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Jurisdiction

Improper Use of Government Resources

An anonymous complaint was filed with the Commission alleging that a State employee was used her department's equipment and funds, for her personal use, and that she was violating certain agency regulations. The Commission's statute requires that all complaints be sworn. *29 Del. C. § 5810(a).* Although this was not a sworn complaint, the Commission reviewed the matter to decide if it had jurisdiction.

As to the allegation of using government funds to pay for personal matters, the Commission has held that it has no authority to review expenditures of State funds. *See, e.g., Commission Op. No. 97-23.* Regarding the alleged violation of State regulations, the Commission can only interpret Title 29, Chapter 58. It has no authority to interpret other State laws, rules, or regulations. *See, e.g., Commission Op. No. 97-28.*

However, the Commission can refer to the appropriate State authority any substantial evidence of a violation of any criminal law. *29 Del. C. § 5809(4).* Assuming, but not deciding, if there was misuse of government funds, the matter was referred to the Attorney General's office. ***(Commission Op. No. 01-10).***

For other cases dealing with jurisdiction, See*, Commission Op. No.01-11.*

Personal or Private Interests

Spouse's Business Seeks to do Business with the State

A State employee's spouse's private enterprise wanted to provide certain services through a State agency. The State employee was not employed by that agency, but in his official capacity he periodically files certain court documents for it. The documents relate to the services provided by private enterprises, including his spouse's. The agency told his spouse that she could not do business with it because of her husband's State job. The agency told her to obtain an opinion from this Commission. Based on the following law and facts, the Commission held that: (1) a private enterprise cannot seek an advisory opinion interpreting the Code of Conduct; and (2) if the State employee did not give opinions on which private company the agency would use, or evaluate the merits of the services of his wife's company or her competitors, then the Code would not be violated.

Issue 1: Advisory Opinions to Private Parties: Can a private enterprise obtain an advisory opinion from this Commission?

Only State employees, officers, honorary officials, or State agencies may seek advisory opinions. *29 Del. C. § 5807(c).* Thus, a private person or enterprise cannot . Here, the company owner's spouse was a state employee, so he could seek an opinion or the agency could have.

Issue 2: Restrictions on State Employee's Conduct: The Code of Conduct does not restrict private enterprises from contracting with the State on the mere basis that a close relative of a State employee owns the private enterprise. Rather, it restricts the conduct of the State employee whose relative owns the private enterprise. Specifically, State employees cannot:

(A) review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. *29 Del. C. § 5805(a)(1).* If a "close relative's" private enterprise will benefit to a lesser or greater extent than other like enterprises, as a matter of law, the State employee has a "personal or private interest," and therefore cannot review or dispose of the matter. *29 Del. C. § 5805(a)(2).* "Close relative" is defined to include "spouses." *29 Del. C. § 5804(1).*

(B) represent or otherwise assist a private enterprise on matters involving the State before the agency by which they are employed. *29 Del. C. § 5806(b)(1).*

Here, the "personal or private interest" arises from the State employee's spouse's "private enterprise." Her company is one of four that provides certain services to a State agency. He does not participate in any way in the agency's decision on which entity will be selected as the service provider. He does not give the agency advice on those matters. Thus, he does not review or dispose of the matter of which private enterprise the agency will select. Also, no facts suggested that he represents or assists his spouse's company before the agency by which he was employed, as he was employed by a State agency other than the one that selects the provider. Even assuming that filing court docents for the agency which selects the provider resulted in being "employed" by that agency, no facts suggested that he represents or assists his wife's private enterprise before that agency.

Once the agency selects the provider, the Court must approve it. Within that context, he becomes involved. He has no discretion or influence on whom the agency selects. He does not express any position on the merits of any of the companies which the agency may select. He described his position as the filer of the paperwork as a ministerial function.

For a government official to have a "personal or private interest" that tends to impair judgment, the individual must have some ability to exercise judgment. *Darby v. New Castle Gunning Bedford Education Assoc., Del. Supr., 336 A.2d 209 (1975).* A "matter" is "ministerial" when the duty is prescribed with such precision and certainty that

"nothing is left to discretion or judgment." *Id. at 211.*

Here, he has no discretion about which company is selected. He merely files the paperwork reflecting the agency's choice. Without discretion on which company the agency will use, his judgment could not, as a matter of law, be impaired. Thus, he could engage in ministerial conduct related to the court filings.

However, if an issue arises and he has to go beyond such ministerial conduct, then he could not review or dispose of such matters. A specific example discussed was that if it came to his attention that any of the service providers may not be properly fulfilling their responsibilities, etc., that he should recuse himself from participating, either formally or informally, in those matters. If such a situation occurred, another advisor could be assigned to the matter. Also, if his State duties were redefined, he was advised to further assess his situation.

Issue 3: Appearance of Impropriety: State employees may not engage in conduct which may raise suspicion that the public trust is being violated or that will not reflect favorably upon the State. *29 Del. C. § 5806(a).* This is basically an appearance of impropriety test. *Commission Op. No. 92-11.*

The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant facts that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams, Del. Supr., 702 A.2d 825 (1997).*[1]

In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. Nos. 97-23 and 97-42.* First, as long as he restricts his conduct as indicated above, there is no actual violation of the prohibitions. Second, he has no discretion on which company is selected, so his judgment could not be impaired. Third, he will recuse himself from situations where judgment would be involved. Fourth, he is entitled to a "strong presumption of honesty and integrity," under the Code of Conduct. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd., Del. Supr., No. 304, Veasey, J. (January 29, 1996).*

Based on the totality of the circumstances, the relevant facts indicate that, with the restrictions imposed here, he could perform the ministerial function of filing court papers

[1] *Williams* interpreted the Code of Judicial Conduct. Such interpretations may be used as guidance in interpreting the Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. *See, Commission Op. No. 95-5 (citing Sutherland Stat. Constr. § 45-15, Vol. 24 (5th ed. 1992)(decisions on statutory construction have relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other).*

for the agency without it impairing his impartiality and competence. ***(Commission Op. No. 01-02).***

Roommate Contracting with State

The Commission was asked if it would violate the Code if a program director's roommate contracted with his agency. Based on the following law and facts, the Commission determined that, at a minimum, it would raise an appearance of impropriety.

(A) Applicable Law

No State employee may review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. *29 Del. C. § 5805(a)(1).*

No State employee may engage in conduct which will raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect favorably upon the State and its government. *29 Del. C. § 5805(a).*

(B) Application of Law to Facts

(1) Restriction on Program Director's Participation

A concern was raised by an agency's contract administrator about awarding a State contract to the roommate of a program director who headed one of several sections in a particular branch. The branch chief was aware that the contractor was the director's roommate. The contract purportedly would require the roommate to develop a web site for the branch, including the section headed by the program director who was his roommate. Because the program manager would normally have oversight of that portion of the contract dealing with his section, the contract administrator was concerned that there might be a conflict of interest. That concern was legitimate.

The Code of Conduct prohibits State employees from reviewing or disposing of matters in which they have a personal or private interest which tends to impair independent judgment. *29 Del. C. § 5805(a).* Delaware Courts have recognized that a "personal or private interest" can arise from familial relationships, financial interests, business and social relationships, etc. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, J. (January 29, 1996)(no direct financial benefit to State official, but decision could affect company which was entering a business alliance with his private employer); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993)(no direct benefit to official, but spouse's employer would benefit from contract decision). Campbell v. Commissioners of Bethany Beach, Del. Supr., 139 A.2d 493*

(1958)(value of decision makers' property could increase from favorable decision for applicant); Shellburne, Inc. v. Roberts, Del. Supr., 238 A.2d 331 (1967)(alleging "personal interest" or "conflict of interest" where church of decision maker would benefit from decision).

Here, the director's roommate would receive the direct benefit of the contract, but the benefit would also accrue to their shared household. This is similar to the situation in *Prison Health*. It also is similar to a situation where a State employee gave her roommate State contracts. *Ford v. Department of Public Instruction, Del. Super., C.A. No. 96A-01-009, J. Gebelein (January 16, 1998) (because of improprieties in the contracting was fired from her job and prosecuted for misconduct in office).* The Court specifically noted that the relationship created a "conflict of interest." Thus, a State official need not receive a direct financial benefit from the decision in order to have a "personal or private interest" in the matter. When such interests arise, the official is not to review or dispose of the matter.

Where such personal or private interests exist, the official's participation is improper even if that participation consists only of "neutral and unbiased" comments, and even if the official does not vote on the decision. *Beebe.* Even where the official's participation was "indirect and unsubstantial" the Court held that even such limited conduct was improper. *Prison Health*.

Here, the program director and the branch chief said that the program director has not been and would not be involved in decisions relating to the award of the contract to his roommate. However, the program director said he received an e-mail about the contract. No facts were given on what that e-mail consisted of, whether it required a decision, etc. It was unclear whether the branch chief sent the e-mail to the program director or had an employee send the e-mail to him. Regardless of how it occurred, it appears that the branch chief or the staff communicated with the director about the contract. Moreover, at another point, the branch chief said that the director's roommate, "talked to me, the fiscal person, and **met with the program directors** just to develop an understanding of the scope of the work" *(emphasis added).* Since the branch chief's statement did not indicate that this particular program director was excluded from that meeting, if he met with his roommate to discuss the scope of the work, then he would be "reviewing or disposing" of a matter in which he had a personal or private interest. The actual conduct appears to indicate that there were communications with the director about not only the contract, but about the scope of the work. This seemed to contradict other statements by the branch chief and the director that he had not been involved in the contract. However, for purposes of this opinion, we will assume that the director was not in any manner involved in the contract.

(2) Conduct of the Branch Chief - Appearance of Impropriety

On the face of it, isolating the director from the contract decision--e.g., writing the

contract, awarding the contract, overseeing the contract for the scope of work, etc.--would appear to remedy his conflict as the Code provides that a violation occurs *if* the person who has the personal or private interest reviews or disposes of the matter.

However, that is not the end of the inquiry. Not only does the Code restrict the director from reviewing or disposing of the matter, it provides that:

"**Each State employee** ...shall endeavor to pursue a course of conduct which will not **raise suspicion** among the public that he is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government." *29 Del. C. § 5806(a) (emphasis added).* This is basically a test of whether there is an appearance of impropriety. *Commission Op. No. 92-11.* The significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." *29 Del. C. § 5806(a)*. Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably. *Commission Op. No. 92-11*.
Accordingly, we look not only at the director's conduct, but the course of conduct engaged in by each State employee involved in this decision. That requires us to consider the branch chief's conduct and whether it would raise suspicion that the public trust was being violated or would reflect unfavorably on the State.

Delaware Courts have long recognized that the awarding of State contracts involves a responsibility to safeguard the public trust. Specifically, the statutes and rules dealing with public contracts are meant to protect the public against the wasting of money. *C&D Contractors v. Delaware Tech. & Community College, Del. Ch., 318 A.2d 142 (1974); W. Paynter Sharp & Son, Inc. v. Heller, Del. Ch., 280 A.2d 748 (1971); Fetters v. Mayor and Council of Wilmington, Del. Ch., 72 A.2d 626 (1950).* The rules and statutes on obtaining State contracts seek to prevent waste through favoritism. *Fetters, 72 A.2d at 326.* As noted by the Court, the award of State contracts "has been suspect, often because of alleged favoritism, undue influence, conflicts and the like." *Heller, supra.* Consequently, there are statutory provisions and rules to follow in awarding contracts to avoid those suspicions. Here, the very rules and provisions meant to avoid allegations of favoritism, etc., were not followed.

(a) Three Quote Rule and Lowest Bidder Rule

State procurement laws and rules require that if a contract exceeds a certain threshold the agency must obtain three written quotes. *See, Purchasing and Contracting Advisory Council Rules on Small Purchase Procedure and Thresholds.* The branch chief said the three quote rule applied to this contract, and supplied documents which he said supported compliance with the rule. He said the director's roommate was the lowest of the three bidders.

Delaware Courts have recognized that the public has a desire to see that public officials granting State contracts have work done as cheaply as possible. *Fetters* and *Heller*. Obviously, the contract price plays a role in achieving that goal. However, the fact that someone is the "lowest" bidder does not guarantee the award of the contract. *Fetters*; *Heller and C&D.*

Specifically in *Heller*, where there was a possible appearance of a conflict, the Court said "the saving of money, which is certainly desirable, is not the exclusive test by which a vendor is to be chosen." *Heller*. It said that while awarding the contract to the lowest bidder would save the State $9,000, such savings could not be said to be more important than the confidence the public must have in the integrity of the agency's decisions. *Heller*. The Court found "there is nothing whatever in his record" to show that the contract resulted from anything other than submitting the lowest responsible bid, but "it is vital that a public agency have the confidence of the people it serves, and for this reason, it must avoid not only evil but the appearance of evil as well." Thus, the dollar amount bid must be placed in the context of whether the branch chief's conduct insured public trust and confidence in the agency's decision.

Was his bid, as a matter of law, the "lowest bid"? Under Delaware law: "A contract cannot be said to have been let to the lowest and best bidder unless all bidders have been invited to bid upon the same specifications." *C&D*. Aside from the Court's recognition that all bidders must bid on the same specifications, the Purchasing and Contracting Advisory Council rules require three quotes on the **same** purchase order. The branch chief's course of action on this contract did not result in all bidders having the same specifications or the same contract/purchase order.

The documents he gave the Commission dealt with contracts with the director's roommate, and two other companies ("Company A" and "Company B"). They had three different prices, but clearly were not for the same contract or specifications. Company A bid on a web site solely for one section of the branch. The proposal in no way responded to a request for bid on a web site for all five branch sections, which was offered to the director's roommate.

The branch chief said he later asked Company A about the price for a web site for all five sections, and they reduced their price by approximately $10,000. He provided a second proposal from Company A which had a lower price. But the text of the proposal did not support the assertion that the lowered price in the second response was in any way a bid for a web site for all five branches. Just like the first response, it dealt only with a site for one section. Certainly, if the second proposal were meant to cover all five branches, there would have been a change in the substance of the response.

The other "bid" the branch chief provided was to develop a web site for a Division of the agency by Company B. It had nothing to do with the five sections of his branch. Rather, it was a bid to build a site on a subject for which his branch had no

responsibility. Nothing showed that Company B was asked to bid on a contract for a web site for his five branches.

Finally, the "bid" he provided that was to be the contract with the director's roommate consisted of eight pages of boilerplate materials copied almost verbatim from Company B's contract. In fact, the branch chief said, "I drafted a simple contract for him to carry out this work." It is clear from the documents which the branch chief submitted that he merely took the Division contract for a web site which had nothing to do with his branch and inserted the director's roommate's name and the dollar amount. The eight pages of boilerplate cover such things as insurance liability coverage; indemnification clauses; licensing standards; compliance with Civil Rights acts and other laws for regarding discrimination; termination process; limits on subcontracting; resolution of disputes; etc. Those pages have no substance of the contract except to say he is to be paid $35,000 over a year.[2] Attached as Appendix B to that boilerplate is the "Service and Budget Description." That three-page document is, again, virtually a verbatim copy of the information submitted by Company B on a totally different web site, merely changing such things as the name and amount. Since the roommate's "contract" is just a copy of Company B's proposal for a totally different web site, it might well raise a question of whether the roommate made a viable bid on the five branch web site, on which he was supposed to be bidding. We will assume that it was.

However, even assuming that the copied document is a viable bid, he cannot be considered the "lowest bidder." That is because Company A and Company B were never asked to bid on a contract to design a web site for all five branches. Company A was only asked to respond with a proposal on a web site for one section in both instances. Company B was never asked to bid on any contract for the branch. As Company A and Company B did not bid on the same contract and specifications as was offered to the director's roommate, it is clear that he did not give the "lowest bid of three," he gave the **only** bid for a contract for all five branches.

A three quote requirement gives some indicia of integrity and fairness in the decision to award the contract. Complying with that rule aids in removing those long held suspicions that government contracts are awarded out of favoritism because the rule provides an objective measurement of fairness--the price as compared to others. Ignoring that most basic requirement--getting three quotes on the **same** purchase or contract--raises suspicion that there was a violation of the public trust because the very rule that could help remove suspicion of unfair dealings was circumvented.

(b) The Need for the Lowest "Responsible" Bidder

[2]The document contains no information on what hardware or software would be needed; contains no information on the time line for accomplishing the work; gives a per hour rate but no information on how many hours the work will take; etc.

