

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

The Director of Application Development's position at DOE was eliminated during an agency reorganization, and he was seeking employment with a consulting group that contracted with DOE to run a data transfer computer program. SEC determined: 1) the 365-day cooling off restrictions in the Postemployment rule would not apply to the Director's employment opportunity, and 2) the term "application" in the particular matters provision in IC 4-2-6-11 did not encompass computer applications such as the data transfer computer program the Director had worked on while at DOE.

September 2011  
No. 11-I-13

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 state employee was the Director of Application Development with the Indiana Department of Education ("DOE") until August 12, 2011. As such, the Director supervised software developers in the creation of DOE web applications. The Director's position was eliminated due to reorganization within the DOE. He is now seeking employment with a consulting group which the DOE has contracted with to run an on-line system for managing information on special needs students.

The Director did not engage in any negotiation or administration of a contract with the consulting group and did not make any regulatory or licensing decisions that directly applied to the consulting group. While the Director did serve on a broad-based evaluation committee that reviewed a variety of solutions being considered, he was not a decision maker in that case. His work consisted of primarily assisting connections between the consulting group system and the DOE data systems. These are used to move student and user data from the DOE to the consulting group.

On August 16, 2011, the Director requested an Informal Advisory Opinion to determine whether his intended employment with the consulting group would be contrary to the Code of Ethics. In this request, the consulting group indicated that he personally and substantially participated in the computer application regarding the data transfer from the DOE to the consulting group. It is unclear, however, whether the data transfer project falls within the definition of 'application' under I.C. 4-2-6-11(a)(1) and the particular matter restriction in I.C. 4-2-6-11(c).

#### **ISSUE**

What rules in the Code of Ethics would apply to the Director's intended employment opportunity with the consulting group? Would his acceptance of the proffered position subject him to any post-employment restrictions under I.C. 4-2-6-11?

## 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 Director's intended employment with the consulting group invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the Director's prospective employment is analyzed below.

### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the 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 Director, it would not appear that an offer of employment from the consulting group would result from information of a confidential nature. Accordingly, the Commission finds that the Director's acceptance of an employment offer from the consulting group 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

Director from accepting employment for 365 days from the date he leaves state government under various circumstances.

First, the Director would be prohibited from accepting employment as an executive branch lobbyist pursuant to I.C. 4-2-7-1(5) for the entirety of the cooling off period. It does not appear that employment with the consulting group would require the Director to register as an executive branch lobbyist.

Second, the 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 does not appear that the Director was involved in the negotiation or administration of any contracts with the consulting group on behalf of the State. Specifically, while the Director served on a broad based committee that reviewed a variety of potential solutions, he was not in a position to be a decision-maker. Accordingly, the Commission finds that this provision would not apply to the Director.

Third, the post-employment rule would prohibit the Director from accepting 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 Commission finds that this provision does not apply to the Director, as he did not make any regulatory or licensing decisions that applied to the consulting group.

Finally, the Director is 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 Director disclosed that he personally and substantially participated in the computer application regarding the data transfer from the DOE to the consulting group. The Commission finds that the computer application does not qualify as an 'application' under I.C. 4-2-6-11(a)(1); therefore, the Director would not be prohibited from assisting the consulting group with the program.

## **CONCLUSION**

The Commission finds that the Director's intended employment with the consulting group 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) does not apply to the Director's intended employment with the consulting group. In addition, the restriction in I.C. 4-2-6-11(c) does not include a computer application; therefore, the Director would not be prohibited from assisting his new employer with the data transfer computer program.