

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

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

The Director of the OMB was offered employment with a state public university. SEC determined first that “person” for purposes of the Postemployment rule encompasses state public universities. Regarding three potential particular matters, SEC further found: 1) the act by the Director of voting on employer contribution rates did not amount to personally and substantially involvement in the matter; 2) the Governor’s proposed budget bill is a legislative matter that falls outside the scope of the particular matter provision; and 3) Capital Projects matters for state universities do not qualify as particular matters since “public works projects” as set forth in IC 4-13.6-2-3(b)(2) do not encompass state educational institutions.

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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**

A state employee currently serves as the Director of the Office of Management and Budget (“OMB”). In December of 2011, he was offered an employment opportunity by a state public university (“University”).

The Director began working for the State on January 10, 2005. In his first position with the State, he served as the General Counsel and Policy Director for the OMB. In this position, he never negotiated or administered contracts with the University and never made regulatory or licensing decisions that affected the University or its subsidiaries.

On June 1, 2007, the Director was appointed by Governor Daniels to serve as Director of the State Budget Agency (“SBA”). The Budget Director manages a staff of approximately thirty budget analysts, assistant directors, and deputy directors. The SBA is primarily tasked with management and oversight over the expenditure of state general, dedicated, and federal funds. The Budget Director serves on the State Board of Finance, the State Budget Committee, and numerous other boards and commissions. Statutory provisions require that all contracts include signatory approval from the Department of Administration, Office of the Attorney General, and SBA on the “Executive Document Summary” of the contract. During his tenure as Budget Director, the state employee delegated his signatory authority to SBA staff pursuant to a written delegation. He has not personally signed any contract with the University on behalf of the State. Moreover, while the University has numerous contracts and grant agreements with various state agencies, the Director was not personally involved in the negotiation or administration of those contracts. None of those contracts or grant agreements were with the OMB or SBA.

On September 17, 2010 he was appointed OMB Director. The OMB was established by Governor Daniels in 2005. The OMB Director serves as the state’s chief fiscal officer. The SBA, Department of Revenue, Department of Local Government Finance, Government Efficiency and Financial Planning Division, and Public Finance Director all report to OMB. The OMB Director serves as Chairman of the Indiana Finance Authority (“IFA”), Chairman of the Distressed Unit Appeals Board, and as a trustee of the Indiana Public Retirement System (“INPRS”). The OMB organization is comprised of approximately 1,200 state employees.

Since becoming aware of the offer for employment in December 2011, the Director affirms that he has not participated in any decision or vote in which the University had a financial interest in the outcome of the matter. In addition, the Director indicates that he would not be required to register as an executive branch lobbyist in his intended post-employment position with the University.

Regarding particular matters, the Director identifies the following three matters that he was involved with during his tenure with the State.

- **Employer Contributions Rates** - The first matter involves the approval of employer contribution rates. As OMB Director, the state employee served as one of nine trustees for the INPRS. One function of the board of trustees is to approve annual employer contribution rates for all employers paying into the system, including state public universities. Individual employer contribution rates are calculated by an outside actuarial firm under contract with the INPRS. Then the INPRS board annually approves, en masse, contribution rates for over one thousand separate employers. In December 2010, the Director voted favorably for the approval of employer contribution rates. He did not personally or substantially participate in the matter other than voting when it was presented to the full board for consideration.
- **Budget Bill** - The second matter identified involves the development and consideration of the Governor's recommended FY 2012-13 budget bill. The Governor's proposed budget included recommended appropriations for the state's seven public universities. The proposed appropriations for the University in the Governor's recommended budget – like all other universities – were based upon a recommendation by the Indiana Commission for Higher Education ("CHE"). The Director did not personally or substantially participate in CHE's process or recommendation for any public university. The Governor's recommended budget is the first step in the consideration of the state's biennial budget by the General Assembly. Final determination on the amount of any given public university's appropriation was made by the General Assembly in House Enrolled Act 1001-2011. Moreover, the Director has not personally and substantially participated in any decision regarding those appropriated funds since the budget was passed.
- **Capital Projects** - Third, the Director has been involved with some of the University's legislatively approved capital projects in both his capacity as a member of the State Budget Committee ("SBC") and as the former Budget Director. Public universities receive legislative authorization in the biennial state budget to construct specified capital projects. The initial authorization is determined and set by the General Assembly in the budget bill. The budget bill then directs the SBC to consider and review each legislatively authorized capital project before construction can officially commence. The SBC consists of four legislators and the State Budget Director. The SBC plays a significant role in the appropriations management for the State, both during a budget writing session and in the interim. Specifically, the SBC reviews all capital projects over \$100,000. This includes new construction, qualified energy savings projects ("QESP"), leases and R&R projects on behalf of state agencies and public universities, including other types of projects specifically authorized in the budget bill. During the period from

