

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)

The Chief Deputy Commissioner at IDOI was contacted by two groups about potential employment opportunities. The IDOI EO implemented a screen to ensure the Deputy did not participate in any matters involving either of the groups while he was negotiating for employment. SEC found the screen complied with IC 4-2-6-9(b). In addition, the Deputy would not be prohibited from accepting employment with either group immediately upon leaving state employment since he represented that he did not engage in any conduct that would implicate the revolving door restriction of the Postemployment rule.

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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 state employee is the Chief Deputy Commissioner for Health, Public, and Legislative Affairs at the Indiana Department of Insurance (“IDOI”). The Indiana Insurance Institute (“Institute”) contacted the Chief Deputy Commissioner and indicated that they have a job opening and asked if he would be interested in speaking with them about it. The following are member companies of the Institute:

Accident Fund Holdings, Inc., Allstate Insurance Company, American Family Insurance, American Surety Company, Brotherhood Mutual Insurance Company, CAN, Chubb, Group of Insurance Companies, The Cincinnati Insurance Companies, Eastern Alliance Insurance Company, Employers Protective Insurance Company, Erie Insurance Group, FCCI Insurance Group, Farmers Insurance Group, Grain Dealers Mutual Insurance Company, The Hanover Insurance Group, The ILM Group, Indiana Farm Bureau Insurance Company, Indiana Farmers Mutual Insurance Company, Indiana Insurance Company, NAMIC Insurance Company, Inc., Nationwide Insurance Progressive Insurance Company, State Auto Insurance, State Farm Insurance Companies The Travelers Insurance Companies, USAA, Wolverine Mutual Insurance Company, Frankenmuth Insurance, and Westfield Group.

The Chief Deputy Commissioner contacted IDOI’s Ethics Officer, on September 26, 2013, prior to responding to the Institute and disclosed the potential employment opportunity. Because the Institute and its member companies have matters pending before the IDOI, the Ethics Officer established a screen so that the Chief Deputy Commissioner could continue to pursue employment negotiations with the company. The screen was instituted on September 27, 2013. The Ethics Officer sent an email memorandum to all relevant IDOI staff indicating that the Chief Deputy Commissioner should have no involvement or participate in any discussions involving the Institute or its member companies. She also forwarded a communication to the Institute informing the company of this screen.

More recently, the Chief Deputy Commissioner was contacted by CNO Financial Group (“CNO”), a holding company with entities regulated by IDOI, about a possible employment position. To allow the Chief Deputy Commissioner to pursue that employment opportunity, the Ethics Officer screened the Chief Deputy Commissioner from any involvement with CNO or any of the following subsidiaries:

Bankers Life and Casualty Company; Colonial Penn Life Insurance Company; Washington National Insurance Company; Consecos Insurance Company; Consecos Life Insurance Company; Consecos Life Insurance Company of Texas; Bankers Consecos Life Insurance Company; Senior Health Insurance Company of Pennsylvania

The Ethics Officer sent an email memorandum to all relevant IDOI staff indicating that the Chief Deputy Commissioner should have no involvement or participate in any discussions involving CNO or any of its subsidiaries. She also forwarded a communication to CNO informing the company of this screen.

ISSUE

What rules in the Code apply to the Chief Deputy Commissioner’s prospective employment opportunities? Would accepting either position subject him to any post-employment restrictions under IC 4-2-6-11?

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 Chief Deputy Commissioner's intended post-employment opportunities implicate the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Chief Deputy Commissioner's opportunities is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Chief Deputy Commissioner 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 these employment offers resulted from information of a confidential nature. Accordingly, the Chief Deputy Commissioner would not violate IC 4-2-6-6 in accepting employment with either the Institute or CNO.

B. Conflicts of Interest

IC 4-2-6-9 prohibits the Chief Deputy Commissioner from participating in any decision or vote if he has knowledge that various persons may have a “financial interest” in the outcome of the matter, including himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In Advisory Opinion 10-I-7 the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment.

In this case, the Chief Deputy Commissioner has been contacted by both the Institute and CNO. As a result of this initial contact, the IDOI Ethics Officer implemented a screen to ensure the Chief Deputy Commissioner complied with IC 4-2-6-9(b) whereby he would be screened from any contact with either the Institute, as well as its member institutions, or CNO, and its affiliates. In addition, the Ethics Officer contacted both the Institute and CNO to inform them of the screening mechanism in place. The Chief Deputy Commissioner must ensure he complies with the terms of these screens and abstains from participating in any decisions or votes for the remainder of his employment with IDOI involving either the Institute or CNO to avoid violating IC 4-2-6-9 as he negotiates for employment with them.

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 Chief Deputy Commissioner from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Chief Deputy Commissioner 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 Chief Deputy Commissioner represents that he is aware of this restriction, as are both the Institute and CNO, and will not engage in any executive branch lobbying activity until the one-year cooling off period has expired.

Second, the Chief Deputy Commissioner 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 with that employer 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. In this case, the Chief Deputy Commissioner indicates he has not negotiated or administered any contracts with the Institute or CNO during the course of his state employment. Accordingly, this restriction would not prohibit the Chief Deputy Commissioner from accepting employment with either the Institute or CNO immediately upon leaving state employment.

Third, the Chief Deputy Commissioner 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. The Chief Deputy Commissioner states that he has not made any such regulatory or licensing decisions for either the Institute or CNO. Based on those representations, this restriction would not prevent him from accepting employment with either the Institute or CNO immediately upon leaving IDOI.

Fourth, the Chief Deputy Commissioner is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. It does not appear from the information presented to the Commission as though any offer of employment would be extended by the Institute or CNO in an attempt to influence him in his capacity as a state employee. Specifically, the screen instituted by IDOI will remove the Chief Deputy Commissioner from any involvement in Institute or CNO matters as he negotiates with either group. Accordingly, this restriction does not apply to the Chief Deputy Commissioner's prospective employment opportunities.

Finally, the Chief Deputy Commissioner is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. 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.

In this case, the Chief Deputy Commissioner does not identify any particular matters in which he personally and substantially participated involving the Institute or CNO. As a result, this provision would not restrict any matters on which he could represent or assist the Institute or CNO in the future.

CONCLUSION

Subject to the foregoing analysis and the application of the one-year restriction against executive branch lobbying, the Commission finds the Chief Deputy Commissioner's acceptance of any employment offer by the Institute or CNO would not violate the post-employment restrictions found in IC 4-2-6-11. Moreover, although the screening mechanism implemented by IDOI would be appropriate for future use in compliance with IC 4-2-6-9(b), the Chief Deputy Commissioner should seek further post-employment advice for any other employment opportunities that may arise.