Even if the three companies had bid on the same contract, a State agency is not restricted to dealing with the company who makes the lowest bid. Rather, the law and rules require consideration of factors other than money. Officials must decide if the bidder is the "lowest responsible bidder." *Fetters and C&D.*

Public officers cannot lawfully ask each bidder to make his own plans and specifications and to base his bid thereon, and then, after the bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid. Such a procedure would destroy competitive bidding and give public officials an opportunity to exercise favoritism in awarding contracts. *C&D.*

In dealing with Company A, one branch section met with the company to discuss specific needs for that section's web site. Based on the documents the branch chief submitted, the meeting involved more than just a discussion or meeting with a program manager. It included the agency's computer specialist. Subsequently, Company A submitted a clear and specific proposal identifying such things as the software it would use, definite time tables for completion, end goals such as training classes, training manuals, a series of objectives, etc. Courts have recognized that when State contracts have plans, specifications, and estimates, and insure that information is passed to all persons interested in bidding, this enables bidders to prepare their bids intelligently and on a common basis. *C&D*. Like the three quote rule, the use of specifications insures fair competition and instills public confidence in the integrity of its government's decision making process because there is some objective information on which the official can base his decision.

That clearly did not occur with the director's roommate. After Company A bid on one section's web site, the branch chief initiated a call, soliciting the director's roommate to give a cost to design a web site for all five sections. The branch chief said he happened to remember him from a meeting some time ago and recalled that he did web site design. The branch chief expressed his own limited knowledge about the technical aspects of web sites. While he said that the director's roommate met with him, the fiscal officer, and the program managers; no facts indicated that he met with the agency's computer specialists who could assist in an area where the branch chief admittedly had limited expertise. Moreover, no definite plans or specifications came from either the phone call to him or the meeting. Further, while the branch chief noticed a substantial difference between the roommate's price and Company A's, he had no idea why there was such a difference. He speculated that it might be because the director's roommate works out of his home and might charge less per hour than Company A. It was pointed out to him that without any specifications in the director's roommate's contract it would be hard to see how the price difference between his costs and Company A's costs were connected to technical content, creative content, or some other aspect of the contract. His response was: "I totally agree."

In other words, without any specifications it could not be ascertained if the bid is lowest,

nor can it be ascertained if it is a “responsible” bid.

The branch chief said that “sometimes the harder we try to define what the product is that we want to buy, the closer we come to making it unnecessary that we hire someone.” He went on to say that: “I can say what it is I want, but I can’t design a web site.”

The problem here is that his agency was certainly able to work with Company A to define what it needed on one section’s web site. Specific needs were identified by the agency; specific approaches to those needs were identified by Company A, etc. This shows that there can be specs; that other contractors are required to develop specs based on the agency’s needs, etc. Yet, the director’s roommate was not asked to develop such specs.

In effect, the branch chief asked each bidder to make his own plans and base his bid thereon. He offered Company A the chance to bid for a web site for one section. After receiving that bid, he called the director’s roommate and offered a completely different contract--one for all five sections. He then compared the costs of unlike contracts, and proceeded to adopt the plan that had no specifications.

As noted by Delaware Courts, the procedures for selecting a contractor can be destructive of competitive bidding and give public officials an opportunity to exercise favoritism in awarding contracts. Here, the public could well suspect that “competitive bidding” was destroyed because the companies did not bid on the same contract. Moreover, even if they had bid on the same contract, since one contractor did not have to develop any specifications it could not be ascertained whether the bidding was “competitive.” If one contractor is not “responsible” for giving any specifications, it is difficult to see how he could be the “lowest responsible bidder.”

This is not to say that the director’s roommate does not have the ability, expertise, etc., to do the job. Given a true competitive opportunity it was possible he could be the “lowest responsible bidder.” However, the branch chief’s course of conduct in selecting him denied a true competition among bidders.

(C) Conclusion

Even if the director recuses himself, the branch chief’s course of conduct raises suspicions that the integrity in the selection process was compromised. First, he failed to follow procedures to get three quotes on the same contract. That requirement would help insure public trust in the system by insuring fair prices, fair competition, etc., were considered rather than a selection based on non-existent or purely subjective criteria. Second, he failed to get any specifications from the director’s roommate. Specifications insure not only that the bidders are bidding on the same contract, but insure a plan that is definitely sufficient so that there is less of a chance that the award is based on

something other than the merits. As with the three quote rule, the need for all competitors to bid on the same contract, etc., are meant to instill public confidence in the conduct of its government, circumventing those procedures clearly "raises suspicions" that his conduct violated the public trust.

It is not just a matter of circumventing the rules meant to protect the public trust. The course of conduct he pursued---not only personally soliciting the director's roommate when he knew there was a question about a possible conflict---but then proceeding to shepherd the selection process through for him by drafting his contract; not requiring specifications from him while requiring that of Company A; not having him meet with computer specialists who were technically qualified to make decisions, when the branch chief admitted that his own knowledge of the technical aspects of web sites was limited; not being able to produce objective criteria for his selection, etc., raises suspicions that the director's roommate was receiving preferential treatment and that the contract may have been awarded out of favoritism.

Thus, even if the director's conflict were remedied by removing him from the process, the branch chief's course of conduct failed to achieve what the Delaware Courts deem "vital" for a State agency when there is a question of a conflict in the awarding of a State contract--"the confidence of the people it serves." Under those circumstances, the program manager's roommate could not be awarded the contract. ***(Commission Op. No. 01-04).***

Former Private Client Seeks Decision - Inability to Delegate

A State officer notified the Commission of a possible conflict of interest because as a private attorney he had assisted some clients in purchasing real estate. At that time his clients discussed the possibility of applying for a certain type of State license. However, they planned to pursue that on their own. Thus, he was not involved in any matters related to their license application. At the time of the purchase, he was not aware that he would be considered for the position of the State official who was responsible for issuing this type of license.

After he accepted the State job, his former clients' application was scheduled for a hearing. By statute, he was required to decide if the application would be approved.
State officials may not review or dispose of matters if they have a personal or private interest that would tend to impair independent judgment in performing their official duties. *29 Del. C. § 5805(a)(1).* However, there is an exception which provides that, if there is a statutory authority that cannot be delegated, the State employee may exercise responsibility with respect to the matter, if promptly after becoming aware of the conflict he files a written statement with the Commission disclosing the personal or private interest and explains why the responsibility could not be delegated. *29 Del. C. § 5805(a)(3).* After a review of his statutory duties, the Commission concluded that, as a

matter of law, there was no one to whom he could delegate his statutory duty to rule on the application.

Here, he immediately contacted the Commission's office and prepared a written statement and faxed it to the Commission to comply with the prompt disclosure requirement. While the Code states that such disclosure is confidential, *29 Del. C. § 5805(a)(3),* he chose to disclose the situation to the participants at the application hearing and make it part of the record. ***(Commission Op. No. 01-05).***

Decisions about Uncle's Organization - Disclosure Required

If a State officer has a "personal or private interest" in a matter, but has no authority to delegate the decision to another, he must promptly file a full written disclosure on becoming aware of a conflict. *29 Del. C. § 5805(a)(3).* We held in a prior opinion that this officer had no authority to delegate his statutory responsibilities. *Commission Op. No. 01-05.* Thus, we do not address that issue again. Here, as his disclosure was "promptly" filed, his conduct fully comported with the law.

However, he asked if, as a matter of law or fact, there was a conflict so he would have a definite ruling and not have to "assume" a conflict if a similar situation arose. He asked because his uncle has a close affiliation with an entity which was seeking a license extension through his office, and he was the only person authorized by statute to make the decision.

The Code of Conduct has two provisions dealing with "personal or private interests." The officer noted in his disclosure that he did not believe he had a conflict under *29 Del. C. § 5805(a)(2)(a) and (b).* That section identifies two situations which automatically create a "personal or private interest" which tends to impair judgment. They are where: (a) a State officer or his close relative would accrue a financial benefit or detriment to a greater extent than others in the same class or group of persons; or (b) a State officer or his close relative's private enterprise has a financial interest that will be affected to a lesser or greater extent than other similarly situated private enterprises. In other words, by operation of law, there will always be a conflict under that section if the person is a "close relative" and would receive a "financial benefit" that others similarly situated would not receive. He noted that the definition of "close relative" does not include "uncle" and his uncle would not receive a direct "financial benefit." *29 Del. C. § 5804(1).* We agree that, as a matter of law, the situation does not substantiate a conflict under *29 Del. C. § 5805(a)(2)(a) and (b).*

However, that cannot end the inquiry because we must decide if the facts would substantiate a conflict under any other provisions. *See, e.g.*, *Commission Op. Nos. 96-61 and 00-04. (State officers said there was no conflict because their situations did not fall within the definitions of terms in 29 Del. C. § 5805(a)(2)*, *but Commission found conflicts under other provisions).*

The other section dealing with "personal or private interests" is *29 Del. C. § 5805(a)(1).* That section is not limited to narrow definitions such as "close relatives" and "financial interest." Rather, it recognizes that a State official can have a "personal or private interest" outside those limited parameters. It is a codification of the common law restriction on government officials. *See, e.g., Commission Op. Nos. 00-04 and 00-18.*

At common law and since its codification, Courts and this Commission have recognized that this provision covers various relationships that may create a "personal or private interest," that are not enumerated as they are in the other section. *See, cases cited in Commission Op. Nos. 00-04 and 00-18.* Delaware Courts have held that under the common law, which has now been codified, the issue of whether the "personal or private interest" is sufficient to "tend to impair judgment" is an issue of **fact**, not of law as in *§ 5805(a)(2). See, e.g., Shellburne, Inc. v. Roberts, Del. Ch., 238 A.2d 331 (1967)(under common law, where complainant alleged government official had "personal interest," and "conflict of interest" because of friendship and social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993)(Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact).* Thus, at common law and as codified, this section permits consideration of whether a particular relationship is either sufficient to create a conflict or too attenuated to create a conflict. *See, Commission Op. No. 96-42(improper for State employee to participate where brother-in-law would be affected by decision); but see, e.g., Commission Op. No. 00-18(allegation of "personal or private interest" that State officer would financially benefit from decision was too remote and speculative).*

Where a relationship is not within the definition of "close relative," the facts can still give rise to a conflict under *29 Del. C. § 5805(a)(1). Commission Op. No. 96-42 (improper for State employee to participate in decision where brother-in-law's company would benefit from decision).*[3] "In-laws," like uncles, are not defined as a "close relative," so *§ 5805(a)(2)* would not apply, but *§ 5805(a)(1)* could.

Aside from the *§ 5805(a)(1)* restriction, the Code prohibits State employees from engaging in conduct that may "raise suspicion" among the public that he is acting in violation of the public trust and his actions will not reflect favorably upon the State and its government. *29 Del. C. § 5806(a).* This is basically an "appearance of impropriety" test. *Commission Op. No. 91-2.* The Commission has held that:

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[3] *See, Brice v. State, Del. Supr., 704 A.2d 1176 (1998)(Merit Rules defined "immediate family" but did not include "uncle" in definition. However, Merit Employee Relations Board (MERB) held that where an uncle participated in decision about nephew it was a conflict. Court affirmed MERB's decision and noted that uncle's participation in decision was "the most blatant discrimination on account of nepotism and favoritism.").*

> [T]he significant import of *Section 5806(a)* is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." *29 Del. C. § 5806(a)*. Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably. *Commission Op. No. 92-11.*

Here, the provision which appears to be violated is the restriction on reviewing or disposing of matters if there is a "personal or private interest" which would tend to impair judgment in performing official duties. *29 Del. C. § 5805(a)(1).* His official duties required him to decide certain licensing issues. His uncle was on the board of an organization seeking to have its license extended. As a board member, and because of a past elected position, the uncle has substantial power and influence in the State. While he may not receive a direct financial benefit from his nephew's State decisions, an approval certainly benefits the organization--if not, the Board on which he sits would not want the extension. This is not a remote and distant relative. The issue of whether the license should be extended has been contentious. In fact, members of the public had questioned why he was making the decision and noted the familial relationship. The public could well suspect, and it is clear that at least some of the public did suspect, that his decision could result from favoritism or preferential treatment for his uncle's organization.

Based on those facts, the majority of the Commission concluded that, at a minimum, there is an appearance of a conflict.

This is not to say that his judgment was, in fact, impaired, only that it could raise suspicions among the public that it was. However, we also note that when he encountered this situation, he promptly and fully complied with filing the full disclosure mandated by law. That is all the law requires, and it provides that such full disclosures are confidential. *29 Del. C. § 5805(3).* However, he elected to more fully disclose the situation by making it a matter of record at the application hearing. Moreover, his decisions can be appealed.

Accordingly, while concluding that a conflict exists, the law permits him to act after filing a disclosure, and he fully comported with the law, as required by *29 Del. C. § 5805(a)(3).* ***(Commission Op. No. 01-14).***

Board Official Who Sued Board Cannot Review Similar Law Suit

A local government official was elected to a Board which must go into executive sessions to discuss a complaint filed against it. A complaint had been filed against the Board by a former State employee. The local elected official was also a former employee, and had filed a similar complaint against the Board. The Board intended to

have executive sessions to discuss the litigation, and asked if the local elected official should participate in executive sessions where the similar complaint is to be discussed. Based on the following law and facts, the Commission concluded that the official should not participate as it would constitute a conflict, or at least the appearance thereof.

(A) Applicable Law

The Code of Conduct provides that no State employee, officer or honorary official may:

(1) review or dispose of any matter pending before the State in which he has a personal or private interest. *29 Del. C. § 5805(a)(1).* A personal or private interest is an interest which tends to impair independent judgment in performing official duties with respect to that matter. *Id.;*

(2) use public office to secure unwarranted privileges, private advancement or gain. *29 Del. C. § 5806(e);*

(3) engage in any activity beyond the scope of his public position which might reasonably be expected to require or induce him to disclose confidential information acquired through his public position. *29 Del. C. § 5806 (f);*

(4) beyond the scope of his public position, disclose confidential information gained through his public position, nor shall he otherwise use such information for personal gain or benefit. *29 Del. C. § 5806 (g);*

(5) pursue a course of conduct which will raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which reflect unfavorably upon the State and its government. *29 Del. C. § 5806(a).*

(B) Facts

Both former State employees worked for the same agency. When their employment contracts were not renewed, both then sued the Board. Both suits are against not only the Board but individual board members. The defendants are identical in both suits, except for one person. The board's legal counsel asked the elected official to recuse himself from executive sessions discussing the other suit because it was believed that the suits were sufficiently similar that the elected official could obtain information during the legal strategy sessions that could assist him in his complaint. The elected official's position was that as an elected Board member, he had a duty to the public to be present. Further, he did not believe that the cases were so sufficiently similar that he would gain any advantage from participating in the legal strategy sessions.

The first issue was whether the complaints were similar.

While the specific facts differ, the allegations that are the foundation of the complaint are essentially the same--misuse of State funds and resources.

Each complaint is further similar in that both: (1) are suing the same Board;(2) are suing identical board members individually, except for one named defendant; (3) allege misuse of government funds; (4) allege their performance reports were unfairly rated; (5) allege their contracts were not renewed and no reasons were given; and (6) allege the reason for the low performance reports and non-renewal of the contracts was retaliation for observing, reporting and discussing conduct they believed was contrary to policies, practices and law.

The complaints overlap substantially in legal theories. Both allege that their conduct in speaking about what they considered was improper conduct was protected by the First Amendment; that retaliation for such speech deprived them of their civil rights. Both bring claims of civil rights violations under *42 U.S.C. § 1983*. Both allege that their conduct was protected under the State's "Whistle blower" statute. Both allege breach of an implied covenant of good faith and fair dealing and intentional interference with a contractual relationship.

Based on the above facts we concluded there was a substantial overlap in the two complaints.

(C) Application of Law

Having found a substantial overlap in the complaints, the next issue is whether the facts are sufficient to require the official to recuse himself from confidential legal strategy sessions on the other former employee's complaint.

(1) Applying Restrictions If there is a "Personal or Private Interest"

The Code of Conduct prohibits State employees, officers and officials from participating in reviewing or disposing of matters before the State in which they have a personal or private interest *29 Del. C. §5805(a)(1).* A personal or private interest in a matter is an interest which tends to impair a person's independent judgment in the performance of his duties with respect to that matter. *Id.*

The official's legal counsel appeared to suggest that the legal parameters of the above provision, *§5805(a)(1)*, are defined by *§5805(a)(2).* Reading the law in that manner, he concluded that for the law to apply, the "personal or private interest" must result in a financial benefit or detriment to the State official or a close relative or that the official or close relative have a financial interest in a private enterprise which would be affected by action or inaction on the matter to a lesser or greater extent than others similarly

situated as provided by *§5805(a)(2)(a) and (b).* He said the financial benefit must be a "direct, substantial, pecuniary interest in the subject matter" and it could not be said the official would gain directly from any knowledge acquired in discussing the other complaint.

