

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

### **IC 4-2-6-1 Definitions**

The former Director of the DNR's Division of Historic Preservation and Archeology was interested in pursuing several opportunities following his retirement from state employment including: consulting on preservation and heritage projects, publishing a book of previous writings, instructing at Ball State, and advocating for preservation related legislation. SEC advised the Director to contact the IDOA Division of Executive Branch Lobbying to confirm any activity in advocating for legislation would not violate the lobbying restriction of the Postemployment rule. SEC found further that none of the Director's proposed postemployment opportunities would implicate the 365 day "cooling off" period; however, he would be restricted from consulting on any grant applications or agreements in which he personally and substantially participated while at DNR pursuant to the the particular matter restriction of the Postemployment rule.

January 2013

No. 13-I-1

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 4-2-6-4(b)(1).

### **BACKGROUND**

A state employee recently retired from serving as Director of the Division of Historic Preservation and Archeology ("Division") within the Department of Natural Resources ("DNR"). The former state employee served as Director of the Division twice, the first time from 1990-1994 and the second time from 2007 to the time of his retirement. During his second tenure as Director, the former state employee served on staff committees which rated grant applications for matching funds from the Division's annual federal Historic Preservation Fund ("HPF") grant. The Division's grants staff then provided a rank-ordered list based on the rating scores to the Indiana Historic Preservation Review Board for its approval of the ranking. When the amount of the federal loan was known, the Division applied for the grant from the National Park Service ("Park Service") and recommended grantees, based on the ranking and the amount of funds available. The former state employee signed the grant award letters to the grantees once the Park Service gave its approval.

Under the former state employee's direction, the Division also entered into cooperative agreements with non-profit organizations such as the Indiana Historical Society under which the Division provided one hundred percent (100%) federal HPF grant funding for a cooperative project to the non-profit recipient or state university. In these cases, the former state employee signed the cooperative agreement on behalf of the Division. Most of the state universities in Indiana have received federal pass-through HPF grant funds as either matching grants or through cooperative agreements during the former state employee's latest tenure as Director of the Division. Through matching grants or cooperative agreements, the Division also made available federal HPF funds to Indiana Landmarks, the principal statewide, private, non-profit historic preservation organization in the state, to a number of cities and towns, and to several local non-profit historic preservation or historical societies, including the Indiana Historical Society, a statewide, private non-profit organization.

The Division was also involved in regulatory affairs through its comments under Section 106 of the National Historic Preservation Act on thousands of federally-funded projects in the state, many of them sponsored by local governments across Indiana. The former state employee reviewed all of the Division letters commenting on the projects and signed all of the comment letters. The former state employee also attended meetings on particular projects and spoke on behalf of the Division and the DNR.

The former state employee's job responsibilities as Director also involved serving as an ex officio member of the Indiana Courthouse Preservation Advisory Commission ("ICPAC"), a temporary commission created by the Indiana General Assembly, from 2008 until 2012. The former state employee oversaw the staffing of the ICPAC and the production of its 2011 report to the Indiana General Assembly: *Indiana's Historic Courthouse: Re-Investing in Community Treasures*.

The Division also co-sponsored, along with Indiana University and Indiana Landmarks, the annual statewide preservation conference, and the former state employee signed the contract on behalf of the Division under which the funding by the three sponsors was committed.

The former state employee is interested in pursuing post-employment consulting opportunities that involve providing professional advice on historic preservation projects and heritage projects around the state. He identifies potential consulting clients as county commissioners, Indiana Landmarks, cities and towns, and possibly local preservation organizations or historical societies. The former state employee is also considering publishing a book of subjects covered by his monthly newspaper column on Indianapolis and Indiana heritage, which he has written for the Indianapolis Star since 2003. In addition, the former state employee may be interested in teaching historic preservation classes at Ball State University.

### **ISSUE**

What rules in the Code would apply to the former state employee's intended post-employment opportunities? Would serving as a private consultant, publishing a book, or teaching classes at Ball State University 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 former state employee's intended post-employment ventures implicate the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the former state employee's arrangement is analyzed below.

#### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the former state employee 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. Since the former state employee has not identified any specific employer and instead suggests he would provide services as a private consultant in historical preservation affairs to various clients, potentially publish a book, and possibly teach classes through Ball State University, it is difficult to determine whether any opportunities would implicate this rule. As long as the former state employee ensures any employment, transaction, or investment entered into with any of the various clients or entities is not made as a result of material information of a confidential nature, as defined in I.C. 4-2-6-1(a)(12), his proposed post-employment activities would not violate I.C. 4-2-6-6.

