

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

A former employee requested advice regarding the application of the post-employment rule's particular matter restriction to a consulting opportunity with a city. One of the city's projects is funded by a grant that she had involvement in as a state employee. SEC determined that the particular matter restriction would not prohibit the former employee from working on the identified project because her participation in the funding grant was not personal and substantial. Specifically, the former employee only provided technical assistance and did not make any decisions regarding the grant. Further, this particular grant comprised a very small percentage of her workload during the relevant grant cycle.

May 9, 2019
2019-FAO-010

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 employee of the Indiana Department of Natural Resources (DNR) Division of Nature Preserves, Lake Michigan Coastal Program (LMCP) served as the Special Projects Coordinator for the LMCP from July 31, 2017 to October 19, 2018. In that capacity, she served as project manager for several projects. Two of those projects included negotiating a contract extension or developing and negotiating subcontracts and then administering and overseeing the contract work.

The employee also supervised the LMCP's Outreach and Education Assistant and served as a team member of the Lake Michigan Lake-wide Action and Management Plan (LAMP), working closely with IDEM's LAMP Coordinator housed in IDEM's Northwest Indiana Office. As part of this work, she served as the interface to many Northwest Indiana environmental organizations by attending the regular monthly meetings. As a related responsibility, she also served as coordinator for completion and EPA/NOAA approval of Indiana's Coastal Nonpoint Pollution Control.

A smaller and intermittent part of the employee's job was to provide support to other LMCP program efforts, including the grant program. The employee provides that the LMCP's grant program is a bit different from many grant programs in that it encourages potential grant applicants to reach out to and work with the grants staff and technical staff to discuss their project ideas; ask questions to ensure that projects they submit are eligible, consistent with needs in the LMCP area and are not duplicative; and otherwise seek feedback to strengthen their grant proposals. This approach helps the grant program achieve an overall goal to fund high quality, viable, sustainable projects that advance the LMCP's mission.

Accordingly, all LMCP staff in the Chesterton office, including the employee, served as technical resources to the decision-making bodies and grants staff to answer questions and provide technical perspective on all grant applications submitted at the pre-proposal level and full proposal level. At the pre-proposal level all staff read all pre-proposals and then attended the

LMCP Grants Committee meeting to provide technical support as needed and answer questions based on one's areas of expertise. The Grants Committee, which is composed largely of appointees on the Coastal Advisory Board, then voted on which proposals should be recommended to the full LMCP Coastal Advisory Board for their approval and voted to move the recommended pre-proposals to the full proposal level.

At the full proposal level a similar process was in place where technical staff read the proposals and attended the Technical Advisory Board meeting (an appointed group of DNR employees/leaders from different DNR Divisions). This board ranked, discussed and voted on which proposals should be recommended for funding. The grants program staff then compiled and assessed this list of recommendations and presented the recommendations to the Director of DNR for final decisions and approval before sending the final approved project list to NOAA for their review. The technical staff's role in this process was limited to being technical resources in the process. As described above, the technical staff, including the employee, had no direct voting or decision-making role.

Specifically, the employee provides that her role in the grants process during her tenure with DNR was limited to 1) talking to any potential applicants who reached out to her for assistance (only one of the fifteen or so applicants sought her advice and feedback); 2) reading all of the pre-proposals submitted and serving as a technical resource to the grants staff, particularly the Grants Assistant, and to the Grants Committee during their pre-proposal review meeting; and 3) reading all full proposals submitted and serving as a technical resource for the Technical Advisory Board during their full proposal review meeting. The employee provided the Commission with supporting materials for her request, including the cover page and a grants process diagram that outlines the process and refers to the decision-making bodies involved throughout the process. She also provided a link to the entire current Grant Pre-Proposal Guidance for additional details.

The City of Gary's Green Urbanism and Environmental Affairs Department recently asked the employee if she would be interested in helping them as a private consultant (Backhus Consulting LLC) on a long list of environmental projects that would need attention while one of their current employees is on temporary maternity leave. The employee had previously worked with the City of Gary (the City) as a consultant on Green Infrastructure projects from late 2015 to early 2017, prior to being hired as the LMCP Special Projects Coordinator.

The employee provides that although she was involved in some contracts as a DNR employee, she was not involved in any contracts with the City while she was with DNR. The LMCP Grants Specialist is the staff member that deals with contracting for all grants. The employee also notes that she was not involved in any regulatory or licensing decision involving the City, and she is not aware of LMCP having any regulatory or licensing authority. She also notes that she does not plan on doing any executive branch lobbying if she performs work for the City.

According to The employee, one of the many projects the Director of the Department conveyed as a possible element of the consulting scope of work was a project (the Project) funded in part by a LMCP grant in which the employee participated during her employment with DNR. As described above, as a technical staff member, The employee served as a technical resource for

the Grants Committee (September/October 2017), Technical Advisory Board (January 2017) and Grants Program staff when the Project was evaluated by these decision-making bodies who discussed, ranked and voted on all pre- and full proposals submitted in late 2017.

The employee is seeking a Formal Advisory Opinion to determine whether her limited technical resource input involvement in the overall grant selection process rises to the level of “personal and substantial participation” in the Project and prevents her from working with the City in implementing some elements of this particular project.

ISSUE

Do any restrictions in the Code apply to the employee’s post-employment opportunity with the City?

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 4-2-6-11 (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

The employee's post-employment opportunity with the City implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the employee's prospective post-employment is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction, or investment that 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 the employee would utilize confidential information in her consultant work with the City. So long as any compensation the employee receives does not result from confidential information, her post-employment opportunity with the City would not violate IC 4-2-6-6.

B. 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 employee from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation.

First, the employee 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 (IDOA).

The employee has indicated that she does not plan on engaging in any executive branch lobbying as part of her work for the City. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, she would not violate this provision of the post-employment rule.

Second, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she engaged in the negotiation or administration of a contract or grant 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 or grant. The employee provides that she was not involved in any agreements, contracts or grants between the City and the State during her tenure at DNR except as otherwise outlined herein. The Commission has considered a grant to be a contract for the purposes of this rule.

The Commission finds that the employee has never participated in the negotiation or administration of a contract or grant with the City during the course of her state

employment. Accordingly, this provision would not apply to the employee's post-employment opportunity with the City.

Third, the employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The employee provides that she was not involved in any regulatory or licensing decisions that applied to the City while with DNR. The Commission finds that the employee has never made a regulatory or licensing decision that directly applied to the City during the course of her state employment. Accordingly, this provision would not apply to the employee's post-employment opportunity with the City.

Fourth, the employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The employee is a former state employee; thus any future employer cannot influence her in her official capacity as a state employee.

Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents her from representing or assisting a person on any of the following twelve matters if she 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 instance, the employee would be prohibited from representing or assisting the City, as well as any other person, in a particular matter in which she personally and substantially participated as a state employee. The "personal and substantial" standard is one the Commission applies on a case-by-case basis.

Based on the information provided, the employee had some limited involvement in the LMCP grant through which the Project was funded; however, she was not involved in ranking proposals or in making funding decisions. She and all of the LMCP staff in the Chesterton office merely provided technical resources to the decision-making bodies and grants staff to answer questions and provide technical perspective on the viability and quality of projects proposed in all grant applications. She estimates she spent less than five percent of her time on the proposals for this particular grant during the relevant grant cycle.

Accordingly, the Commission finds that the employee's involvement in the Project as a state employee did not rise to the level of being "personal and substantial" for purposes of the particular matter restriction, and she would be permitted to work on the Project for the City as a consultant.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the employee's post-employment opportunity with the City would not violate any of the post-employment restrictions found in IC 4-2-6-11.