For a number of reasons, we cannot agree that *§5805(a)(2)* defines the parameters of *§5805(a)(1)*. First, the Code of Conduct has a clear and specific definition section. *See, 29 Del. C. § 5804.* Second, within the clear text of *§5805(a)(1)*, the second sentence reads that "a personal or private interest is one which tends to impair independence of judgment. . . . " Thus, within that provision the law spells out what constitutes a "personal or private interest." Third, the Delaware Supreme Court has affirmed an interpretation of *§5805(a)(1)* independent of *§5805(a)(2). See, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).* Fourth, we have held that *§5805(a)(1)* is a codification of the common law restriction on public officials having a personal or private interest. *Commission Op. Nos. 97-24; 97-30; and 00-04.* That is because conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253 (1997).*

Under the common law, the restriction on government officials participating when there was a "conflict of interest" or a "personal or private interest," was not limited to close relatives and/or a direct financial interest. *(See cases cited in Commission Op. Nos. 97-24; 97-30; and 00-04).* Those Delaware cases show that conflicts can arise from more than just a familial relationship or from a direct financial benefit. Subsequently, the General Assembly codified the restriction on Executive Branch officials participating if they have a "personal or private interest" in *29 Del. C. § 5805(a)(1)*.[4]

The Delaware Supreme Court affirmed an interpretation of *§5805(a)(1)*, where the alleged "personal or private interest" of a State official did not involve a "close relative" or a direct pecuniary interest. *Beebe, supra; See also, Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993)(no direct pecuniary interest).* Neither *Beebe* or *Prison Health* considered the statutory terms of *§5805(a)(2).*

Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001), cited by the official, is a decision by the Superior Court (not by the Delaware Supreme Court) and is distinguishable.[5] For example, "close

[4]A similar restriction applies to the Legislative Branch if they have a "personal or private interest." *Del. Const. Art. II § 20.* Like *29 Del. C. § 5805(a)(1),* which applies to Executive branch members, it makes no reference to limiting "personal or private interests" to only situations where there is a familial relationship or a direct financial interest.

[5]We note also that in *Harvey*, the Court said: "Although this statutory provision *[29 Del. C. § 5805(a)(2)]* does not apply to employees of a municipality or township, the Court finds that it provides further guidance in this matter." That finding is inconsistent with the current status of Delaware law. On

relatives" were involved so *29 Del. C. § 5805(a)(2)* would be the logical starting point for the Court's inquiry. The Court found no violation of that provision, but went on to note that while the Board members were not required to recuse themselves due to any financial interest, it may have been "prudent" for them to do so, "had it been possible."[6] Under *Beebe* and *Prison Health*, we must consider *29 Del. C. §5805(a)(1)* and make a factual determination of whether the official's "personal or private interest" is sufficient to require his recusal. We also consider other Code of Conduct restrictions.

(2) The Official's "Personal or Private Interest"

First, the official's "personal or private interest" is his interest in seeing a positive resolution to the complaint he has brought against the Board and the individually named officials. A positive resolution may serve to "clear his good name," as he alleges that the defendants' actions resulted in his character and professional reputation being maligned. Moreover, he asserts that the defendants' conduct resulted in pecuniary damages. Thus, he has a financial interest in a positive resolution, even though under the applicable authorities *(Beebe, etc.)* a direct financial interest is not required for there to be a Code violation.

Are those interests sufficient to tend to impair his independent judgment in performing official duties related to the other complaint? The law does not require that his judgment actually be impaired; only that it would "tend" to be. *See, 29 Del. C. § 5805(a)(1).* Moreover, under the appearance of impropriety standard, the conduct need not actually result in a violation of the public trust, it need only "raise suspicion" of a violation. *See, 29 Del. C. §5806(a).*

Here, if the official participates in legal strategy sessions where the other complaint is discussed, he will gain insight into what strategy may be used in defending against his complaint, which we found raises similar issues, identical legal theories, and is against the same defendants, with one exception. In discussing the strategy, the Board's attorney, who represents the Board and identical named defendants (except one), in both suits, could certainly discuss the same defenses, same applicable case law, and same applicable statutes. Further, in discussing if the Board should consider settlement, the amount of settlement, or whether to press forward to trial, counsel would

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July 22, 1992, the Governor signed Senate Bill No. 406 which specifically provides that: "Subchapter I, Chapter 58 of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation [local code of conduct legislation at least as stringent as the State Code of Conduct] by January 23, 1993." The Town of Odessa has not enacted such legislation. Thus, its employees, elected, and appointed officials are subject to the State Code of Conduct.

[6] *Harvey* dealt with a Constitutional issue. It said that a direct financial interest must exist for the conflict to rise to the level of a Constitutional due process violation, but noted that not all issues of recusal involve Constitutional validity. For example, in *Beebe,* the Court found that under the Code of Conduct, the official should have recused himself from the outset, but did not find that his failure to do so rose to the level of a Constitutional violation.

have to reveal what he sees as the likelihood of success under various scenarios, reveal what figures might be used in settlement discussions, etc.

The official posited that because the cases are not factually similar, he will not gain any benefit from participating in these discussions. We must disagree. First, some strategy discussions are not based on the facts. For example, the Board's attorney may wish to discuss with the defendants whether, regardless of any facts, it wants to further expend government funds by going to trial or strive for a settlement to resolve the matter without further expense. Alternatively, the Board's attorney may wish to discuss with the defendants the federal Court's recent ruling in the other case and how that may affect the Board's decision on its next course of action. That particular ruling was decided as a matter of law, not of fact. The Board's attorney may also wish to discuss the implications of the Court's decisions on dealing with the official's similar suit. As the Board members are defendants in both suits they will certainly see the parallels and may wish to discuss the implications. Further, as both complainants raise a *42 U.S.C. §1983* claim, decisions on one can affect the other because *§1983* recognizes that civil rights claims can sometimes be established by proving a pattern of misconduct by government officials.

If the official participated, his "personal or private interest" in his own suit may tend to impair his judgment in making decisions regarding the other complaint, in violation of *29 Del. C. § 5805(a)(1)*, or his participation in such discussions may "raise suspicions" that his judgment may tend to be impaired, in violation of *29 Del. C. §5806(a).*

(3) Use of Confidential Information/Use of Public Office

We note that by law, strategy sessions, including those involving legal advice or opinion from an attorney-at-law, are closed to the public under the Freedom of Information Act when an open meeting would have an adverse effect on the bargaining or litigation position of the public body. *29 Del. C. §10004(b)(4).* In other words, the proceedings are confidential. That law recognizes that those who have an adverse interest in the pending or potential litigation against the government may glean helpful information in their own legal actions against the government, whether their facts, legal theories, etc. are identical or not. Here, the official has that adverse interest in pending litigation. Beyond those who have adverse interest, the General Assembly excluded the entire public from such sessions, even those who do not have a legal action pending and may gain no benefit from hearing the discussion. By exempting even those without any adverse interest, the General Assembly recognized that discussions on legal strategy between government attorneys and their government clients must be shielded. This permits the attorney to fully explore the matter with his clients and gives his clients the freedom to engage in conversations that those with an adverse interest are not entitled to discover. It is difficult to believe that the defendants who are being sued by two former State employees would feel free to have an open discussion with their legal counsel in front of one of those people, because of the similarity in the cases. Further, it

would impose on defendants' counsel an obligation to basically screen every word said by the defendants to insure they did not make statements in one case that could be construed as admissions in the other; that they did not speak on matters which may be protected under the attorney-client privilege; that they did not speak on matters that would not normally be discoverable; etc.

Legal counsel for the board, who represents the Board and the named defendants in both complaints, believes that there is a sufficient overlap between the two complaints that discussions of the other complaint could benefit the official in his similar complaint. As he is defending both suits with essentially the same defendants, allegations, legal theories, etc., we must give weight to his evaluation of the two cases. Further, we must couple that fact with our own evaluation of the overlap between the complaints based on reviewing the two complaints. As noted above, while there are factual differences, there is a substantial overlap between the named defendants, the types of alleged improper actions, the legal theories, and the law on which those theories are based.

By contrast, the official's legal counsel is not involved in the other complaint. Thus, he is not as intimately conversant with both complaints. By hearing what defense theories the Board will use and identifying the law it will argue, the official would be in a position to pass this confidential information to his legal counsel which could gain for him an advantage that no other person with an adverse interest against the government would be entitled to hear. Also, a discussion on what figures may be available or appropriate for a similar case, could assist the official in negotiations he might subsequently have with the same defendants in his similar complaint.

If the official participated in the discussions, he could gain confidential information as a result of his public position, and might reasonably be expected or induced to use such information for his personal gain or benefit in violation of *29 Del. C. §5806(f) and (g)*, or his participation in the meetings could "raise suspicions" that he might reasonably be expected or induced to improperly use or disclose such information, in violation of *29 Del. C. §5806(a).*

(3) There is No Exemption from the Code of Conduct If An Official Is Elected by a Large Number of Voters

It is argued that because the official was elected by a large number of voters that he has a public obligation to attend the meetings. No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would have to recuse themselves when they had a conflict. The restrictions would then become meaningless.

Finally, no facts indicate that other elected Board members, who are not named defendants, and do not have a personal or private interest, cannot fulfill the "public obligation," to the extent there is one. Thus, this is not a situation as in *Harvey, supra*,

where, although the recusal would have been prudent, it was impossible for others to perform the function. We also note that the official is not a named defendant in the other complaint. Thus, his presence is not required to participate in his own defense.

The official's "public obligation" under the Code of Conduct is that his conduct, like all employees and officials subject to that law--elected or not-- "must hold the respect and confidence of the people," and avoid conduct which is "in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *29 Del. C. §5805(1)*. To achieve that goal, the General Assembly provided standards to guide their conduct and noted that "some standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties." *29 Del. C. §5802(3).*

Here, the standard prohibiting State officials from reviewing or disposing of State matters if they have a personal or private interest in the matter is one that carries a criminal penalty of up to one year's imprisonment and/or a fine not to exceed $10,000 for knowingly and willfully violating that provision. *29 Del. C. §5805(f).* Thus, compliance with that provision is deemed "vital."

The restrictions on improperly using or disclosing confidential information; using public office for public gain; and engaging in conduct that will raise suspicion of a violation of the public trust, carry administrative penalties. However, compliance with those provisions can be achieved here by not violating the criminal provision.

(D) Conclusion

Based on the above law and facts, the official has a "personal or private interest"--both pecuniary and non-pecuniary--in his complaint against the Board and the named defendants that prohibits him from participating in executive sessions of the School Board where legal strategy on a similar complaint is discussed with counsel. ***(Commission Op. No. 01-20).***

State Officer Should Refrain from Participating in State contract written by Spouse

A State officer's spouse was counsel for, and drafted contracts for, an agency over which the State officer had decision making authority. The Commission, based on the following law and facts, concluded the State officer should not review or dispose of the contract matter.

The State officer was authorized to enter into agency contracts. Prior to assuming that State position, the agency had contracted with an organization, and the contract was up for renewal. Normally, a contract extension would be routine. However, the organization enacted a new fee structure for the contract services. A competitor for

government contracts for the same services was challenging the fee structure in Court. The State officer's spouse, who wrote the proposed contract extension, which include the new fee structure, was involved in the Court action.

The contract terms were identical to the fee structure language. The contract was not publicly notice and bid, and by law did not need to be bid. That meant no competition against a contract written by the officer's spouse. The Court action shows that the competition for the contract is more than willing to challenge the status quo. The officer's agency is not a party to the challenge, but the fee structure that constitutes the contract is being challenged.

Applicable Law

(A) State officers may not review or dispose of matters if they have a personal or private interest which may tend to impair judgment in performance of their duties. *29 Del. C. § 5805(a)(1).* Whether an interest is sufficient to tend to impair judgment is an issue of fact under this provision. *Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993); see also, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).*

(B) By operation of law, an interest is automatically sufficient to impair an official's judgment if the official's action or inaction would result in a financial benefit or detriment accruing to a close relative to a greater extent than such benefit or detriment would accrue to others of the same class or group. *29 Del. C. § 5805(a)(2).* "Close relative" includes "spouse." *29 Del. C. § 5804(1).*

(C) State officers may not engage in conduct which may raise suspicion among the public that they are acting in violation of the public trust and will reflect unfavorably upon the State. *29 Del. C. § 5806(a).* This is, in essence, an appearance of impropriety standard. *Commission Op. No. 00-03.*

3. Application of Law to Facts

Obviously, the officer's spouse is within the definition of "close relative." Further, the spouse receives a financial benefit from representing the contracting organization. However, no facts indicate any direct benefit from the contract over which the officer had authority. Thus, there may not be a technical violation of *29 Del. C. § 5805(a)(2).* However, Delaware Courts have held that even if the close relative has no direct financial interest, it would be "prudent" for the official to recuse themselves, if possible. *Harvey v. Zoning Board of Adjustment, Del. Super., C.A. No. 00A-04-007, J. Goldstein (Nov. 27, 2000).*

More significantly, the Delaware Supreme Court has affirmed a decision

interpreting *29 Del. C. § 5805(a)(1)* which held that conflicts can arise even if the official or a close relative would not receive a direct financial benefit. Rather, the close business or personal relationship alone was sufficient to require recusal. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996); see also, Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).*

In *Prison Health*, the Court held that although the State employee did not select the contractor, and his participation was "indirect" and "unsubstantial," it was "undoubtedly improper" for him to discuss the contract with those making the selection as his spouse was a "low-level" employee of one of the companies seeking the contract. No facts indicated that the he or his spouse would personally benefit from the contract.

Here, the officer's spouse handled the disputed regulation which constitutes the contract, and wrote the contract which the State officer is to approve or disapprove. Thus, the State officer has more authority over the contract than the State employee in *Prison Health,* and the officer's spouse has a more involved interest in the contract than the spouse in *Prison Health.* It may appear to the public that the officer would approve the contract merely because it was written by the officer's spouse. That is not to say that the officer would do so, but the law does not require an officer's judgment actually be impaired; only that it may "tend to be," or "raise suspicions" that it would be.

If a State official has a statutory responsibility that cannot be delegated, then the official may proceed in the face of the conflict if there is full disclosure to the Commission. *29 Del. C. § 5805(a)(3).* Here, the officer had statutory authority to delegate the contractual powers, duties or functions to a Division Director. *(Citation omitted).* The officer was aware of that provision, but was concerned that delegating the responsibilities to a Division Director would not serve much purpose as that individual works for the officer, so it could still raise appearance of impropriety issues.

The officer's assessment was correct. Delegating the responsibility to someone who works for the officer is not a cure-all for the "appearance of impropriety" issue. However, the test for an appearance of impropriety is if the conduct would create in reasonable minds, **with knowledge of all the relevant circumstances** that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *Commission Op. No. 00-03(citing In re Williams, Del. Super., 701 A.2d 825 (1997)(emphasis added)).*

Here, the relevant circumstances are that there was no other person at a higher level to whom the matter could be delegated; and the subordinate had been dealing with this contract prior to the officer assuming the current position. There is no way to eliminate all possible appearances of impropriety short of either the State officer leaving public office or the spouse's firm withdrawing from its long-standing contractual

representation of the organization. The Code does not require such remedies. Rather, it states that the official who has the personal or private interest may not review or dispose of the matter. By delegating the "full power and responsibilities," there is no technical violation of the law. While the Division Director does work for the officer, that individual will have full authority to act without consulting the officer. The officer is aware that the power is relinquished and will not be involved with the contract. Under the Code of Conduct, there is a presumption of honesty and integrity. *Beebe, supra.* Thus, there is a legal presumption that when the full power and authority is given to that individual, the officer will not interfere or assert powers over that contract. To do so would subject the officer to disciplinary action, which is the incentive for complying with the law.

(D) Conclusion

Delegating this matter to a Division Directors may not be the ideal solution. However, based on all the relevant circumstances, it is the best solution under these particular facts. ***(Commission Op. No. 01-33)***.

Promotion of Relative

It would not violate the Code of Conduct if a State officer's close relative was considered for a promotion in the same agency if the officer were completely removed from reviewing or disposing of any matters related to the close relative's application, consideration for selection, etc. Further, if the close relative were promoted, any subsequent matters related to that relative could not be reviewed or disposed of by the officer.

(A) Applicable Law

State officers may not review or dispose of matters before the State where they have a personal or private interest. *29 Del. C. § 5805(a)(1*). A personal or private interest is one which tends to impair independent judgment in performing official duties. *Id*. Whether an interest is sufficient to disqualify an official from participating under this provision is an issue of fact. *Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).*

Where a "close relative" is involved, by operation of law, there is an automatic conflict requiring recusal if action or inaction on the matter would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons. *29 Del. C. § 5805(a)(2)(a).* "Close relative" includes "siblings of the whole and half-blood."

