

**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)**

An ALJ for the IURC requested the SEC reconsider its previous determination in Advisory Opinion No.14-I-4 that the Postemployment rule's one-year cooling off period applied to his intended employment with a water company because, according to a policy adopted by the IURC, the state employee made regulatory or licensing decisions affecting the company in executing his duties as an ALJ. SEC determined that its findings in Advisory Opinion No. 14-I-4 remain in effect.

July 2014  
No. 14-I-4A

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 serves as an administrative law judge ("ALJ") for the Indiana Utility Regulatory Commission ("IURC"). The ALJ requested an advisory opinion from the Commission regarding a potential post-employment opportunity he was interested in pursuing with American Water Works Company, Inc. ("American Water").

The Commission issued Advisory Opinion No. 14-I-4 to the ALJ and found, in relevant part, that the one-year cooling off period applied to his intended employment with American Water because, according to Policy No. 11-P4 ("Policy), a policy adopted by the IURC, the state employee made regulatory or licensing decisions affecting American Water in executing his duties as an ALJ. Accordingly, the Commission found that the ALJ would be prohibited from accepting an employment position with American Water until after the expiration of 365 days from his last date of leaving state employment or until a waiver is received.

The ALJ now requests that the Commission reconsider Advisory Opinion No. 14-I-4. Specifically, the ALJ alleges the Policy violates the spirit of 42 IAC 1-6-1 because it is not consistent with Indiana law. 42 IAC 1-6-1 provides that an appointing authority of an agency may adopt policies, rules, or regulations concerning the subject matter of the Code provided that the policies, rules, or regulations are at least as strict as the rule.

**ISSUE**

Should the Commission's findings in Advisory Opinion No. 14-I-4 be reversed in light of the ALJ's assertion that the IURC Policy is inconsistent with Indiana law?

**RELEVANT LAW**

**42 IAC 1-6-1 Other sources**

Sec. 1. An appointing authority of an agency or a state officer may adopt policies, rules, or regulations concerning the subject matter of this rule provided that the policies, rules, or regulations are at least as strict as this rule. All such policies, rules, or regulations shall be filed

with the commission, but failure to file does not affect the validity of such policies, rules, or regulations as applied to the agency's or state officer's employees or special state appointees.

#### **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**

In this case, the ALJ's primary challenge is regarding the consistency of the Policy with the agency's enabling statute. Specifically, the ALJ alleges that the Policy is inconsistent with "Indiana law" because "the law is clear that only IURC commissioners make regulatory or licensing decisions." He further argues that because the Policy is inconsistent with Indiana law, the Commission must reconsider the finding that the one-year cooling off period applied to his intended employment with American Water because, according to the Policy, the state employee made regulatory or licensing decisions affecting American Water in executing his duties as an ALJ.

One of the statutory duties of this Commission is to act as an advisory body by issuing advisory opinions to interpret IC 4-2-6, IC 4-2-7 or the rules adopted under those chapters. This Commission does not have the authority to 1) interpret another agency's policies and 2) perhaps more importantly, to determine whether the Policy is consistent with the agency's enabling statute. If the ALJ wants to challenge the Policy, he may do so, but he must do so in another forum. The Commission, in this case was only interpreting the Code of Ethics, it was not interpreting the Policy. It was appropriate and within the Commission's discretion to consider the Policy when determining whether the ALJ made a regulatory or licensing decision regarding American Water. Should the ALJ challenge the Policy's validity in the appropriate forum and succeed, reconsideration by the Commission may be appropriate at that time.

### **CONCLUSION**

The Commission's findings in Advisory Opinion No. 14-I-4 remain in effect.