

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

A former Project Management Office Director for PERF was considering employment as a sales executive with a consulting company that had a Contract with PERF to provide staffing services. While the former Director was employed at PERF, he had been responsible for interacting with the contract staff vendors to the Contract as well as hiring and firing these contract staff and signing off on their timesheets. SEC found that the Director’s involvement with the Contract amounted to engaging in the administration of a contract and that he was in a position to make a discretionary decision affecting the nature of the administration of that Contract. Consequently, he would need to observe the 365-day cooling off period before accepting employment with the consulting company, absent a waiver from his agency.

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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

A former employee of the Public Employees’ Retirement Fund (“PERF”) was employed as the Project Management Office Director from May 2005 until he left state employment on June 30, 2010.

The Former Director is considering leaving his current non-state employment to accept a sales executive position with a consulting company. This position would require him to interact with various agencies, including PERF and the Teachers’ Retirement Fund (“TRF”).

While he was employed at PERF, the Former Director was ultimately responsible for a large portion of the projects that were completed for PERF and/or TRF. As the Director, full-time and contract staff reported to him. Contract staffers that reported to him at PERF were employed by several vendors, including the consulting company which still has a contract with PERF (“Contract”). The Former Director’s responsibilities at PERF included the hiring and firing of contract staff. He also signed time sheets for these employees and interacted with the vendors regarding their contract staff. Before leaving PERF, the Former Director also provided feedback to PERF regarding the Contract.

ISSUE

Would the Former Director’s acceptance of an employment offer from the consulting company be contrary to the State Code of Ethics?

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. 4-2-6-11 (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 Former Director's intended employment with the consulting company invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the Former Director's prospective employment is analyzed below.

A. Confidential Information

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

B. 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 Former Director from accepting employment under various circumstances until the elapse of 365 days from the date he leaves state government.

First, the Former Director would be prohibited from accepting employment as an executive branch lobbyist as defined in I.C. 4-2-7-1(5) for the entirety of the cooling off period. Based on the Former Director's description of the job duties associated with his prospective employment, the Commission finds that this provision would not apply to the

Former Director as long as he continues to ensure compliance with this restriction for 365 days from his final date of state employment.

Second, the Former Director would be 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, it would appear that the Former Director was involved in the administration of the Contract. Specifically, the Former Director was responsible for hiring and firing contract staff from the consulting company. In addition, he signed off on time sheets and authorized payments for services for the consulting company staff that worked for PERF. Moreover, it would appear that he was in a position to make a discretionary decision that would affect the outcome of the administration of the Contract since he was making decisions regarding the consulting company staffing and necessary resources based on his agency's needs. As a result, the Commission finds that the one-year restriction would apply, and the Former Director would be prohibited from accepting employment with the consulting company until after June 30, 2011, the expiration of 365 days from the last day of his employment with the state.

In addition to the one year cooling off restriction, the Former Director would be 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. In this case, the Former Director identifies at least one contract that would qualify as a "particular matter," namely the Contract. Moreover, it appears that the Former Director's participation in the Contract was personal and substantial. Accordingly, the Commission finds that the Former Director would be prohibited from representing or assisting anyone, including the consulting company, on this matter. To continue ensured compliance with this restriction, the Former Director would also be prohibited from representing or assisting the consulting company or any other person with any of the twelve matters identified above (whether such matter(s) involved the consulting company or not) if he personally and substantially participated in that matter during his employment with the state

CONCLUSION

The Commission finds that the Former Director's intended employment with the consulting company would not violate I.C. 4-2-6-6.

The Commission further finds that the one-year restriction set forth in I.C. 4-2-6-11(b)(2) applies to the Former Director's intended employment with the consulting company. Accordingly, the

Former Director is prohibited from accepting employment with the consulting company until after the expiration of 365 days from his last day of state employment.

Should the Former Director obtain employment with the consulting company after the one-year cooling off period, the Commission finds that he would be prohibited from assisting the consulting company on the Contract and any other particular matter he personally and substantially participated in during his tenure with the state.