Further, State officers may not engage in conduct that may raise suspicion

among the public that the officer is engaging in conduct violating the public trust or which will not reflect favorably upon the State. *29 Del. C. § 5806(a).* This is, in essence, an appearance of impropriety test. *See, e.g., Commission Op. No. 97-23 and 97-42.*

(B) Application of Facts to Law

The State officer's "close relative" was initially hired before the officer was in a position to be involved in the hiring, supervision, etc. Later, the officer was promoted to a decision making position with authority relative to such matters. When the close relative applied for a promotion in a Division of the agency, the officer had such authority.

Because he is a "close relative" as defined by the Code, we looked first to the Code provision that creates an automatic conflict. *29 Del. C. § 5805(a)(2).* It is clear a decision on the promotion could result in a "financial benefit" to a "close relative." Other applicants would make up the "class or group of persons" referred to in that provision. However, the officer would not participate in the promotion decision from which the close relative could, if selected, derive a financial benefit. The officer would not be involved: in deciding how the agency will announce the job (e.g., inter-agency; intra-agency, or to the public); selecting or participating in the promotion panel; or participating in the final selection. With those restrictions, *29 Del. C. § 5805(a)(2)* would not be violated.

The next issue is whether the officer should be disqualified under *29 Del. C. § 5805(a)(1).* Under that provision, we look at more than just the narrow parameters of *29 Del. C. § 5805(a)(2).* Specifically, while § *5805(a)(2)* looks only at whether there would be a direct "financial benefit," *§ 5805(a)(1)* is broader. It requires disqualification in "any matter" if you have a personal or private interest which tends to impair judgment. Here, if the close relative is promoted, it would be a financial benefit. Beyond that, as he engages in his day-to-day work, issues may arise which entail no specific financial benefit for him, but could be issues where the officer normally would be involved in decisions that could impact on him. For example, if the officer reviewed or disposed of his performance evaluation, that may not result in a financial benefit to him, but certainly could raise the specter that the officer's judgment could be impaired in participating in that evaluation because of the close relationship.

However, again, the officer would not participate in performance evaluations, disciplinary actions, etc., or work with the close relative on issues in his office, etc. If the officer does not become involved in those matters, no facts indicate a violation of *29 Del. C. § 5805(a)(1).*

Finally, we must decide if the conduct would violate the standard against the appearance of impropriety. The test for an appearance of impropriety is whether the

conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams, Del. Supr., 701 A.2d 825 (1997).*[7] Thus, we look at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42.*

First, the officer was not involved in the original decision to hire the close relative; they worked in different divisions of the State agency; the officer was not in a position to evaluate his performance, etc.

Second, the officer will not participate in any matters concerning the close relative. That is what the law requires. Moreover, the officer reviewed the Commission's prior decisions dealing with nepotism so was conversant with the need to stay as far removed from decisions about the close relative as possible. Consistent with those opinions, the Division Director, without input from the officer, will decide how the job will be announced, based on the Merit Rules. Obviously, there would be less of an appearance that the posting is geared to him if, rather than an intra-agency announcement, the job were open to all State employees or to the entire public. However, as long as the announcement comports with the Merit Rules, and the officer is not involved (does not write the announcement; decide how it will be announced, etc.), we cannot require the Division Director to do more than required by law in terms of the announcement.

We further note that the panel reviewing the applications and making the promotion decision will consist of persons other than just from the State agency where they both work. It is expected that 3 to 5 people will be on the panel and 50% will not be from the agency, but will be qualified to make the decision, and will proceed pursuant to the Merit Rules. The officer will not participate in the panel, or select the panel.

If the close relative is promoted, the position is at least two levels removed from the officer's position. Thus, it is not expected that the close relative will work with the officer on matters relative to his job.

Regarding decisions to be made about him, if the Division Director needs to go to a higher level, the matter will be taken to a Senior level executive in another Department.

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[7] *Williams* interpreted the Code of Judicial Conduct. Such interpretations may be used as guidance to interpret the Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. *See*, *Commission Op. No. 95-5 (citing Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992)(decision on statutory construction has relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other)).*

Additionally, the two are not physically located in the same building. Thus, the officer cannot observe or comment on the relative's day-to-day work, nor be in a position to have the knowledge to agree or disagree with any performance evaluation, disciplinary action, etc., and would not participate in such matters.

We are very aware of how sensitive State employees and members of the public are to the issue of nepotism. However, the law does not preclude relatives from working for the same State agency. Rather, it prohibits relatives from participating in decisions about their own relatives. This will not occur. Further, the officer and Division Director are aware of the need not only to insure that the officer does not participate, but also have taken affirmative steps to insure such things as the officer, etc., if issues regarding the close relative brother arise.

We cannot overemphasize the need for the officer to stay as far removed as absolutely possible from issues dealing with the close relative. The issue of nepotism has resulted not only in complaints to this Commission, but in challenges alleging unfair hiring practices under the Merit Rules and challenges through the Court system in the award of contracts. *See*, *Brice v. State, Del. Supr., 704 A.2d 1176 (1998)(court found facts surrounding the hiring of a relative were "the most blatant discrimination based on nepotism and favoritism"); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993)(improper for State employee to have "limited" and "indirect" and "unsubstantial" participation where close relative's private employer sought State contract).*

In *Prison Health*, a Department of Corrections (DOC) employee gave a list of DOC employees to a representative from Administrative Services who was selecting a committee to decide which company would receive a State contract. The DOC employee's spouse was a low-level employee in one of the companies. The DOC employee also attended a meeting where the contract was discussed and asked three questions. He did not vote on the selection; no facts indicated that the selection committee did not make the decision based on a complete understanding of the contract requirements or that his spouse would receive any particular benefit from the contract decision. The Court twice noted that his participation was "indirect and unsubstantial," but found that "undoubtedly" even this "limited" participation was "improper." We specifically note this case so that it is clear that even activities which may appear to be innocuous can result in a challenge based on a conflict of interest.

(C) Conclusion

With that warning, and having considered all the relevant circumstances that a reasonable inquiry would disclose, at least with the facts known at this time, we find that as long as the officer does not participate and the precautions described above are taken by the officer and Division Director, there is not a perception that the officer's ability to carry out official duties with integrity, impartiality and competence is impaired.

However, the officer nor the Division Director, nor the Commission can possibly foresee all circumstances that may arise regarding the close relative. Accordingly, if any issues arise where the officer or the Division Director need further guidance, they were advised to return to the Commission with the particular facts of that situation. ***(Commission Op. No. 01-23).***

NOTE: ***When an advisory opinion is granted, the proceedings a generally confidential. One exception is when the requestor authorizes the Commission to release the information. 29 Del. C. § 5807(a). The Commission was authorized to release the following opinion in its entirety.***

November 13, 2001

Gerard P. Kavanaugh, Jr., Esq.
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Advisory Op. No. 01-35 – Family and Financial Interests

Hearing and Decision by: John E. Burris, Chair; Arthur G. Connolly, Jr., Vice Chair; Commissioners Zenaida Otero Gephardt; Mary Jane Willis; Paul E. Ellis; Clifton H. Hubbard

Dear Mr. Kavanaugh:

The State Public Integrity Commission, based on the following facts and law, concluded that Christopher J. Castagno, President, New Castle City Council, may participate in matters on the study and possible acquisition of properties for a new police station and municipal offices, including the Van Dyke Armory, with the understanding that President Castagno will publicly disclose this ruling.

I. Facts

Christopher J. Castagno is President of the New Castle City Council. Council is considering sites for a new police station and municipal offices. One possibility is the Deemer property. Another is the Van Dyke Armory. The legal ownership of the Armory

is vested in Douglas J. Salter, as a Trustee for the benefit of Dennis M. Salter's children. West End Civic Association members questioned whether President Castagno has a conflict of interest as Dennis and Douglas Salter are his first cousins, and the trust beneficiaries are his second cousins.

Regarding the President's relationship with Douglas and Dennis Salter, while they are first cousins, they do not have a business or social relationship other than an occasional family party; are not social friends, golfing buddies or regularly in each other's company. Dennis Salter apparently is acting as the realtor for the Armory, but will not receive a sales commission. No facts indicate that Douglas Salter, as Trustee, would receive any financial benefit.

For over ten years, Council has discussed the need for a new City Administration Building and Police Department. As early as 1996, the possibility of acquiring the Armory was discussed. Also, in 1998, Dennis Salter wrote to the then-President of City Council, Dr. Genevieve L. Miller, on the availability of the Armory. Those events occurred before Mr. Castagno moved to the City and before he was a Council member. More recently, Dennis Salter called Dr. Miller, who is no longer Council President, but is a Council member, to again discuss the City's consideration of the Armory. He then sent another letter to Dr. Miller about the Armory. The City requested proposals for an independent study of the property. There will be not only a "Police Needs Assessment" but a suitability study considering such facts as the age of the structure and various structural, electrical and mechanical system's needs. TetraTech was selected to perform the evaluation. The suitability study and "Police Needs Assessment" will be

considered by Council to aid it in deciding if the Armory will be the site selected. Also, there will be an independent fair market appraisal of the property to aid the decision. Apparently, a study of the Deemer property has been completed.

President Castagno has made public his connection to the legal and equitable owners of the property. Further, he will make this opinion public so that the public is aware of the facts and law considered by the Commission in rendering its opinion.

II. Application of Law to Facts

(A) Personal or Private Interests arising from "Close Relatives" and "Financial Interests" Create an Automatic Conflict

There are two situations where the law automatically imputes a personal or private interest to a government official that would tend to impair the official's judgment, and therefore require the official to recuse himself from participating in those matters. They are:

(1) if the official's participation in the matter would result in a **financial benefit** or detriment to the officer or a **close relative** to a greater extent than such benefit or detriment would accrue to others of the same class or group; or

(2) the official or a **close relative** has a **financial interest** in a private enterprise and the private enterprise or the financial interest would be effected to a lesser or greater extent than like enterprises or interests by the action or inaction of the official on the matter. *29 Del. C. § 5805(a)(2)(a) and (b) (emphasis added).*

Here, the official, President Castagno, will not receive a financial benefit, nor does he have a "financial interest" in the property. "Financial interest" means: (1) a legal or equitable ownership interest; (2) receiving income of more than $5,000 as an

employee, officer, director, trustee, or contractor; and /or (3) being a creditor of the private enterprise. *29 Del. C. § 5804(5).* President Castagno does not have a legal or equitable interest in the property; nor is he a trustee or a beneficiary; nor is he a creditor. The property is part of a trust created by his first cousin, with another first cousin serving as trustee. His second cousins are the beneficiaries.

As a matter of law, his "close relatives" would not receive a financial benefit, because "close relative" is defined as "a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood." *29 Del. C. § 5804(1).* Clearly, "cousins" are not within the definition.

When the language is clear, a statute must be held to mean what is clearly expressed. *Commission Op. Nos. 97-10 & 97-12 (citing, inter alia, Norman v. Goldman, Del. Super., 173 A.2d 607, 609(1961); Labor's Educational and Political Club Independent v. Danforth, Mo. Supr., 561 S.W. 2d 339, 345 (1977)*("it is a well-settled rule of law that the legislature's own construction of its language by means of definition of terms should be followed in interpreting the statute and is binding").

Here, the statute has clear and unambiguous definitions of "financial interest" and "close relative." We have held that where the facts do not fall within the statutory definitions of "financial interest" or "close relative," then, as matter of law, the provisions in *29 Del. C. § 5805(a)(2)(a) and (a)(2)(b),* are not violated. *See, e.g., Commission Op. No. 01-14.* We are required to be consistent in our opinions. *29 Del. C. § 5809(5).* Accordingly, we find that as a matter of law, President Castagno is not required to recuse himself under those provisions.

Further, no facts indicate that even if they were his "close relatives," that they would benefit to a lesser or greater degree than others within the same class or group. Council is having independent studies of the properties, including fair market appraisals. Thus, the benefit to each of the competitors would be based on concrete data regarding the specific property.

Having eliminated those provisions, we follow our prior rulings which require us to consider if his official participation would violate other Code of Conduct provisions. *See, e.g.*, *Commission Op. No. 00-14*.

(B) Other Personal or Private Interests Depend on Particular Facts to Determine if a Conflict Exists.

The Code of Conduct not only restricts officials from participating in decisions if they have the requisite "financial interest" or a "close relative" involved, but also restricts their participation if they have any "personal or private interest" that may tend to impair judgment in performing official duties with respect to that matter. *29 Del. C. § 5805(a)(1).*

That provision is a codification of the common law which prohibited government officials from participating in decisions where they had a "personal interest." *Commission Op. Nos. 97-24 and 97-30.* In interpreting the common law, Delaware Courts recognized that a "personal interest" can arise even if no "close relative" or "financial interest" is involved. *See, e.g., Shellburne, Inc. v. Roberts, Del. Super., 238 A.2d 333 (1967).* After the common law was codified at *29 Del. C. § 5805(a)(1),* Delaware Courts continued to interpret that provision to recognize that conflicts could arise absent the prerequisites of "financial interest" and "close relative." *Beebe Medical*

Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, C.J. (January 29, 1996). Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

Under the common law, and its codification, "the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Prison Health, supra; See also, Beebe and Shellburne.*

Thus, we consider the relationship between President Castagno, his cousins, and the decision that needs to be made. We have noted that President Castagno will receive no financial benefit from the decision and has no financial interest in the decision. He asserts that he has no business relationship with the Trust or his cousins. Further, neither of his first cousins will financially benefit as the benefit would go to the trust if Council selects the Armory. Further, Dennis Salter, will not receive a financial benefit in the form of a sales commission as there is no listing agreement and he is not a licensed real estate agent. Any financial benefit would go to the President's second cousins.

These are not "close relatives" as a matter of law under the Code of Conduct. Moreover, President Castagno asserts that they are not "close relatives" as a matter of fact. He states that the families do not have a social or business relationship; and socialize only at a few social events such as when they might attend an occasional family reunion, or during the Christmas season. The relationship is not such that they exchange gifts. He further states that occasionally he may see Douglas Salter as his

children and Douglas' children attend the same school. In essence, he states that the relationship is too distant or remote to impair his independent judgment.

The Delaware Supreme Court has affirmed that in interpreting the State Code of Conduct, there must be a "strong legal presumption of honesty and integrity," in the public officer's conduct.. *Beebe, supra.* We combine his statements about the financial effect, and his relationship with his cousins, with the facts that independent studies will assess the police needs and ascertain the suitability of the site, and that there will be an independent fair market assessment of the property. The independent studies and assessments help to insure that the decision is made based on "hard facts," rather than a remote relationship with his cousins. The reason for not participating when there is a personal or private interest is to insure that decisions are based on the merits, rather than favoritism, conflict and the like. As the studies and assessments will be public records the public will also have an opportunity to know the "hard facts" about the property.

Courts have noted how remote and nebulous alleged conflicts can be. *Commission Op. No. 00-18.* Delaware Courts have held that for the interest to be sufficient to require an official to recuse himself, the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne, 238 A.2d at 331; Camas v. Delaware Board of Medical Practice, Del. Super., C.A. No. 95A-05-008, Graves, J. (November 21, 1995).* In *Camas,* the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim. In *Camas,* the familial relationship

was one of husband and wife. Here, the relationship is much more attenuated. Based on news articles and the information presented at the Commission's meeting, the allegation of a conflict appears to be based on the conclusory fact that President Castagno and the Salters are cousins.

Conclusory allegations based on suspicion and innuendo cannot support a claim; rather, the claim must be based on hard facts. *Commission Op. No. 96-75 (citing CACI, Inc.-Federal v. United States, Fed. Cir. 719 F.2d 1567 (1967)).* Here, we must start with the "strong legal presumption of honesty and integrity," and consider whether the facts overcome that presumption. The mere fact of a familial relationship is weighed against the fact that he states that he does not have a close relationship with those cousins. Moreover, the other "hard facts" are that independent studies will be considered when making the decision, and the public will have access to that information, giving it concrete data on the various facilities considered. Further, the fact that Council has contemplated the Armory as a possible site before Mr. Castagno even lived in the City or was a Council member serves to diminish the impression that the Armory is being considered merely out of favoritism for President Castagno's cousins.

