

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

A former ISDH employee sought advice when he began working on a grant application with an informatics and healthcare research organization (“Organization”) on whether a problem arose under the Postemployment rule since he had managed a contract with the Organization while he was still employed by the State. SEC found that the arrangement did not implicate any of the “cooling off” provisions of the Postemployment rule since the former employee was not employed directly by the Organization and advised him to continue to comply with the requirements of the “particular matter” portion of the rule in his new position.

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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 former employee of the Indiana State Department of Health (“ISDH”) separated from employment with the ISDH on July 15, 2009. Upon leaving state employment, the former employee accepted employment with the Indiana University School of Medicine (“IUSOM”) as an Associate Research Scientist. During his tenure at the ISDH, the former employee served as the Director of the State Health Data Center, and as of March 2009, as a Senior Research Chemist at the ISDH Labs.

In his new employment, the former employee serves as an Associate Research Scientist for IUSOM. In this capacity, he is responsible for contributing to the training and education of informatics fellows, collaborating with other investigators in developing and implementing research projects and supporting organizational service obligations. He also works to obtain grant funding from various sources including the Centers for Disease Control, the Department of Health and Human Services, and the Agency for Healthcare Research and Quality. The funding is for the study and research application of clinical health information science to better serve and inform public health practice.

In the process of working on his first grant application with IUSOM, the former employee realized that it would be important for him to work with the ISDH and an informatics and healthcare research organization in order to achieve the job’s objectives. The informatics and healthcare research organization that is supported by a foundation and closely affiliated with IUSOM and the Health and Hospital Corporation of Marion County. The informatics and healthcare research organization, however, is a separately incorporated entity with its own board of directors.

While still employed with the State, the former employee managed a contract in 2006 between the ISDH (“Contract”) and the informatics and healthcare research organization as part of his duties with the agency. The Contract concluded in December of 2006.

On August 17, 2009, the former employee received an opinion from the ISDH Ethics Officer indicating that his employment with IUSOM was in violation of IC 4-2-6-11(b)(2). Specifically,

the opinion indicated that his employment was in violation of the post-employment rule based on his disclosure to the ISDH Ethics Officer that he had negotiated and administered a contract with IUSOM. The former employee then requested a waiver from the ISDH Commissioner to allow him to continue to fulfill his job responsibilities at IUSOM, including work that required contact with the informatics and healthcare research organization. The waiver was denied.

### ISSUE

Is the former employee prohibited from accepting an employment opportunity with IUSOM before the expiration of the one-year “cooling off” period required by the post-employment rule set forth in IC 4-2-6-11(b)?

### 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.

#### **IC 4-2-6-1**

##### **Definitions**

(b) The definitions in IC 4-2-7 apply throughout this chapter.

#### **IC 4-2-7-1**

##### **Definitions**

Sec. 1. The following definitions apply throughout this chapter:

(5) "Lobbyist" means 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.

## **ANALYSIS**

The former employee would be prohibited from accepting employment or receiving compensation until the elapse of at least three hundred sixty-five (365) days after leaving state employment for work as a lobbyist. In addition, the one-year cooling off period would apply to the former employee if he (1) negotiated or administered a contract with the employer on behalf of the state and was in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration, or (2) made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer.

Based on the information provided, the Commission finds that the 365-day post-employment restriction would not apply to the former employee's employment with IUSOM. Specifically, the former employee indicates that his job duties at IUSOM would not constitute lobbying activity. Similarly, the former employee clarifies that he never negotiated or administered a contract with IUSOM. Instead, he discloses that he negotiated and administered a contract with the informatics and healthcare research organization on behalf of the State during his employment at ISDH. Despite the fact that IUSOM and the informatics and healthcare research organization may be closely affiliated, the two are separate entities, and the former employee is employed by IUSOM, not the informatics and healthcare research organization. With respect to IC 4-2-6-11(b)(2)(B), the provision that pertains to regulatory or licensing decisions, it does not appear that the former employee ever made a regulatory or licensing decision as a state employee that would have affected IUSOM or a subsidiary of IUSOM.

With respect to IC 4-2-6-11(c), the former employee continues to be prohibited from representing or assisting IUSOM or any other person in any "particular matter" in which he personally or substantially participated in during his tenure with the State. The former employee has not identified any particular matters that he personally and substantially participated in while at the ISDH that he would be required to work on in his position at IUSOM.

## **CONCLUSION**

Based on the foregoing analysis, the Commission finds that the former employee is not prohibited from accepting an employment opportunity with IUSOM before the expiration of the one-year "cooling off" period required by the post-employment rule set forth in IC 4-2-6-11(b). The former employee should continue to ensure compliance with the "particular matter" restriction set forth in IC 4-2-6-11(c).