

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

A former INDOT employee sought guidance on the particular matter restriction as it applied to his past participation in a permit application and his ability to participate in a related project for his new employer. SEC found the former employee would be prohibited by IC 4-2-6-11(c) from working on the part of the large-scale INDOT project related to the waterway permit application he participated in as a state employee, as his participation in that matter appeared to be personal and substantial. He could however, work on other parts of the project that did not involve particular matters he personally or substantially participated in as a state employee.

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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 former state employee worked for the Indiana Department of Transportation (“INDOT”) as an Environmental Manager/Senior Environmental Manager within INDOT’s Environmental Services Division. INDOT employed the former Environmental Manager from June 16, 2008 to May 23, 2014. His primary job responsibilities were to review environmental studies and waterway permit applications prepared by in-house staff and consulting firms. When approved, he would submit these documents to various regulatory agencies for their review and approval. The former Environmental Manager also conducted inspections during construction to document compliance with project permits. As a Senior Environmental Manager, he also assisted in the management of two on-call consulting firms, who monitored and maintained INDOT’s stream and wetland mitigation sites. In this role, he also reviewed requests for proposals (“RFPs”), though this was not a frequent task.

The former Environmental Manager’s employment as an Environmental Planner at Parsons began on May 26, 2014. Prior to starting this position, he requested an informal opinion from the Office of Inspector General (“OIG”) on May 14, 2014. In his request, he detailed his two previous interactions with Parsons. First, the former Environmental Manager indicated that he had limited involvement with Parsons in regards to document review responsibilities. His involvement primarily was tied to coordination for the U.S. 50 North Vernon Major Moves project, which is composed of a West-Bypass and an East-Bypass. As a Senior Environmental Manager, he managed a team member who directly reviewed and scored West-Bypass deliverables. His involvement on the West-Bypass was limited to participation in early coordination meetings with his designated team member, during which he would provide feedback to Parsons. He also signed the waterway permit applications for the West-Bypass. His involvement on the East-Bypass was limited to a few early coordination meetings regarding the project’s permits. Parsons formally submitted the permit applications for the East-Bypass to INDOT after the former Environmental Manager’s employment with the State had terminated.

Second, the former Environmental Manager was a reviewer on one RFP that involved Parsons, which was for on-call monitoring and maintenance services for the S.R. 25 Hoosier Heartland

Major Moves project. More than six firms submitted letters of interest, and Parsons ended up being a sub-consultant for the firm (Cardno JFNew) to which INDOT ultimately awarded the contract. The former Environmental Manager scored this RFP several months prior to the Environmental Planner position being posted by Parsons. In addition, there were three other scorers for this RFP, including the former Environmental Manager's supervisor, who made the final selection.

The informal opinion that the former Environmental Manager received from the OIG prior to accepting employment with Parsons recommended that he not work on either of the above items to avoid a potential violation of the post-employment rule's "particular matter" restriction. The informal advisory opinion specifically noted that this restriction would likely apply to the on-going permit applications, because he had been personally involved with these applications while at INDOT.

The former Environmental Manager has been employed at Parsons for over eighteen months. During this time, he has not worked on either the U.S. 50 or S.R. 25 projects. Further, the former Environmental Manager is not seeking an opinion regarding the RFP for on-call monitoring and maintenance services for the S.R. 25 Hoosier Heartland Major Moves project. However, INDOT has since awarded Parsons' construction inspection services for the U.S. 50 North Vernon East-Bypass mitigation sites. INDOT assigned this work several months after the former Environmental Manager started at Parsons. Parsons may also be tasked with erosion/sediment control inspection services for the East-Bypass based on recent coordination. The former Environmental Manager would like to participate in both of these opportunities due to his background in inspection services. Therefore, the former Environmental Manager is requesting a formal advisory opinion to determine whether he can perform inspection services on the U.S. 50 North Vernon East-Bypass mitigation sites.

ISSUE

Does the post employment restriction set forth in IC 4-2-6-11(c) prohibit the former Environmental Manager from participating in inspection services for his new employer due to his past involvement in the related waterway permit applications while an INDOT employee?

RELEVANT LAW

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

One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

- (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.

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) 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 the individual's 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) consultation by;
- (3) representation by; or
- (4) 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 the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
 - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
 - (B) any contract that:
 - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
 - (ii) is no longer active.

(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. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.
 - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
 - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise

violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

- (1) be signed by the former state officer, employee, or special state appointee;
- (2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and
- (3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

ANALYSIS

IC 4-2-6-11 is the ethics rule that governs post-employment for employees of the executive branch of state government. This rule outlines various restrictions that apply to a former state employee that may limit the type of work the former state employee may engage in after leaving his or her employment with the State. Generally, IC 4-2-6-11 provides for a one-year “cooling-off” period before the former state employee may perform certain work. The waiting period may be longer in cases that involve a “particular matter” as defined by the statute.

Because the former Environmental Manager’s date of separation from the State exceeds 365 days, the Commission finds that the cooling off provision, found at IC 4-2-6-11(b)(2), is no longer applicable to him.

The restriction set forth in IC 4-2-6-11(c), however, is separate and applies to a “particular matter.” This restriction prevents the former Environmental Manager 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.

The former Environmental Manager participated in Parsons’ waterway permit applications related to mitigation services for the U.S. 50 North Vernon Major Moves project, which is composed of a West-Bypass and an East-Bypass. There are separate mitigation sites, and separate contracts for each mitigation site, for the East and West-Bypass portions of the U.S. 50 project. Parsons prepared a waterway permit application to perform mitigation services for the West-Bypass while the former Environmental Manager was an INDOT employee; the former Environmental Manager participated in this process and signed the permit on behalf of INDOT.

The Commission finds that the former Environmental Manager’s participation on the West-Bypass waterway permit application, a particular matter, as a state employee, was personal and substantial enough to trigger the particular matter restriction and prohibit him from assisting or representing Parsons in this matter. Consequently, this restriction would prohibit the former Environmental Manager from providing construction inspection services for Parsons on the West-Bypass mitigation sites.

The Commission further finds that the former Environmental Manager's participation in the East-Bypass waterway permit application, a separate particular matter, was not personal or substantial. Specifically, though the former Environmental Manager attended a few early coordination meetings regarding permit applications while he was an INDOT employee, Parsons had not started the waterway permit application process for the East-Bypass until after the former Environmental Manager had left state employment. This was due in part to the fact that the East-Bypass was still being designed and the mitigation sites for the East-Bypass had not yet been determined when the former Environmental Manager was an INDOT employee. Rather, these determinations were made after the former Environmental Manager left state employment to begin working for Parsons. Therefore, the former Environmental Manager would not be prohibited from performing construction inspection services for Parsons as they relate to the East-Bypass mitigation sites.

The Commission requests that the former Environmental Manager provide copies of the reports that Parsons plans to provide to INDOT regarding the mitigation services. Specifically, the Commission requests a copy of any reports detailing the construction inspection services that Parsons completed as part of their contracts with INDOT so that the Commission can verify that the former Environmental Manager's involvement in these services is limited to the East-Bypass.

In addition, the former Environmental Manager should keep in mind that he is prohibited from assisting Parsons or any other person on any other particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves Parsons.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the former Environmental Manager would not violate the post-employment restrictions found in IC 4-2-6-11(c) if he were to provide construction inspection services for Parsons so long as his work is limited to the U.S. 50 East-Bypass mitigation sites. The Commission finds that the former Environmental Manager would be prohibited under the post-employment rule's particular matter restriction from working on the U.S. 50 West-Bypass mitigation sites for Parsons because of his personal and substantial participation in the West-Bypass waterway permit application as a state employee.