Courts have noted that:

> "Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so, they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should be not approached with a general

> feeling of suspicion, for as Justice Holmes said, "Universal distrust creates universal incompetency." *Van Itallie v. Borough of Franklin Lakes, N.J. Supr., 146 A.2d 111, 116 (1958).*

The facts show that neither the President nor his first cousins will receive any financial benefit; that the property had been a consideration even before the President moved to the City or became a Council member; that site selection will be based on independent studies of needs assessments, structural functionality, and a fair market appraisal; and the President asserts that he has no close social or business relationship with the cousins or the trust. No facts indicate the consideration of the Armory is a result of favoritism, undue influence or the like, especially as it, like other locations, has been proposed over a long period of time before President Castagno moved to the City. Based on those facts, we find the alleged conflict to remote and nebulous to violate *29 Del. C. § 5805(a)(1).*

(B) Use or Disclosure of Confidential Information

The Code also prohibits improper use or disclosure of confidential information. *29 Del. C. § 5806(f) and (g).* In considering the properties, Council is likely to go into executive session. By law, executive sessions are "non-public." *29 Del. C. § 10004(c)*. Thus, the information discussed would be considered confidential. The Code of Conduct places the responsibility on President Castagno not to improperly use or disclose that information. Delaware Courts have held that where government officials are required by law not to disclose confidential information, and where no facts indicate that the official has violated that obligation, then an allegation of a conflict of interest cannot be sustained. *Camas*, *supra*. Here, no facts indicate that he has improperly

used or disclosed any confidential information. He asserts that he will not engage in such conduct. Again, he is entitled to a "strong presumption of honesty and integrity." *Beebe, supra.* Further, he is aware of that obligation, and should he violate that provision, he could be subject to penalties under the Code of Conduct.

(C) Appearance of Impropriety

Even if the Commission finds no actual conflict under any of the Code of Conduct provisions, it must decide if the conduct would "raise suspicion" among the public that he is engaging in conduct that would violate the public trust. *29 Del. C. § 5806(a).* This is basically an "appearance of impropriety" test. *Commission Op. No. 92-11.*

The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *Commission Op. No. 01-02 (citing In re Williams, Del. Supr., 701 A.2d 825 (1997)).* Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42.*

Here, Mr. Castagno has an obligation, when seeking an advisory opinion to "fully disclose" the facts to the Commission. *29 Del. C. § 5807(c).* Full disclosure permits the Commission to consider all of the "relevant circumstances." Further, by making this opinion public, the public then knows the relevant information he has disclosed and should there be facts that were not disclosed, he may be subject to disciplinary action. *29 Del. C. § 5807(c).*

We have held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75(citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567 (1967).*

We believe that holding is consistent with the Delaware Supreme Court decision which held that: Absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware, Del. Supr., 592 A.2d 436 (1991).*

Consistent with those holdings and based on the totality of the circumstances, we conclude that the mere allegation of a distant familial relationship is insufficient to establish an appearance of impropriety when weighed against the following "hard facts:" (1) neither he nor his first cousins will financially benefit; (2) his cousins are not "close relatives" as a matter of law or fact; (3) this issue was raised with Council long before he was a Council member; (4) independent studies/assessments will be used in making the decision; (5) the studies and assessments will be public records; (6) items 3, 4 and 5, diminish the possibility that the decision will be based on favoritism; and (7) this opinion will be made public so that the public, like this Commission, is aware of the relevant facts considered in concluding that there was no violation.

III. Conclusion

Based on the above law and facts, we find that the familial relationship between President Castagno and his cousins is too remote and speculative to raise to the level of an actual conflict or the appearance thereof. ***(Commission Op. No. 01-35).***

Board Member of Charter School

The State Public Integrity Commission reviewed a request for advice on whether it would violate the Code of Conduct if a State officer was a Board member of a Charter School, and concluded that such service would be improper.

State officers must pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust or that would not reflect favorably upon the State. *29 Del. C. § 5806(a).* This is basically an appearance of impropriety test. *Commission Op. No. 92-11.* No actual misconduct is required; only a showing that the course of conduct could "raise suspicion" that the conduct reflects unfavorably. *Id*. Also, State officers may not incur any obligation that substantially conflicts with their official duties. *29 Del. C. § 5806(b).*

Board members have a fiduciary duty to the organization on which they serve. *Commission Op. No. 95-24.* That duty imposes a responsibility to act for the benefit of the organization. Under the Charter School's by-laws, Board members are, among other things, responsible for establishing the budget; approving major expenditures; determining general policies and strategic planning, etc. As Charter Schools compete with public schools for State funding, the responsibility of the Board members would include determining how much money to seek from the State; how that State money would be spent; etc. While the State officer indicated that he would not appear before State agencies to seek money on behalf of the Charter School, the duties to the organization would still require him to make budget decisions about seeking State money, etc.

His Board membership could require advocating positions or recommending policies to the Executive (e.g., Department of Education) or Legislative branches of government regarding issues or policy initiatives on education. Even if he attempted to recuse himself, the Board, as an entity, could take public positions on education issues, and it could be difficult for the public to understand the distinction between his activities as a Board member and his activities as a Senior level official in the Governor's administration. It has been recognized that "matters associated with public education can become extremely controversial." *In Re: Request for an Opinion from the Judicial Ethics Advisroy [sic]Committee, Del. Super., JEAC 1999-1, J. Cooch (April 22, 1999).* In fact, recent news articles addressed concerns raised because Charter Schools gain State funds for every student they recruit, while public schools lose those dollars, and public schools have expressed concerns because some districts apparently are losing bus service to Charter Schools. Those are just recent issues on which Charter School Boards may have to take a position and advocate their position to the Board of

Education or the General Assembly.

Aside from the Board's need to deal with other State agencies on issues, policies, legislation, and funding, he indicated that while the Charter School would not seek monetary assistance from his agency, there would be occasions when it would request assistance with other services. Thus, in his official capacity, he could be placed in the position to make decisions on whether the Charter School would receive such services. The problem there is that, again, the Charter School could be competing against other schools for the same services. As his fiduciary duty would require him to act primarily for the benefit of the Charter School, that duty could substantially conflict with his State duties to work equally with other schools that would compete for the same services.

Finally, it cannot be ignored that there could be an advantage to the Charter School in having a member of the Governor's Cabinet on its Board. Moreover, most public school board members are elected by the public. Thus, they could be voted out of office if they act in violation of the public trust or in a manner that would not reflect favorably upon the State. He would not be subject to that kind of scrutiny as a Board member of a Charter School. This could result in the appearance that this particular Charter School has an "inside track" or unfair advantage in obtaining State funds, obtaining State services from his agency, etc.

Considering all the above facts, his service as a Board member could raise suspicions among the public that even the passive action of just being a Board member would give this Charter School an unfair advantage over other schools that compete for such funding and such services.

We note that in our discussions, when we discussed the fiduciary duties of a Board member regarding such things as budgets, etc., he said he really did not envision becoming involved in those matters. Rather, he saw his role as being an "advisor" on certain aspects of the School, e.g., promoting leadership skills, personal responsibility, establishing the curriculum; lending a degree of credibility to the standing of the School. He said he did not envision acting as an agent of the School, but looked at his role as "strictly an advisor."

The problem is that as a Board member, legal obligations to the School are imposed that are much broader than serving as an advisor. Because those obligations could raise suspicions of a substantial conflict in performing official duties, we conclude that it would be improper for him to serve as a Board member of the Charter School. ***(Commission Op. No. 01-47).***

Mandatory Disclosure of Business Dealings

Local Official Contracts with Local Government

A local official submitted the details of business dealings that his private enterprise had with the town in which he held an elected position, to comply with our prior ruling that he annually file a "full disclosure," pursuant to *29 Del. C. § 5806(d). Commission Op. No. 98-11.* "Full disclosure" is meant to insure that no conflict of interest arises from such dealings. *Id.* Based on the following law and facts, we find no conflict.

The contract his company had with the town was for less than $2,000. Such contracts must reflect arms' length negotiations. *29 Del. C. § 5805(c).* Arms' length negotiations require sufficient distance between the parties to insure fairness in the transaction, e.g., no self-dealing, no undue influence, fair market price, etc. *Commission Op. No. 98-23.*

Arms' length distance is established in part by the restriction against government officials reviewing or disposing of matters where they have a personal or private interest. *29 Del. C. § 5805(a)(1).* This provision prohibits self-dealing. *Commission Op. No. 98-23.* The official said that he did not review or dispose of the decision.

Arms' length distance is further established by the restriction on representing or otherwise assisting a private enterprise before one's own agency. *29 Del. C. § 5805(b)(1).* This restriction is to insure that officials do not use their influence with their colleagues and co-workers in their own agency to secure a contract. *Commission Op. No. 98-23.* He identified the agency with which he contracted and it was not his own agency.

A further aid to test for "arms' length" negotiations is to ascertain how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *Id. (citing e.g.*, *Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991)(in finding arms' length negotiations, court noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions")).* The contract resulted from an emergency when a water main broke and the town's employees could not handle the repair. He is asked to do emergency work when other contractors are not available or the cost is too high because other companies charge for the travel to and from the work site, while he does not. Thus, an alternative transaction would have cost more.

Finally, he stated that he did not use confidential information in obtaining the contract and/or use his public office to secure the business dealings. *29 Del. C. § 5806(e), (f) and (g).* He is entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd*, *Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).*

Accordingly, he submitted a "full disclosure" as required by *29 Del. C. § 5806(d),* and he comported with the Code of Conduct requirements in those dealings. ***(Commission Op. No. 01-03).***

Accepting Things of Monetary Value

Gifts

Grand Gala Tickets from a Lobbyist

A State officer asked if it were proper to accept tickets to the Grand Gala from a lobbyist which lobbied his agency. Based on the following law and facts, his acceptance would raise an ethical issue.

State employees may not accept compensation, gifts, payment of expenses, other employment, or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. Also, they may not use public office to secure unwarranted privileges, private advancement or gain. *29 Del. C. § 5806(e).*

In interpreting similar federal regulations which address having expenses for government employees paid by private parties, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995)*.

2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the appearance that the employee is using public office to secure privileges or private gain. *Id.*

Here, the tickets were given to him by a lobbyist. He and the lobbyist had been friends for years--played golf, etc. Despite those years of friendship, the lobbyist had never before offered the State officer tickets to events such as the Grand Gala. The State officer had recently been appointed to a Senior level executive branch position. His agency had some decision making authority over a company the lobbyist

represented. Thus, it appeared that he was offered the tickets, not because of the longstanding friendship, but because of his State position. We point this out because it focuses on the reason for exercising caution when accepting things of value from a lobbyist.

When an organization is registered to lobby, the registration is a clear indicator that the organization has an interest in official decisions. *Commission Op. No. 99-05 & 99-17.* We have urged public officers to exercise "great caution" in accepting gifts or things of value from entities that have an expressed interest in official decisions. *Id*. Here, the organization represented by the lobbyist had identified its interests in official State decisions its lobbying registration, and there was a clear connection to its interest in decisions made by his department.

His department worked with the organization represented by the lobbyist to negotiate certain State matters that impacted on the agency's budget for one of its divisions. The division's staff puts the proposal together, negotiates with the organization, and then sends the budget to this State officer for final approval. There is a substantial amount of money involved. Moreover, if the organization did not fund the division's budget at the level at which his agency had committed, then by federal regulation, the organization would have to shut down, which could cost it about a million dollars each day. Thus, there was significant decision making authority by him relative to the organization, and it clearly had a significant interest in the outcome of his decisions.

Thus, the adverse effect on the public's confidence in its government is that the offer could well have been made to curry favor in his decision making. Accordingly, we must find that acceptance, at a minimum, would raise an appearance of impropriety. ***(Commission Op. No. 01-06).***

Payment of Conference Fee

A State officer, who was required to file an annual financial disclosure report, reported the value of a payment of a conference registration fee by a private company which did business with his agency. He also asked if acceptance would raise any ethical issues. The Commission concluded that: (1) the value was properly reported on his financial disclosure report; and (2) acceptance does not raise any ethical issues under the State Code of Conduct.

(A) Financial Disclosure Law

"Gift" includes "payment," and must be reported as a gift if the value is more than $250. *29 Del. C. § 5812(o) and §5813 (a)(4)(e).* However, it need not be reported if there was "consideration of equal or greater value." *Id*. "Consideration" generally means that something is given in exchange; it means recompense; payment; an act, forbearance or promise given by one party for an act or promise of another.

Commission Op. 96-52 (citing 17A Am. Jur. 2d Contracts §§ 133 and 114).

We have held that where a private source paid fees for State officials to attend courses to enhance their skills as a public officer, mere attendance at the sessions, without any requirement to perform any specific services, e.g., speaker, constituted "some consideration," but not consideration "equal to or greater than" the value received. *Commission Op. No. 96-25.* The Commission is to be consistent in its rulings. *29 Del. C. § 5809(5) and § 5807(c).* Consistent with that prior opinion, we found that there was consideration, but not of "equal or greater value," as he was not asked to perform any specific services in return for the value paid. Therefore, he properly reported the value on his annual financial disclosure report.

(B) Code of Conduct

Executive Branch employees may not accept payment of expenses if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b).*

The conference was directed at increasing his skills and knowledge in the area of technology for which he was responsible. The agenda reflected that during the conference, the majority of his time was spent on attending courses, rather than social activities. That diminishes the possibility that he was using public office for "private perks." *See, e.g., Commission Op. Nos. 97-07 & 97-33*.

Further, the State paid most of the expenses of attending the conference--air travel, hotel, etc., while the private company paid only registration fee. We have noted that when the government pays for its employees to participate in official functions there is a presumption that the employees are then under the "watchful eye" of the agency. *See, "Guidelines for Public Officers," January 21, 1997* (*citing Sanjour v. Environmental Protection Agency, D.C. App. Ct., 984 F.2d 434,445 (1993) (interpreting a federal ethics provision restricting payment of expenses)).* In essence, the agency had determined that there was a need for his attendance at the conference. Also, he indicated that the company, while sponsoring the conference, did not use it as a forum to promote its products or services. Here, there were no recent or pending matters before his agency regarding any contract or business dealing with the company. He did not expect any such activity within the next year or more. This diminishes the possibility that accepting the payment of expenses would impair his judgment in performing official duties or result in preferential treatment to the company, as there would be no occasion. *See, e.g., Commission Op. No. 98-26.* Accordingly, there was no violation of the restriction on accepting payment of expenses. ***(Commission Op. No. 01-09).***

Tickets to Fund Raiser

A senior level officer, who routinely decides if certain entities will receive State funding, accepted fund-raiser tickets, hosted by an entity which had matters pending before the official. He had no official duties to perform at the event. He said the agency would not have paid for his ticket as part of his official duties because "as a Division, we explicitly do not support fund-raisers." Based on the following law and facts, the Commission held that it was improper for him to accept tickets to the fund-raiser. Therefore, the full ticket value ($60) should be re-paid to the gift giver.
The Code of Conduct restricts accepting gifts or anything of monetary value if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5805(b).* The fourth criteria is basically an appearance of impropriety test. *Commission Op. No. 96-72.*

The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or personal gain. *29 Del. C. § 5806(e).*

The invitation offered four options for those who wished to attend. He initially planned to attend and pay $40 out of his own pocket because he had a "personal interest" in attending. When he called to RSVP and buy the $40 ticket, the company offered him a free ticket valued at $60. That ticket permitted him to not only attend the performance, but a pre-show cocktail party. He said it was offered to him as an opportunity to "represent the Division." He knew it was a fund-raiser and knew the Division did not sanction official attendance at fund-raisers. He accepted the upgraded ticket, and attended. The event occurred on April 19, 2001, and the company had recently submitted grant applications to his Division, with a decision to be made in early May 2001.

In a prior opinion to his Division, we said that where private sources offer to pay for government officials, who have decision making authority over them, it can raise ethical concerns. *Commission Op. No.* 97-33 *(citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 85, 94 (1995)(interpreting federal ethics restrictions on accepting payment from private sources for performing official duties)).* Two ethical concerns noted in *Sanjour* are:

(1) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.*

Here, the private party had an immediate interest in his decisions. It had recently submitted applications for a final decision in May. While he said the timing was a coincidence, it could appear that the company was attempting to curry favor. It offered him tickets as "an opportunity to represent the Division." Based on that statement, the

tickets were offered because of his official position. However, he knew "as a Division, we explicitly do not support fund-raisers." By attending when their offer was based on his representing the Division, it may raise the appearance of the Division's stamp of approval on that company's fund-raiser, when that is contrary to the Division's policy.

(2) even if there is no reason to suspect that the private party is trying to curry favor with the employee when expenses are paid by a private source, the employee's acceptance of such benefits may raise the appearance that government employees are using public office for private gain. *Id.*

We specifically said in a prior opinion to his Division that when a private source, which does business with his agency, pays for persons from his Division to attend performances, cocktail parties, etc., and there is no official evaluation to be performed, that it could well raise the appearance that they are using public office for social gain. *Commission Op. No. 97-33*.

