revolving door ("cooling off" period)
- IC 4-2-6-11(c)
 - ▣ Particular matter
- IC 4-2-6-11(d)
 - ▣ Absolute prohibition
- IC 4-2-6-11(g)
 - ▣ Waiver

Postemployment restrictions

Revolving Door/Cooling Off

IC 4-2-6-11(b)(1)

- A former *state officer, employee, or special state appointee* who accepts employment or receives compensation:
- **as a lobbyist**
 - before the elapse of 365 days following the end of his/her state service commits a postemployment violation.

Executive Branch Lobbying

- A Lobbyist is:
 - an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under rules adopted by the Indiana Department of Administration (IC 4-2-7-1(5))

Postemployment restrictions

Revolving Door/Cooling Off

IC 4-2-6-11(b)(2)

- A former *state officer, employee, or special state appointee* who accepts employment or receives compensation:
- **from an employer if s/he was:**
 - a) engaged in the negotiation or administration of a contract with that employer on behalf of the state or an agency; and b) in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration
 - before the elapse of 365 days following the end of his/her state service commits a postemployment violation.

Postemployment restrictions

- Employer: IC 4-2-6-1(a)(10)
 - Any person from whom a state officer or employee or his/her spouse receives *compensation*. A customer or client of a self-employed individual in a sole proprietorship or a professional practice is not considered to be an employer.

Postemployment restrictions

Revolving Door/Cooling Off

- A former *state officer, employee, or special state appointee* who accepts employment or receives *compensation*:

IC 4-2-6-11(b)(3)

- **from an employer if s/he made a regulatory or licensing decision that directly applied to the employer or a parent or subsidiary**
 - before the elapse of 365 days following the end of his/her state service commits a postemployment violation.

Postemployment restrictions

- Particular matter: IC 4-2-6-11(c)
 - A former *state officer, employee, or special state appointee* who *represents or assists a person* in a *particular matter* involving the state if s/he personally and substantially participated in the matter during the course of state employment commits a postemployment violation, regardless of whether s/he receives *compensation* for the *representation or assistance*.

Postemployment restrictions

- Particular matter: IC 4-2-6-11(a)
 - ▣ 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.
 - 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.

Postemployment restrictions

- Absolute prohibition: IC 4-2-6-11(d)
 - ▣ A former *state officer, employee, or special state appointee* who accepts employment or compensation from an *employer* when the circumstances surrounding the employment or compensation lead a reasonable person to believe the employment/compensation is given or offered for the purpose of influencing him/her in the performance of his/her duties or responsibilities with the State commits a postemployment violation.

Postemployment restrictions

- Waiver: IC 4-2-6-11(g)
 - ▣ An *employee's* or a *special state appointee's state officer or appointing authority* may waive application of the lobbying, cooling off/revolving door or particular matter restrictions in individual cases when consistent with the public interest.

Confidential information

- 42 IAC 1-5-10
 - Benefiting from confidential information
- 42 IAC 1-5-11
 - Divulging confidential information
- IC 4-2-6-6
 - Compensation resulting from confidential information

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