June 2007 to September 2010, the Director served as one of the five voting members of the SBC.

With respect to any QESPs, leases, and R&R projects considered by the SBC that involved the University, the Director's participation was limited to being notified by Budget Agency staff that the University had submitted a request to the SBC, transmitting the submitted requests to SBC members, attending the SBC meeting, and voting to approve the SBC agenda. No votes are taken on individual agenda items, instead, the entire agenda is approved with one vote.

In August 2010, the IFA approved the allocation of federal tax exempt volume cap for one QESP for the University. Volume cap is awarded on a monthly basis by one vote of the board. Dozens of projects/entities during a calendar year receive "volume" under parameters determined by the U.S. government and applied equally to all applicants by IFA staff. In most years, the total allocation made available from the federal government is not fully utilized by IFA and is transferred to the Indiana Housing Authority. The Director participated in the unanimous board vote in August, 2010. He did not otherwise participate in IFA's consideration of the allocation to the University.

With respect to all university capital projects that involved new construction from June 2007 to September 2010, the Director likewise received notification from staff and discussed those projects with staff, representatives from the requesting university and with members of the SBC. His personal involvement in these matters was at most one hour per project. He attended the SBC meeting and voted as a member of the SBC for the agenda. (The same process as above applies—no individual projects are voted upon, all projects, both from state agencies and universities are considered in one vote.) Furthermore, as part of the SBC's review, the SBC delegates to the SBA review the financing plan for the capital project. This is consistent with IC 21-34-10 and 21-35 which provides that no bonds may be issued by a university without approval of the SBC, SBA, and Governor. Financing plans are received and reviewed by the State Public Finance Director, in consultation with the Assistant Director for Education within the SBA. After review by the Public Finance Director and SBA staff, a recommendation for approval is made to the Budget Director. See IC 21-34-10-1(b). Approval is then transmitted through a written letter. The transmittal letter serves as the final step in the consideration of the project. The Director did not personally and substantially participate in the review of a university's financing plan other than signing the approval letter, which he indicates is a statutory formality. This process, form and mode of approval has been consistently used since the 1980s for all legislatively authorized university capital projects.

### **ISSUE**

What rules in the Code of Ethics would apply to the Director's intended employment opportunity with the University, and would his acceptance of the offered 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 Director's intended employment with the University 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 Director 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, it does not appear that the University's offer of employment resulted from information of a confidential nature. Accordingly, the Commission finds that the Director's acceptance of the University's employment offer does not violate I.C. 4-2-6-6.

#### *B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the Director 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 a potential employer. In this case, it appears that the Director has an arrangement for prospective employment with the University. Accordingly, the Director would be prohibited from participating in any decision or vote in which he or the University would have a "financial interest" in the outcome of the matter. The Director indicates that he has not participated in any decision or vote in which the University would have a financial interest in the outcome of the matter since becoming aware of the University's employment offer. To the extent that the Director has complied with this provision and continues to abstain from participation in any decision or vote in which he or the University would have a financial interest in the outcome of the matter for the remainder of his state employment, the Commission finds that the Director's intended employment with the University does not violate I.C. 4-2-6-9.