Here, he said he initially intended to pay $40 for one ticket to attend the performance only because of his "personal interest." That was what the event was worth to him when it was going to be out of his own pocket. However, when an upgraded ticket was offered, he accepted a ticket of increased value. Clearly, he personally gained from the transaction. He saved himself the $40 and obtained a free $60 ticket, which had the additional benefit, valued at $20, of attending the pre-show cocktail party. He noted that there were two "more lavish options." Just because he did not accept *the most lavish* option does not mean that he did not personally benefit. Moreover, he accepted that benefit on the basis of his official status, as the ticket was offered as "an opportunity to represent" his Division. As the Division specifically did not sanction fund-raisers, it could well appear that he used his public office to obtain unwarranted privileges, private advantage or gain. The Code of Conduct specifically prohibits such conduct. *29 Del. C. § 5806(e).*

He said he was willing to repay $40, but did not think he should have to repay $60. His rationale was that the event was a fund-raiser; and (1) his agency does not sanction official attendance at fund-raisers and therefore would not pay or reimburse him; and (2) he personally should not be expected to repay it because otherwise he would have to support all fund-raisers. We disagree with that rationale. He received the full benefit of the ticket--not just the performance which would have cost$40--but the benefit of participating in the pre-show socialization, etc. As he received the full value, that is the value that must be repaid.

He also said that attending these events takes time away from his family. We understand that the nature of his work requires him to attend many functions in the evening that are officially sanctioned. This was specifically **not** a State sanctioned event. Moreover, from his statement, he only planned to buy one ticket from the very beginning. Thus, the State job did not take him away from his family, it was his own

personal decision.

For the reasons detailed above, at a minimum, it appears that acceptance may result in: impaired judgment or preferential treatment as the company had matters pending at the time of acceptance; an appearance that the company was trying to curry favor from him because of his official position when it knew it had matters pending; and the appearance that he may have used public office to secure unwarranted privileges or personal gain. Accordingly, the full value, $60, must be repaid. **(*Commission Op. No. 01-15).***

Soliciting from Private Sources

A State agency asked if it could solicit pharmaceutical companies to pay for a graduation ceremony for one of its programs. Based on the following law and facts, the Commission concluded that such conduct would violate the Code of Conduct and that a waiver could not be granted.

State employees may not accept payments of expenses, gifts, or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)(emphasis added).*
First, the above statutory language does not authorize any soliciting. *Commission Op. No. 00-37.* The General Assembly has only given seven agencies authority to solicit funds from private sources. *Id*. This department was not one of them. *Id.* As the General Assembly clearly and specifically identified agencies that could solicit from private sources, we held that had the General Assembly intended this agency to have specific statutory authority to solicit private sources it could have so provided. *Id*. Moreover, had the General Assembly intended that under the Code of Conduct it would be permissible for State employees to solicit, it could have said so. *Id*. However, the Code of Conduct gift law does not mention any authority to solicit. We have held that where the legislation is silent, we cannot graft words onto a statute because to do so would be creating law. *Commission Op. No. 95-001.*

Second, even assuming we could graft such language onto the statute, we have held that it would be improper for an agency to have expenses paid by pharmaceutical companies when the State employees had significant indirect decision making authority. *Commission Op. No. 96-78.* Here, the persons who would benefit from the soliciting have more direct authority regarding which pharmaceutical companies products may be used. *Id*.

The companies would be solicited to pay for a post-graduate ceremony for persons completing their residency requirements, their guests, agency staff, and University who teach and train the residents. The plan was to seek the funds from several of the larger

pharmaceutical companies. The expected costs would be $3,000 for a dinner, speakers, door prizes, etc. The request said their State budget, in its employee recognition fund, only allows $25 per person for a total of $275. In effect, the requestor wanted the pharmaceutical companies, which did business with his agency, to supplement his State budget. That could raise an appearance that the companies which are solicited and pay for the party might receive preferential treatment in decisions to be made about which pharmaceutical company's products might be used. It may also raise the appearance that public office is being used for unwarranted privileges or private gain because these State employees, their guests, etc., would receive a greater benefit than other State employees who stay within their budget for "Employees' Recognition."

A waiver was sought so that private funds could be solicited. We can only grant a waiver if the literal application of the law is not necessary to serve the public purpose or there is an undue hardship on State employees or a State agency. *29 Del. C. § 5807(a).* The basis for the waiver is that the agency budget was reduced this year, and that this is an event which is "a deep part of the American landscape," and is "given full honor year in and year out."

However, the budget reduction is the same hardship that all State agencies have had to experience. Moreover, we understand that this event was not held at all last year. Further, the plain language of the statute does not include "soliciting" and the General Assembly has determined the budget amount that is to be used for "Employee Recognition." A waiver would, in effect, permit supplementing the agency's budget from private sources when the General Assembly has not authorized such activities by this agency. Considering those facts, we do not find an undue hardship and believe the literal application of the law is necessary to serve the public purpose. ***(Commission Op. No. 01-13).***

Concurrent Employment

Merit Rule Restriction

A State employee filed a request for an opinion on whether his proposed outside employment would violate the Code of Conduct. In the meantime, his agency was checking to ascertain if the outside employment would violate the Merit Rules, as he was a Merit Employee. The agency concluded that the outside employment would violate the outside employment restriction in Chapter 18 of the Merit Rules which restricts State employees from holding outside employment in their area of responsibility. Thus, the request to this Commission on whether it would violate the conflicts of interest restriction in the Code of Conduct was moot. ***(Commission Op. No. 01-08).***

Part-Time Job with the State

A local government asked if it would violate the Code of Conduct if the local government hired an engineer to work part-time to provide "certain internal management assistance" for approximately one year, while still employed by a private enterprise. Based on the following law and facts, we concluded that with the following restrictions, the employment would not violate the Code of Conduct.[8]

The local government planned to enter an arrangement to hire an engineer to work part-time for a year performing functions related to internal management assistance. The private employer apparently requires a year's notice. The local government wanted to keep the individual's interest in a full-time job with the local government by offering a part-time job during the one-year period. If the private enterprise decides that a full year's notice is not necessary, the individual would have the opportunity for full-time employment earlier.

(A) Jurisdiction

The local government posed two scenarios for its hiring plan: (1) hire the individual during the one-year interim and not pay any wages or benefits during that time; and/or (2) hire the individual during the one-year interim and have the compensation deferred until hired full-time, without violating the Code of Conduct.

As the first scenario envisions not paying the individual, the first issue was whether the Commission has jurisdiction over a non-paid employee. The Code of Conduct applies to employees who are "compensated" by a government agency. *29 Del. C. § 5804(11)(a)(1).* "Compensation" means "any money, thing of value or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by himself or another." *29 Del. C. § 5804(4).* The Commission held that the promise of a future full-time job with the local government is within that definition of "compensation." Thus, even if the individual received no pay or benefits for working for the local government during the notice period, we have jurisdiction to decide if the concurrent employment would violate the Code.

Having concluded that the promise of a future full-time job is within the Code's definition of "compensation," the particular payment plan becomes irrelevant. In fact, the Commission asked why the local government posed those two scenarios rather than just paying the individual from the start of the part-time employment. The local government thought the payment arrangement might have some impact on whether there was a violation of the Code of Conduct, and that by not paying or deferring the

[8] As the local government had not adopted a Code of Conduct, it is subject to the State Code of Conduct. *68 Del. Laws, c. 433 § 1.*

compensation there might not be a violation. As noted above, the local government's method of payment is basically immaterial to whether the employment violates the ethics law because, regardless of the payment plan, (no pay, deferred pay, or payment throughout the interim employment), the individual is being "compensated" as that term is defined under the Code of Conduct.[9]

(B) Code of Conduct Restrictions

As noted above, it is not the method of payment that drives the issue of whether the employment violates the Code. Rather, it is the individual's conduct once he begins work for the local government that must be considered and where necessary, curtained to avoid violating the Code.

The local government asked if the employment would violate the Code restrictions on: (1) government employees reviewing or disposing of matters where they have a personal or private interest which would tend to impair independent judgment in performing official duties, *29 Del. C. § 5805(a)(1)*; or (2) having other employment if it may result in: (a) impaired independent judgment in performing official duties; (b) preferential treatment to any person; (c) official decisions outside official channels; or (d) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*.

In his official capacity, he would not be involved in any present local government operations with third parties, as he would "render certain internal management assistance" to the hiring agency. As long as he would not be involved in his official capacity with the private company which employs him, he would not be in violation of the restriction against reviewing or disposing of matters where there is a personal or private interest (the private employment) which tends to impair judgment in performing official duties. *See, 29 Del. C. § 5805(a)(1)*.

As an aid to understanding the restriction on "reviewing or disposing" of matters where there is a personal or private interest, Delaware Courts, in interpreting that restriction, said that even "neutral and unbiased comments" are improper. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996).* Moreover, the official's involvement cannot consist of "indirect and unsubstantial" participation. *Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).* We understand that if issues related to the private enterprise arise, the deputy engineer, who will not be reporting to this individual, will make decisions about the private enterprise.

[9]We do not attempt to interpret whether any of the payment arrangements would or would not be in conflict with any other laws or policies on compensation, hiring practices, payroll procedures, etc., as those matters are not within our jurisdiction.

The request did not ask what limits might be imposed on his activities on behalf of the private enterprise while he continues to be employed there. As noted above, he cannot represent or otherwise assist the private enterprise before his local government agency. *29 Del. C. § 5805(b)(1).* For example, it is our understanding that the private enterprise sometimes does business with the local government agency which seeks to hire him. He would not, in his private capacity, be able to "represent" the private enterprise before his agency (e.g., formally represent), or "otherwise assist" the private enterprise on the matter (e.g., performing engineering duties relative to the matter; preparing a response to a bid proposal; etc.)

The next substantive question was whether the arrangement would violate the restriction on holding outside employment which is restricted if it may result in:

(1) impaired independent judgment in performing official duties;
(2) preferential treatment to any person;
(3) official decisions outside official channels; or
(4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(d).*

As noted, the individual cannot participate in decisions about the company and cannot represent or otherwise assist the company before his own agency. This diminishes the possibility that his judgment will be impaired or that he could give the company preferential treatment or make official decisions outside official channels. Regarding whether the private employment may result in any adverse effect on the public's confidence in the integrity of its government, we have held that this is basically an appearance of impropriety test. To decide the issue, we look at the totality of the circumstances. *Commission Op. No. 96-76.*

Beyond the fact that he will not make decisions about the company in his official capacity, or in any way assist it before his own agency in his private capacity, we note that the local government intends to publicly announce its decision regarding his employment. This would serve to diminish any appearance that the local government is trying to bring him in from the private sector without the public's knowledge while he is still working for that company. Without such information being disclosed, it may raise appearances that he or the company may receive preferential treatment.

Additionally, if his private firm does business with the local government, the Code of Conduct requires that where an individual has a financial interest in a private enterprise which does business with their government, they must file a "full disclosure" of those business dealings with the Commission. *29 Del. C. § 5806(d).* Such disclosure is a condition of commencing and continuing employment with the government. *Id*.

As indicated at the meeting, it is not possible to envision, at this time, every

conceivable situation that may have the potential for a conflict because of the individual's concurrent private employment. However, as to those situations where his private enterprise does business with the local government, we can address those aspects on a case-by-case basis. Also, if other situations arise involving the private company, which would not require a full disclosure under *29 Del. C. § 5806(d),* but which may require a resolution of whether there is a conflict under any other Code provision, the local government or the individual can seek further advice.

(C) Conclusion

Based on the preceding law and facts, the conduct of the individual, once he starts to work for the local government, is curtailed in that he may not: (1) review or dispose of matters related to his private employer; and/or (2) represent or otherwise assist the private enterprise before his government agency. Additionally, the law mandates as a condition of commencing and continuing employment, if the private enterprise does business with the local government, he must file a full disclosure of that business dealing with the Commission so that it can decide if there is a conflict of interest. Aside from that mandated requirement, he or the local government can seek further advice as issues arise that may have the potential for a conflict. ***(Commission Op. No. 01-11).***

State Nursing Specialists to Contract for Private Study

Several State nurses wanted to contract with a private company to provide services to test children who were part of a study being conducted by a private enterprise. Based on the following law and facts, the Commission concluded that the conduct would not violate the Code as long as the contract work was performed during non-State work hours.

(A) Applicable Law

State employees may not have any interest in a private enterprise or incur any obligation of any nature which is in substantial conflict with the proper performance of their duties in the public interest. *29 Del. C. § 5806(b).* Also, they may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *Id*.

(B) Application of Facts to Law

In deciding if the obligation to a private enterprise substantially conflicts with performing State duties, one fact we consider is when the outside employment will be performed. *Commission Op. No. 96-17.* At present, the nurses had a backlog at their

State job. As a result, they worked their regular State hours and also worked with clients and their families at night and occasionally on weekends. They receive compensatory (comp) time for performing State duties during non-regular work hours. If they contracted with the private company, they would conduct the study tests for the study during their evenings, weekends, holidays, vacation or comp-time.

A representative of the private enterprise said she expected she will need about three nurses to test approximately 40 children. The test takes about 1 to 2 hours per child. It is given only at a certain age, and she expects an average of two children will be tested each month. The Division Director is aware of the contract, and does not foresee any disruption to their job performance resulting from using non-State hours to give the tests.

Regarding the remaining criteria used to decide if outside employment is acceptable, the criteria and applicable facts are as follows:

(1) Impaired judgment in performing official duties. In their official capacity, they have no decision making authority over any funding the private enterprise may obtain from the State; do not decide if the private enterprise will be selected to perform studies; will not see the same clients in their private capacity that they see in their State capacity; and do not decide who qualifies for the private study. As they have no decision making authority over the private enterprise or the private clients in their State capacity, it does not appear their judgment would be impaired.

(2) Preferential treatment to any person. At first glance, as their State work is backlogged, and they even work some evenings and weekends, it may appear that in deciding how to use their time they would opt to perform the private work because of the additional pay, which could result in preferential treatment for the private enterprise's study rather than spending their off-duty time to perform compensatory work for the State. Having discussed this at length, it appears there would be time to perform the contract work. Also, the agency , which decides when and how the backlog will be addressed, did not object to the contract work.

(3) Official decisions outside official channels. No facts indicated that this is an issue.

(4) Any adverse effect on the public's confidence in the integrity of its government. This is basically an appearance of impropriety test. *Commission Op. No. 96-72*. As it does not appear that: (1) their judgment would be impaired; (2) they could give preferential treatment to the private organization or the children in its study; or (3) they are in a position to make official decisions outside official channels, there is no appearance of impropriety based on those facts. Further, to insure that approval of their outside work under the Code of Conduct would not violate or circumvent the Merit rule on outside employment, they obtained a decision from the Deputy Attorney General

assigned to their agency stating that the conduct would not violate the Merit Rules. See, *e.g., Commission Op. No. 99-26 (conduct that would violate or circumvent Merit Rules would have adverse effect on public's confidence).* Finally, we also discussed at length that the tests can only be provided by nurses who hold certain credentials and who have obtained a given number of hours of experience in performing the tasks involved. This limits the number of nurses who can give the tests and those nurses are primarily State workers. This fact reduces the possibility that they used their public office to obtain the private contract as there are objective criteria to establish the limited number of nurses available and the *bona fides* of the nurses seeking to contract.

(C) Conclusions

Based on the above law and facts, the private contracts will not violate the Code of Conduct as long as the nurses perform the contractual work during non-State work hours. ***(Commission Op. No. 01-17).***

Dual State Positions

A State employee asked if he could serve as an appointee to a Commission while holding a full-time State job. Based on the following facts and law, he could hold the dual State positions if he recuses himself from the types of matters identified herein.

The State employee was being appointed to the Commission pursuant to a State statute which required that certain persons be appointed. The Commission has some oversight of certain appeals presented to the Commission by the State employee's supervisor. The Commission also selects the individual who holds the supervisory position. Its other functions, which are its primary duties, do not entail decisions about or affecting the supervisor.

The Code of Conduct prohibits State employees from accepting other employment if it may result in:

(1) impaired independent judgment in performing official duties;

(2) preferential treatment to any person;

(3) official decisions outside official channels; and

(4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b).*

"Other employment" includes secondary positions with the State. *Commission Op. No. 99-35*. In that opinion, the Commission held that it would be a conflict for a State employee to render decisions that had significant impact on his supervisor, and accordingly he should recuse himself. Here, the State employee, to avoid violating the restriction on participating in decisions where his judgment might be impaired, will recuse himself when the Commission makes decisions about his supervisor. As he will recuse himself, nothing indicates he would be able to give preferential treatment to

his supervisor, or make official decisions outside official channels.

The Code also prohibits State employees from incurring any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. *29 Del. C. § 5806(b).* We understand that his Commission duties will not substantially interfere with the performance of his State job.