#### *B. Post-Employment*

As an initial matter, the Commission determined that the former state employee's pursuit involving the publication of the articles he wrote for the Indianapolis Star in book form would not implicate the post-employment rule but that he should consult with the Indianapolis Star to ensure there are no copyright issues involved.

The Post-employment rule, found in 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, would prevent the former state employee from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the former state 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. The former state employee mentioned that he may wish to be an advocate for legislation related to historic preservation as part of his consulting services or on a pro bono basis for historic preservation organizations. The Commission recommends that the former state employee contact the Office of Executive Branch Lobbying to ensure that any of his intended post-employment activities would not require him to register as an executive branch lobbyist. To the extent the former state employee ensures he does not engage in lobbyist activity for the entirety of the cooling off period, he would not be in violation of this provision.

Second, the former state employee 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 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. Third, the former state employee is prohibited from accepting employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer. The term “employer” is defined in I.C. 4-2-6-1(a)(10) and specifically indicates that a customer or client of a self-employed individual in a sole proprietorship or a professional practice is not considered an employer. In this case, the former state employee indicates that he intends to act as a private consultant for clients on historic preservation projects and heritage projects around the state. Accordingly, his potential clients would not be considered “employers” pursuant to this definition. As a result, none of the remaining one-year cooling off prohibitions would appear to be implicated by the former state employee’s proposed post-employment as a private consultant.

Additionally, it is the Commission’s determination that the former state employee’s potential teaching opportunity through Ball State University would also not be prohibited by the remaining one-year cooling off prohibitions as the former state employee indicated that he did not negotiate or administer any contracts with Ball State University on behalf of the State nor did he make any regulatory or licensing decisions that directly applied to Ball State University.

Although it appears the “cooling off” portion of the post-employment rule would not apply to the former state employee’s post-employment opportunities, he would still be subject to the rule’s “particular matter” prohibition in his proposed employment possibilities. This restriction prevents him from working 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 former state employee has identified a couple matters that may qualify as “particular matters,” specifically grant applications and cooperative agreements through which grant funds were provided to non-profit organizations.

The grant applications identified by the former state employee would qualify as particular matters under the provision. Applications are identified specifically as particular matters in I.C. 4-2-6-11(a)(1). As a result, to the extent that the former state employee personally and substantially participated in these matters with DNR, he would be prohibited from assisting or representing any person, including clients, on these applications. In opinion 06-I-17, the Commission issued an advisory opinion to a former staff attorney of the IFA. In that opinion, the Commission opined that “[a]bsent an individual’s disclosure to the Commission that they have substantially participated in a matter, and where an individual is unsure as to whether their conduct would constitute substantial participation, the Commission will make a case-by-case determination as to whether an individual would be subject to the particular matter restriction set forth in I.C. 4-2-6-11(c).” Based on the information provided, it appears that the former state employee personally and substantially participated in these matters. The former state employee indicates that he rated some of these applications and oversaw the Division staff who was responsible for ranking the grant applications based on the rating scores and then applying for grants for the applicants from the National Park Service. The former state employee then signed all of the grant award letters to the grantees. Therefore, the former state employee is prohibited from assisting or representing any person in these matters to the extent they are still active. This restriction would not apply to any future grant applications with which the former state employee was not involved while employed by the state.

The Commission determined that the grant agreements in which the former state employee participated are considered contracts, and thus particular matters, as identified in I.C. 4-2-6-11(a)(4), and that the former state employee’s signing of the cooperative/grant agreements on behalf of the Division rises to the level of personal and substantial participation in these contracts. Specifically, the former state employee as the Director of the Division, oversaw the work completed on these contracts and approved them by signing them on behalf of the Division. Accordingly, the former state employee is prohibited from assisting or representing any person in these matters.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the former state employee may provide private consulting services to clients and pursue teaching opportunities at Ball State University immediately. The Commission further finds that the former state employee would be prohibited from representing or assisting any person in any capacity on the grant applications and grant/cooperative agreements he personally and substantially participated in during his employment with the DNR. Additionally, in light of his interest in historical preservation advocacy and out of an abundance of caution, the Commission recommends that the former state employee contact the Office of Executive Branch Lobbying to ensure that any of his intended post-employment activities would not require him to register as an executive branch lobbyist.