

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

An INDOT District Bridge Engineer was offered employment by a Pennsylvania-based corrosion services company that had served as a consultant on two prior projects in Indiana. Although the District Engineer was not involved in the financial negotiations on the contract, he was very involved in the technical scope of the methodologies to be used and the selection of locations to be examined in both instances. SEC found that the District Engineer's involvement in the project amounted to engaging in the administration of the contracts with the company and that he was in a position to make a discretionary decision affecting the nature of the administration of those contracts. Consequently, he would need to observe the 365-day cooling off period before accepting employment with the company, absent a waiver from his agency.

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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

An employee has been employed by the Indiana Department of Transportation ("INDOT") and has been serving as the LaPorte District Bridge Engineer since 1998. In this capacity, the District Bridge Engineer has been responsible for implementing the FHWA's NBIS program at the state district level. His primary responsibilities include the routine inspection of bridge and large culvert structures on both interstate and state routes. In addition, he advises the INDOT Central Office bridge inspection staff on how to best conduct thorough inspections of problematic structures and to what extent and timeframe rehabilitations of those structures need to be performed.

The District Bridge Engineer was recently offered employment by a corrosion services company (Company) of West Chester, Pennsylvania. The Company provides in-depth inspection and solutions for corrosion in infrastructures. The Company has offered the District Bridge Engineer a Senior Engineer position. In this role, the District Bridge Engineer would be involved with a broad array of activities and duties related to project management and technical advising. He would interact closely with state departments of transportation throughout the United States as well as with the Federal Highway Administration and other federal agencies.

The District Bridge Engineer first began discussions with the Chief Executive Officer (CEO) of the Company about possible employment in February 2009 and subsequently declined that employment opportunity. More recently, in March 2011, the Company approached the District Bridge Engineer a second time with an employment offer. The District Bridge Engineer has not been involved in any financial negotiations or decisions involving the Company since that date.

In 2004, the District Bridge Engineer identified the CEO/the Company as a potential contractor and subsequently recommended him to INDOT's Central Office as having the expertise needed to ascertain the degree of corrosion of the high-strength strands within the SR 912 Cline Avenue Bridge ("Cline Bridge Project"). The District Bridge Engineer participated in the selection committee that was charged with selecting a consultant inspection team. He voted in favor of selecting the engineering consultant inspection team that consisted of the Company and two

other vendors. Consequently, this inspection team was awarded the project of carrying out the in-depth inspection for the Cline Bridge Project. At a later date, the District Bridge Engineer participated as a member of another selection committee charged with selecting a consultant inspection team. Again, the District Bridge Engineer voted in favor of selecting a consultant inspection team consisting of the Company and two other vendors. This time, the inspection team selected was chosen to conduct in-depth inspections of nine bridges throughout the State of Indiana (“State Bridge Project”). In both instances, the District Bridge Engineer was not involved in any financial negotiations of the contract. He was, however, very involved in the technical scope of the methodologies to be used and the selection of locations to be examined in both instances.

ISSUE

What rules in the Code of Ethics would apply to the District Bridge Engineer’s intended employment opportunity with the Company? 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. 4-2-6-9 (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.

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 District Bridge Engineer's intended employment with the Company invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the District Bridge Engineer's prospective employment is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the District Bridge Engineer 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 District Bridge Engineer, it would not appear that the Company's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the District Bridge Engineer's acceptance of the Company's employment offer would not be in violation of I.C. 4-2-6-6.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the District Bridge Engineer 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 and/or a potential employer. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes the interest an employee has that arises from employment or prospective employment for which negotiations have begun. In this case, the Commission finds that the District Bridge Engineer commenced negotiations for this prospective employment opportunity with the Company in March 2011.

Accordingly, the District Bridge Engineer is, and would have been, prohibited from participating in any decision or vote in which he or the Company has or had a financial interest in the outcome of the matter since that time. The District Bridge Engineer indicates that he has not been involved with anything related to the Company since this date. Accordingly, the Commission finds that the District Bridge Engineer is in compliance with I.C. 4-2-6-9. The District Bridge Engineer must continue to observe this provision for the remainder of his tenure with the State unless he discontinues his negotiations for employment with the Company and/or no longer has an arrangement concerning prospective employment.

C. 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 District Bridge Engineer from accepting employment for 365 days from the date he leaves state government under various circumstances.

First, the District Bridge Engineer 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. Based on the information provided, it does not appear that this provision would apply to the District Bridge Engineer. Specifically, the job duties associated with his prospective employment do not indicate that the District Bridge Engineer would be performing duties that would require him to register as an executive branch lobbyist. As long as he continues to ensure compliance with this restriction for 365 days from his final date of state employment, the District Bridge Engineer would not be in violation of this provision.

Second, the District Bridge Engineer 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, the District Bridge Engineer testified that he was engaged in the administration of a contract between the State and the Company. He also disclosed that he was in a position to make a discretionary decision affecting the nature of the administration of that contract. Specifically, the District Bridge Engineer indicated that he was very involved in the technical advisory aspect of the Cline Bridge Project on a day-to-day basis. He further disclosed that he was responsible for controlling the scope of the contract and would make decisions to adjust the scope regularly based on daily findings and test results. Accordingly, it would appear that the one-year cooling off period would be triggered and the District Bridge Engineer would be prohibited from accepting an employment offer from the Company until the expiration of 365-days from the last day of his state employment absent a waiver of this restriction.

Third, the post-employment rule would prohibit the District Bridge Engineer 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. It does not appear that the District Bridge Engineer made a regulatory or licensing decision that directly applied to the Company or its parent or subsidiary. Specifically, the District Bridge Engineer's job duties do not include making regulatory or licensing decisions. Moreover, it does not appear that INDOT is an entity that would regulate or license the Company. Accordingly, this provision would not appear to apply to the District Bridge Engineer.

In addition to the one year cooling off restriction, the District Bridge Engineer would be 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 District Bridge Engineer has identified two separate matters that would qualify as "particular matters." Specifically, the two projects (Cline Bridge Project and State Bridge Project) in which the Company participated on as part of the consultant inspection team would constitute particular matters since both projects involved contracts. Moreover, it appears that the District Bridge Engineer's participation in both matters was personal and substantial. Accordingly, the District Bridge Engineer would be prohibited from representing or assisting anyone, including the Company, on these matters for the life of the matters.

CONCLUSION

The Commission finds that the District Bridge Engineer's intended employment with the Company would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9.

The Commission further finds that the one-year restriction set forth in I.C. 4-2-6-11(b)(2) does apply to the District Bridge Engineer's intended employment with the Company. Accordingly, the District Bridge Engineer is prohibited from accepting employment with the Company until after the expiration of 365-days of his last day of state employment.

Should the District Bridge Engineer obtain a post-employment waiver from his agency appointing authority or seek employment with the Company after the one-year cooling off period, the Commission finds that he would be prohibited from assisting the Company on the two identified projects and/or any other particular matter he personally and substantially participated in during his tenure with the State.