If a person holds a full-time State job and also a paid appointed position with the government, he cannot be paid more than once for coinciding hours of the workday. *29 Del. C. § 5821, et. seq.* He was advised to review that subchapter, and if he had questions on its applicability to his situation, he should review our prior opinions interpreting that section and/or seek further guidance from us. ***(Commission Op. No. 01-18).***

Note: When a waiver is granted, the proceedings become a matter of public record, and are no longer confidential. *29 Del. C. § 5807(a).* In the following case, a waiver was granted.

July 24, 2001

Mr. Alexander J. Rose **WAIVER GRANTED**
Delaware Developmental Disabilities Council
Margaret M. O'Neill Building
410 Federal Street, Suite 2
Dover, DE 19901

Advisory Op. No. 01-22 - Concurrent Employment/Contracting with the State
Hearing and Decision by: John E. Burris, Chair; Commissioners Mary Jane Willis, Paul E. Ellis, Arthur V. Episcopo, and Clifton H. Hubbard

Dear Mr. Rose:

The State Public Integrity Commission has granted a waiver so that three Council members of the Developmental Disabilities Council can work, in their private capacity, on a mini-grant for the University of Delaware's Center for Disabilities Studies. However, they should recuse themselves as Council members when issues on the mini-grant arise before the Council.

(A) Applicable Law

Honorary State officials are prohibited from reviewing or disposing of matters before the State where they have a personal or private interest. *29 Del. C. § 5805(a)(1).* A personal or private interest is one which tends to impair judgment in performing official duties. *Id.*

Honorary State officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. *29 Del. C. § 5805(b)(1).*

(B) Application of Law to Facts

The Developmental Disabilities Council ("the Council") is a State agency created to insure self-determination, independence, productivity, integration, and inclusion in community life of persons with disabilities. It achieves its purpose, in part, by issuing mini-grants to persons or entities that can help accomplish its mission. During its most recent mini-grant cycle, it publicly noticed the opportunity to submit funding proposals. The Council received only one proposal. Theda M. Ellis submitted a proposal on behalf of her employer, the University of Delaware's Center for Disabilities Studies ("the Center"). By law, the Center must have a representative on the Council. *42 U.S.C. § 15025(b)(1)(C)(4)(II).* Ms. Ellis serves as its representative.

The Center seeks a Council grant to contract with Phyllis Guinivan and Gary Mears to teach a course to University of Delaware undergraduates, consumers and family members on "Family Support, Self-determination and Disability." Phyllis Guinivan and Gary Mears are also Council members. This means the Council would award the grant to its own member's employer, who will then turn around and contract with two other council members.

However, federal law requires the Council to collaborate with entities represented on the Council, including the Center. *42 U.S.C. § 15025(c)(5)(G)(ii).* While envisioning contracting with those entities, it tries to reduce conflicts by requiring the Council to have a plan so that Council members will not vote on matters if they would financially benefit; do not discuss grants or contracts if the entity they represent on the Council is the beneficiary, or otherwise engage in conduct that would give the appearance of a conflict. *42 U.S.C. § 15024 (c)(5)(D) and § 15025 (b)(1)(4)(B)(ii).*

To comply with the federal requirement to have a conflict of interest plan, the Council's plan consists of obtaining a decision on whether the conduct would violate the State Code of Conduct. If so, it seeks a waiver pursuant to *29 Del. C. § 5807(a).*[10]

(C) Background to the Proposal

The Center is part of the National Network of Centers for Excellence in Developmental Disabilities Education, Research and Services created by federal law.

[10]The Commission's jurisdiction is limited to interpreting the State Code of Conduct, and it has no authority to interpret federal law. Thus, to the extent the federal law may impose additional restrictions, this opinion is not meant to circumvent federal law.

42 U.S.C. §15063. Among other things, it trains individuals with developmental disabilities, their families, professionals, para-professionals, policy makers, students, and other community members. *Id*. Earlier this year, it offered a free six-day course to consumers and parents of children with developmental disabilities on "Family Support, Self-Determination and Disability." The course was advertised Statewide. Though not mentioned in the ad, the Center planned to have students who completed the course serve as instructors for the same course which it now seeks to pay for with the Council's mini-grant. All 25 students who took the course were offered the chance to teach. Ms. Guinivan and Mr. Mears took the course as they have children with developmental disabilities. They were the only ones interested in contracting.

(D) Terms of the Proposal

The contract will be for one semester at the University of Delaware as part of the undergraduate course, adult education classes, etc. Ms. Guinivan and Mr. Mears will divide the amount paid for the course of $3,645. The mini-grant will also pay their FICA; costs of copying materials; the "university indirect," etc. The total will be $4,881. Thus, the salary/benefits received by each will be $2,440.50. The salary/benefits are based on what a University of Delaware professor would be paid. The proposal indicates that after these classes are taught, the Center plans to use students from those classes for future presentations.

(E) "Personal or Private Interests" of Ms. Ellis, Ms. Guinivan and Mr. Mears

Honorary State officials (appointees to Boards and Commissions) may not review or dispose of matters if they have a personal or private interest which tends to impair judgment in performing official duties. *29 Del. C. § 5805(a)(1).* The personal or private interest of Ms. Ellis is that she wrote her employer's proposal. As an employee, she has a duty and vested interest in the proposal she wrote for the Center. *See, e.g.*, *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, J. (January 29, 1996)(improper for appointee to participate in decision when his employer was entering a business alliance with applicant appearing before the Board).* Ms. Ellis' interest is more direct than the appointee in *Beebe* as her employer (through her) is directly applying for the grant.

Similarly, Council members Guinivan and Mears have a "personal or private interest" in the grant as they will benefit financially. *See, Commission Op. No. 00-32 (appointee to Delaware Heritage Commission should not participate in its decision to award him a contract).*

Thus, the three Council members should not review or dispose of the decision to award the contract or subsequent decisions on the grant, e.g., reviewing how the grant

monies were used, whether the contract was properly performed, etc. The Council's letter says the three council members will not participate in the decision to award the grant. If they recuse themselves on all issues dealing with the grant, there will be no violation of *29 Del. C. § 5805(a)(1).*

(F) "Representing or Otherwise Assisting" a Private Enterprise before One's Own Agency

Honorary officials also may not represent or otherwise assist a "private enterprise" on matters involving the State before their own agency. *29 Del. C. § 5805(b)(1).*

The first issue is whether the University of Delaware's Center for Disabilities Studies (the Center) is a "private enterprise" or a State agency. The federal law says that the Centers may be a public or private entity. *(Citation omitted).* If it is a "State agency," then this particular provision would not apply. The Code of Conduct definition of "State agency" refers only to "school districts." *29 Del. C. § 5804(10).* There is no reference to institutions of higher learning. Thus, it is not specifically defined as a "State agency" in the Code.

Delaware Courts, in trying to decide if the University of Delaware is a "State agency" or a "private entity," have recognized that the answer is not easy. In *Rumsey Elec. Co. v. University of Delaware, Del. Supr., 358 A.2d 712 (1976),* the Delaware Supreme Court said:

> The question of whether the University of Delaware is an agency of the State is a vexing one because of its mixed proprietary activities and public funding. *Parker v. University of Delaware, 31 Del. Ch. 381, 75 A.2d 225 (1950); City of Newark v. University of Delaware, Del. Ch., 304 A.2d 347 (1973).* [However,] "In the contractual area its status appears to have been legislatively defined. In 1964, by specific enactment, the General Assembly conferred upon the University's Board of Trustees 'the entire control and management' of its affairs including 'the manner of awarding contracts.' *14 Del. C. § 5106*."

Based on that law, the Court held that the University of Delaware was **not** a "State agency," but a private entity when it engaged in awarding contracts. *Id*. Thus, it is arguable that in this situation, as the Center is contracting, it could be considered a "private enterprise."[11]

[11]In other situations, e.g., zoning, constitutional issues, etc., the University has been held to be a "State agency." *See, e.g., Parker, supra*. If the Commission assumed the University was a "State agency," it could still raise issues under the Code of Conduct, e.g., *29 Del. C. § 5805(a)(1)*(having an interest which tends to impair judgment); *29 Del. C. § 5806(b)*(accepting other employment); *29 Del. C. § 5806(e)*(using public office for unwarranted privileges, private advantage or gain); *and 29 Del. C. § 5806(a)* (appearance of impropriety).

Assuming it is a private enterprise, the next issue is whether Ms. Ellis "represented or otherwise assisted" the Center before her own agency. Here, Ms. Ellis wrote the proposal she submitted to her Council. Beyond that, if the Council has questions when it considers the proposal, it wants Ms. Ellis to answer the questions. As she has "represented or otherwise assisted" the Center before her own agency, and might continue to do so if the Council has questions about her proposal, it would violate the Code unless a waiver is granted.

It also is possible that Ms. Guinivan and Mr. Mears could end up representing or otherwise assisting the Center before their own agency. By law, the Council must conduct a comprehensive review and analysis of the services offered, including descriptions of how entities funded through it collaborated and contributed to the purpose of the law. *42 U.S.C. 15024(c)(3)(A) and (D)*. For example, if the Council has to inquire how the grant monies were used by Ms. Guinivan and Mr. Mears; look at whether they properly performed the contract; etc., or if Ms. Guinivan and Mr. Mears have to report on the success of the course to the Council, for the Council to complete its comprehensive review and analysis, then the Council would evaluate its own members' performance, and the Council members would be addressing their private work before their own Council.

(G) Request for a Waiver

Because of the Code issues raised by this arrangement, the Council seeks a waiver. A waiver may be granted if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an "undue hardship" on the agency. *29 Del. C. § 5807(a).*

(1) Is the literal application of the law necessary to serve the public purpose?

The purpose of the Code of Conduct is to instill public confidence in the integrity of its government. *29 Del. C. § 5802(1).* This is accomplished by setting specific standards to guide the conduct of State employees and officials. *29 Del. C. § 5802(2).* The specific standards at issue are: (1) reviewing or disposing of matters if there is a personal or private interest; and (2) representing or otherwise assisting a private enterprise before one's own agency.

Regarding the first standard, it appears that the Council members can recuse themselves from acting in their official capacity on the grant matter. Thus, a waiver is not needed for that provision.

The second provision requires a waiver as it is clear that Ms. Ellis is representing the Center before her own agency. Also, as noted, the other two Council members may

be put in a situation where they may have to explain to the Council how the monies were used, etc.

The restriction on representing or otherwise assisting a private enterprise before one's own agency is to insure that State officials do not use their influence within their own agency to affect the decisions of their colleagues or employees or use their access to information or influence within their own agency to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. *Commission Op. No. 00-32*. *See*, *Van EE v. Environmental Protection Agency, D.C. Dist. Ct. of Appeals, 202 F.3d 296(2000)(noting purpose of federal restriction on its employees and officials representing or assisting a private enterprise before federal agency).*

In the context of State officials contracting with their own agency, Delaware Courts have noted that when State officials contract with their own agency the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *Commission Op. No. 00-32 (citing W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748,752 (1971)).*

Here, public concerns about awarding the contract out of favoritism, preferential treatment, etc., are diminished by the following facts: (1) the Council publicly noticed the opportunity of the grant monies to any person or entity which sought to apply; no one else did apply; (2) the Center course was also publicly noticed; (3) the course was free so no member of the public was financially hindered in taking the course; (4) all attendees were notified of the teaching opportunity if they completed the course; (5) the three Council members will not participate in deciding if the Center will be awarded the grant; (6) the credentials of the two Council members to teach the course are outlined in the proposal, giving an objective factual basis for their selection other than mere attendance at the free course; (7) federal law requires the Center and the Council to collaborate on services and programs for persons with developmental disabilities; and (8) by law, if a waiver is granted the proceedings become a matter of public record so that the public will know its concerns about favoritism, undue influence and the like were addressed. *See, 29 Del. C. § 5807(b)(4).*

We also note that if the two Council members are permitted to teach the course that 20-45 persons are expected to attend. According to the proposal, attendees could subsequently teach the course. That would mean the Council would not have to continue dealing with its own council members to fulfill subsequent contracts.

Those facts serve the public purpose--insuring that the contract is not granted out of favoritism, undue influence, and the like.

(2) Is there an "undue hardship" on the State agency--the Council.

If a waiver is not granted, the hardship for the Council is that it appears that the

Council could not issue the grant because there were no other applicants. The effect of that would be that the training program could not be offered as there are no alternative entities to which to award the grant nor are there alternative persons to teach the course.

(H) Conclusion

Based on the above facts and law, we conclude that the three Council members should not participate in their official capacity on matters related to the mini-grant to avoid a violation of *29 Del. C. § 5805(a)(1).* However, the facts show that the public purpose has been served (grant not awarded out of favoritism, undue influence and the like), and there is an undue hardship on the agency, so we grant a waiver of *29 Del. C. § 5805(b)(1)* so that the three Council members can, if required, represent or otherwise assist the Center before their own Council**.** ***(Commission Op. No. 01-22).***

Note: When a waiver is granted, the proceedings become a matter of public record, and are no longer confidential. *29 Del. C. § 5807(a).* In the following case, a waiver was granted.

September 26, 2001

Orlando J. George, Jr. ***WAIVER GRANTED***
President, Delaware Technical and Community College
Office of the President
P.O. Box 897
Dover, DE 19903

Advisory Op. No. 01-36 - Contracting with State

Hearing and Decision by: John E. Burris, Chair; Arthur G. Connolly, Jr., Vice-Chair; Commissioners Mary Jane Willis; Paul E. Ellis; Arthur V. Episcopo; and Clifton H. Hubbard

Dear President George:

The State Public Integrity Commission reviewed the correspondence concerning Delaware Technical & Community College (Del Tech) contracting with a Board of Trustees member, John Mariorano, to provide services as a travel agency for a study tour in Turkey and Greece. While such contract would violate the Code of Conduct, a waiver is granted based on the following law and facts.

Where a State official seeks to contract with his own agency, the official then has a "personal or private interest" in the matter. *Commission Op. No. 98-11.* When an official has a "personal or private interest," the Code requires that he not, in his official capacity, review or dispose of matters related to the contract. *29 Del. C. § 5805(a)(1).*

Also, officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. *29 Del. C. § 5805(b)(1).* Accordingly, Mr. Mariorano should not participate in his official capacity on matters concerning the contract. However, as he wrote his company's response to the College's request for proposals, his actions would constitute representing or otherwise assisting his private enterprise before his own agency.

As the contract, at a minimum, appears to violate the provision on contracting with one's own agency, and may raise issues under the provision dealing with outside employment which restricts such employment if it may result in impaired judgment, preferential treatment, etc., the focus turns to the basis for a waiver.

Waivers may be granted if: (1) the literal application of the law is not necessary to serve the public purpose or (2) there is an "undue hardship" on the official or the agency. *29 Del. C. § 5807(a).*

(1) Is the literal application of the law necessary to serve the public purpose?

The public purpose served by prohibiting State officials from contracting with their own agency was noted in a 1971 Court opinion. *W.Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748 (1971).* In *Heller*, the Court said that when State officials contract with their own agency the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." The Court noted that, at that time, the State had no conflicts of interest law. Subsequently, the Code of Conduct was passed, and restricted officials from dealing with their own agency. *29 Del. C. § 5805(b)(1).* This insures that officials do not use their influence with their agency to affect decisions by their colleagues or employees or use access to information or other influence to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. *Commission Op. No. 00-32.*

Here, the agency, to insure that the contract award was not based on favoritism, but rather on the ability of the bidders to provide certain services, publicly noticed the opportunity for any person or company to compete if the bidder met the criteria outlined in the request for proposals. Public notice and bidding helps diminish the possibility of showing favoritism as it provides the competitive opportunity to all persons or organizations similarly situated to Mr. Mariorano's company. It also aids in diminishing the opportunity for Mr. Mariorano to use his State position to obtain the contract because neither the agency nor he would know, until after the fact, what competition he might have, what bid any competitor would make, etc. As it turned out, there was no competition, but that fact was unknown when he submitted his bid.

Public notice and bidding also helps insure a fair market price. Delaware Courts have held that an "economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Commission*

Op. No. 97-17 (citing e.g., Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991). Your letter indicates that travel agencies are generally compensated through commissions from the service providers to the tour (e.g., airlines, hotels, etc.). When the compensation to a travel agency is paid by the airlines and hotel operators, it is fixed by the industry. Thus, the price would be the fixed market price. That aids in insuring that Mr. Mariorano's compensation is not based on favoritism, undue influence, and the like. In some instances, the commission to the travel agency is established by a direct fee from the participants. However, as his price was established in responding to the public bidding opportunity, that increases the likelihood that his bid would have been the market rate, even though it turned out that he had no competition.