#### *C. Post-Employment*

As a threshold matter, it is unclear whether the post-employment rule would apply to the Director's prospective employment opportunity. Specifically, the post-employment rule consists of two separate restrictions that may limit the Director's ability to accept

employment from an employer under certain circumstances. In this case, his intended employer is a state university. The term “employer” in the post-employment rule is defined to include any “person” from whom a state employee would receive compensation. I.C. 4-2-6-1(a)(9). The term “person” means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision. I.C. 4-2-6-1(a)(12). In this case, it is the opinion of the Commission that a state university qualifies as a “person” and therefore is considered an “employer” as the term is defined. The Commission therefore finds that the Director’s intended employment opportunity with the University triggers consideration of the post-employment rule.

Having determined that the post-employment rule applies when a state employee goes to work for a state university, the following analysis applies to the Director’s intended employment opportunity with the University. 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 Director from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. In this case, the Director’s indicates that he will not be required to register as an executive branch lobbyist. To the extent the Director ensures compliance with this provision for the entirety of the cooling off period, the Commission finds that the Director’s intended employment does not violate this provision.

Second, the Director 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. In this case, it does not appear that the Director has ever negotiated or administered a contract with the University on behalf of the State. While the SBA is statutorily required to approve all contracts, the contracts are negotiated or administered by the individual agencies. Moreover, the Director delegated his signatory authority to other SBA staff members. Accordingly, the Commission finds that this restriction does not apply to the Director’s intended employment with the University.

Third, the Director is prohibited from accepting employment for 365 days from the last day of his state 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 restriction does not apply to the Director’s intended employment with the University because he did not make regulatory or licensing decisions affecting the University at any time during his tenure with the State.

Fourth, the Director is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence him in

his official capacity as a state employee. The information presented to the Commission does not suggest that the University's offer of employment was extended to the Director in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the Director's intended employment with the University.

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 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 has identified three different matters that may qualify as "particular matters." The first matter relates to the approval of employer contribution rates and qualifies as a "particular matter" as a determination. It is the opinion of the Commission, however, that the particular matter restriction does not apply to this matter because he did not personally and substantially participate in the matter. Specifically, while the Director participated in the vote to approve the employer contribution rates of various employers, including the University's rate, his involvement was limited to the vote. The Commission has previously found that participation in a vote alone does not rise to the level of personal and substantial involvement to trigger the restriction.<sup>1</sup>

The second matter identified pertains to the Director's involvement in the Governor's proposed budget bill that is submitted to the General Assembly. Because the budget bill is a legislative matter, it is the opinion of the Commission that the particular matter restriction would not apply to the Director's involvement in matters associated with the budget bill.

Third, the Capital Projects matters involve the legislative authorization in the biennial state budget granted to state universities to construct specified capital projects. Capital projects of state universities would not appear to qualify as "particular matters" for purposes of the post-employment rule. Specifically, out of the twelve particular matters listed in the post-employment rule, these legislatively approved capital projects would only qualify as "particular matters" if they are "public works projects." While the term "public works project" is not defined in I.C. 4-2-6, the Commission looks to the definition of the term in I.C. 4-13.6-1-13 for guidance. While I.C. 4-13.6 governs state public works, I.C. 4-13.6-2-3(b)(2) provides that the article does not apply to state educational institutions. Accordingly, the Commission finds that the University's legislatively approved capital projects are not "public works projects" and are therefore not "particular matters" that are subject to the post-employment rule analysis.

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<sup>1</sup> See Formal Opinion 10-I-10 and Formal Opinion 07-I-8.



## **CONCLUSION**

The Commission finds that the Director's intended employment opportunity with the University would not violate I.C. 4-2-6-6 or I.C. 4-2-6-9. The Commission further finds that the Director's intended employment with the University would not violate I.C. 4-2-6-11.