Aside from the above facts, which aid in insuring that the public purpose is served, if a waiver is granted the proceedings before the Commission become a public record, thereby permitting the public to know that its concerns about favoritism, etc., were addressed. *Commission Op. No. 01-22.*

(2) Is there an "undue hardship" on the State official or the Agency?

No facts indicate any hardship on Mr. Mariorano. However, as there were no other bidders, it appears that Del Tech could not go forward with its study tour if Mr. Mariorano's company is not granted the contract.

Accordingly, since the possibility of the contract being awarded out of favoritism, undue influence and the like has been diminished by the College's actions in publicly noticing and bidding the contract, and as there is a hardship on the agency, a waiver is granted. ***(Commission Op. No. 01-36).***

Post-Employment

Working on Open-Ended Contract for Private Enterprise

A State employee was involved two years ago in awarding a 3-year, open-ended contract. Under that contract, the selected contractor was to provide professional services for certain contract aspects after the agency identified a project. Since the award of that contract, the agency has identified 39 projects needing such studies or analyses. The State employee was involved in 21 of the projects as a manager. Regarding the remaining projects, he was in no manner involved. He asked what restrictions would apply if he went to work for the contractor.

Former State employees may not represent or otherwise assist a private enterprise on matters involving the State, for two years after leaving State employment, if they are matters on which the former employee: (1) gave an opinion; (2) conducted an

investigation; or (3) were otherwise directly and materially responsible for while employed by the State. *29 Del. C. § 5805(d).* They also may not improperly use or disclose confidential information gained from public employment. *Id*.

As to the 21 projects in which he was involved, he could not represent or otherwise assist the private enterprise, as they are matters on which he gave an opinion and was otherwise directly and materially responsible. Regarding the 18 other projects, as he had no involvement, he could represent or otherwise assist the company on those matters.

He also asked if he could represent or otherwise assist the company if it was awarded future contracts. Specifically, he asked if he could work on: (1) an open-ended contract that he expected to be awarded in the Spring; and (2) other future contracts, as yet unidentified, in which he would be involved in the marketing aspect for the company.
As to both matters, he said they would be new contracts on which he had no involvement while employed by the State. To the extent those contracts would be on matters in which he had no involvement, he would not be prohibited from representing or otherwise assisting the private company. However, as the exact terms of the contracts were unknown at this time, if those contracts should, by their terms, encompass matters on which he was involved during his State employment, then he would be restricted from working on those matters. For example, if a project identified in the current open-ended contract, were incorporated in the new open-ended contract to be issued in the Spring, then, consistent with this opinion, he would not be permitted to work on that matter.
As the new contracts are issued, he was advised to review the post-employment law, refer to this opinion for guidance, and if necessary, return to the Commission for additional advice. ***(Commission Op. No. 01-01).***

Post-Employment Waiver Denied

The Commission was asked to grant a blanket waiver of the post-employment law on the basis that a former State officer said that he would not be able to obtain employment in the State without a waiver. Based on the following law and facts, the Commission held that a blanket waiver was not appropriate. Rather, it concluded that the officer's employment required curtailment of certain activities to insure compliance with the post-employment law. However, that decision did not preclude him from returning to the Commission for further guidance or requesting reconsideration of the waiver, based on specific facts which may arise in the future.

The Commission may grant a waiver if the facts substantiate an "undue hardship." *29 Del. C. § 5807(a).*

Here, the facts did not substantiate the alleged hardship--that because of the limits of

the post-employment law, he could not obtain a job in Delaware. In fact, he had been offered a job in Delaware. No facts substantiated, at the time of the request, that the private enterprise would not employ him with the limits imposed by the law. He had not talked to the company about the post-employment limits and asked if they would still hire him; rather, he simply told them he would seek a waiver. Without facts to substantiate that he would not be hired with those limits, we could not find an "undue hardship."

We understood his concern about being able to move from the public sector to the private sector. That concern is incorporated into the Code because the stated purpose is to set specific standards to insure confidence in government, but also encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." *29 Del. C. § 5802(3).* Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State. It merely limited their activity in three discrete areas--where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible while employed by the State. *29 Del. C. § 5805(d).*

This gives former employees the latitude to accept private employment and work for private enterprises in many ways without violating the Code. In his case, the facts indicated there was still much he could do for the private company without violating the law.

First, the job required him to provide managerial oversight for the private enterprise's operations and activities, including identifying service needs, service development and implementation, and evaluations of service provided. Based on the description, these activities dealt with the private enterprise's internal and day-to-day operations and would not involve representing or assisting the private enterprise on matters involving the State. As those activities do not include working on "matters involving the State," then working on them would not violate the post-employment law.

Second, he expected to get involved in educating communities about certain aspects of the private enterprise's services. Again, no facts showed that such activities would entail "matters involving the State." Thus, he was free to engage in that conduct.

Third, he expected to work to raise funds for the private enterprise. That would be achieved by approaching private foundations, the federal government, and the State. Dealing with private foundations, associations, and the federal government would not entail representing or otherwise assisting on "State matters." Thus, he was free to seek funds from private foundations and the federal government.

However, the red-flag goes up on the post-employment restriction regarding obtaining funding for the private enterprise **from the State**. That meant he would "represent or

otherwise assist" the private enterprise "on matters involving the State." We must then narrow that representation/assistance down to whether it would be on "matters" where he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible.

As an example, he said that the private enterprise gets millions of dollars from the State under a State contract with his agency. He said he would not negotiate or re-negotiate that contract with the State as that would be a "tremendous conflict of interest." We agree. As a Senior level executive officer, the State contract was a responsibility of his agency. Because of his position, a contract of that magnitude was certainly his responsibility. Accordingly, he was correct in deciding to recuse himself on that matter.

Similarly, the private enterprise wanted to seek money from a State source other than through the above-mentioned contract. While employed by the State, he chaired an Advisory Committee which recommended to the General Assembly and the Governor how to spend particular funds. If he represented or otherwise assisted the private enterprise in obtaining funding from that source, he would be dealing in matters where he: (1) **gave an opinion** on how to spend the money; and (2) **was directly responsible** for recommendations concerning that money. Such activity would violate the post-employment law.

These two instances illustrate where he should draw the line in terms of soliciting funding or contracts from the State for his private enterprise.

This does not mean the private enterprise cannot solicit funding or contracts with the State. Based on the above facts, it was successful in obtaining contracts in the past without his aid. It could continue to seek such contracts; it merely cannot have him, for a period of two years, represent or otherwise assist it in endeavors for which he was directly and materially responsible as a State employee.

He also said that the private enterprise might want him to advocate for legislation and policies at the State and Federal level. We note again that any action on Federal matters is not within the purview of the State post-employment law. He was free to engage in those activities.

At the State level, he said that the private enterprise has a government relations group and a lobbyist who does 96% of the lobbying. Consequently, he did not expect to have a lot of interfacing with State employees and the General Assembly along that line. However, an example he gave was that there might be a bill to change certain laws pertaining to an issue over which he had responsibility while employed by the State, and the private enterprise might ask him to go to the General Assembly and testify. The particular issue was one where he was responsible for targeting certain funding for that issue when he chaired the Advisory Committee. Moreover, in his State position, outside of chairing the committee, he and other senior level officials were asked to

identify 10 areas of concerns for the State and the possible legislation he was speaking of fit within those areas he had helped identify. Based on the information he provided, it was logical that the type of legislation he thought they would want him to lobby on would result in implementing policies and spending State funds in areas for which he had been directly and materially responsible.

Conversely, if the "matter" pertained to issues in which he was not involved while employed by the State, he would not be precluded from working on that matter. An example he gave was an issue which would likely fall within in his agency's area of responsibility, but it was not an issue while he was employed; it was not a matter that was ever funded by the State; and it also apparently was not an issue that he instituted policies concerning, etc. Based on those facts, it did not appear that it would be a matter on which he gave an opinion, etc.

Obviously, neither he nor this Commission could foresee every possible situation that may arise within the next two years. Moreover, we must make our decisions based on particular facts. *29 Del. C. § 5807(c).* Thus, as guidance to him on whether his activities would pose problems under the post-employment law, we used these particular instances to assist him in complying with the post-employment provision. As issues arose, he was advised to review the post-employment law, this opinion, and if necessary seek further advice from this Commission. ***(Commission Op. No. 01-07).***

Senior Level Officials--What is "Directly and Materially Responsible"?

A former Senior Level Executive Branch officer asked for guidance on representing or assisting various citizens' groups sometime in the future. At the time of the request, no particular group or their needs had been identified. By law, we must base our advisory opinions on a particular fact situation. *29 Del. C. § 5807(c).* We also are to be consistent in our opinions. *29 Del. C. § 5809(5).* Thus, while no particular facts were available to render a final decision, the following information was provided as some guidance.

The post-employment law prohibits State employees, for two years, from representing or otherwise assisting a private enterprise on matters involving the State if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible, while employed by the State. Former employees also may not improperly use or disclose confidential information gained from State employment. *29 Del. C. § 5805(d).*

Generally, there is no trouble identifying matters on which one gave an opinion or conducted an investigation. Thus, the issue deals more with the need for clarification of "otherwise directly and materially responsible" while employed by the State. The officer

had recognized that high-level State officers have a larger responsibility for the entire Department. The Commission considered the duties and powers given this individual in the statute creating the official's position. Under that law, the officer had extremely broad powers and duties. Thus, the statute would be a good starting point for determining if a matter was one for which the officer was "directly and materially responsible."

In a prior opinion, a high-level Senior Executive Officer was advised that because his statutory duties were broadly described, he should presume that he was directly and materially responsible for all the activities described in the statutory definition of his duties. However, he was not precluded from rebutting that presumption on specific projects. *Commission Op. No. 91-10.*

Similarly, once this officer had a particular situation in mind, the facts could be placed within the framework of the statutory duties, and then, if necessary, the officer could return to the Commission for an opinion. ***(Commission Op. No. 01-12).***

Consultant for a Marketing Group

A former State employee proposed to work as a consultant to a national organization which subcontracts with a research and marketing group. The Commission held that the conduct would not violate the post-employment law as someone other than the former employee would represent or otherwise assist those entities before her former agency.

For two years after leaving State employment, former State employees may not represent or otherwise assist a private enterprise on matters involving the State if they are matters on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while employed by the State. *29 Del. C. § 5805(d).* Also, the former employee may not improperly disclose or improperly use confidential information gained from their former position. *Id*.

The research and marketing organization selected a national organization as a subcontractor to work on five pilot programs to help increase consumer awareness of information about long-term care (planning, financing, lifestyle choices, and information sources). One of the pilot programs is in Wilmington. The former State employee was asked to contract with the national organization to work on that program. For example, the former employee expected to contact private businesses to assist them in helping their employees understand the need for advanced planning for long-term care through such things as insurance policies, educational programs, etc.

While employed by the State, she was not involved in assisting companies or their employees in understanding planning for long-term care. Also, her job did not entail

trying to make consumers aware of the need to plan for long-term care, how to finance long-term care, etc., so that they would not have to rely on State services for their long-term care.

Most of her consulting work would be through the State Chamber of Commerce to establish contact with the business community to assist them with these issues for their employees. However, she expected that all employers will be targeted as part of this national campaign to increase awareness of planning for long-term care. Thus, there could be some State involvement. However, there are two other persons assigned to the Wilmington pilot program and if there is a need, they will handle any dealings with her former agency.

Based on those facts, she would not be representing or otherwise assisting the national organization or the research and marketing group on matters involving the State on which she gave an opinion, conducted an investigation, or for which she was otherwise directly and materially responsible for while employed by the State. ***(Commission Op. No. 01-16).***

Working on Same "Matter" - Waiver Denied

Based on the following law and facts, the Commission concluded that it would violate the post-employment law if a State employee went to work for a private company to work on the same project she was working on for her Department. It also concluded that a waiver would not be appropriate.

(1) Applicable Law

State employees, for two years after leaving State employment, may not represent or otherwise assist a private enterprise on matters involving the State if they are matters on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while employed by the State. A former employee also may not improperly use or disclose confidential information gained as a State employee. *29 Del. C. § 5805(d).*

(2) Application of Facts to Law

The State employee wanted to work for a private enterprise on the same project and do the very same work she did on that project for the State. Such conduct would clearly mean that she would be working on the same matter for which she was "directly and materially responsible" in her State position. Such conduct would violate the post-employment law, and would not be permissible unless a waiver were granted.

(3) Consideration of Waiver

The Commission may grant a waiver if: (1) the literal application of the law is not

necessary to serve the public purpose; or (2) there is an undue hardship on the State employee or State agency. *29 Del. C. § 5807(a).*

(A) Is a literal application of the law needed to serve the public purpose?

The purpose of the Code of Conduct is to instill confidence and respect in the public in the integrity of its government. *29 Del. C. § 5802.* This is achieved by setting "specific standards" of conduct. *Id*. One of those specific standards is the post-employment law.

In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

> Today public confidence in government has been weakened by a widespread conviction that officials use public office for personal gain, particularly after they leave government services. There is a sense that a "revolving door" exists between industry and government; that officials 'go easy' while in office in order to reap personal gain afterward.... There is a deep public uneasiness with officials who switch sides–.... Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. *Id.*

Here, the very purpose of the law would be contravened if she were permitted to accept private employment to perform the exact same job. That is because the public could well see this as a "revolving door. " First, she walked into this State job untrained to do the particular work involved. She learned that skill at the agency's expense as part of its contractual agreement with the private company to help train her. She said if she works for the private contractor, she would walk back through the same door of the same office where she now works for the State; sit at the same desk; do the same work, but get paid more than she would as a State employee. In addition to higher pay, she would receive company stock options, health benefits, etc. That would be in addition to the 15 years she has vested in a State pension.

Besides the increase in pay she would receive, the company would receive a financial benefit because it gets a "mark up" if the agency uses her as its hired consultant on this particular job. She said she wanted to go with the private company because she thought there would be better job opportunities and because the private company, like

other consulting companies, could be more flexible in its hours than her State agency. Again, this could be viewed as using the "revolving door" for her personal advantage.

This is not to say that she could not leave the State and get a higher salary, better promotion opportunities, and more flexible hours. All of that could be available through this private company or any other firm as long as she did not work on the same project for which she was responsible. This gives her mobility to move to the private sector, but stays within the legal restriction that is driven by the public concern. For example, the company's representative said that the company is the largest firm of its type in the United States. He also said that it has projects other than this particular project.

As she could still seek employment with the private company or another company without violating the Code, we must conclude that the literal application of the law is necessary to serve the public purpose.

(2) Is there an "undue hardship" such that a waiver should be granted?

We have held that an "undue hardship" is one which "is excessive" or is "more than required." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992)).*

We have already noted that she can accept employment with the company or any other private enterprise as long as she does not work, for two years, on matters for which she was responsible while employed by the State. Thus, we find no undue hardship for her.

She said that if the agency has to select someone else the project "would just fall apart" because "you get to know people and you know their personalities" and it helps build "a working relationship with the contractor, which is sometimes not the easiest thing to do. And once they're comfortable that you can do your job, well, they rely on you." She added: "I think if I walked out now and they took somebody else and put them in there, it would cause a workplace disharmony."

She has a financial interest in obtaining employment with the private company, and it has a financial interest in seeing her continue in the same job as its employee as it will receive a mark-up. We cannot find this to be an "undue hardship" for her or the company. Further, the agency's representative expressed no concern about the project "falling apart" or "workplace disharmony." In fact, the private company's representative, pointed out that when a State employee is doing the same work as a contract employee who makes more, that it "creates some havoc" and "there is animosity." Thus, it appears that if she walked out as a State employee and walked back into that same office the next day doing the same work as a consultant, that would cause the "workplace disharmony" which she said she wished to avoid.

The agency's representative said she had the experience and does a good job, and that

"it makes the most sense to have [her] continue to do the work since she's already halfway through both of those construction projects and she already is up to speed on everything."

Certainly, it would make the most sense to have the person with the most knowledge and continuity perform the work. But we previously noted that the very hardship imposed by the post-employment law--a former employee may not work on the same job for which they were responsible--is that the agency loses that knowledge, continuity, working relationship, etc. *Commission Op. No. 97-18.* While we understand and sympathize with the desire to have her continue doing the exact same DelDOT work, only as a private contractor, that is the very hardship imposed by the statute; it is not excessive. *Id*. As every former State employee could bring continuity and familiarity to performing the same duties for which they were responsible, if a waiver were granted solely on that basis, the former employee would always have an advantage over competitors for the contractual job. *Id*. That would defeat the purpose of the restriction.

The agency's representative said he has a shortage of people within the State who could perform the particular type of work, which consisted of book entries and computer data entries. His options would be to hire a consultant other than her. He said that is difficult as even the consultants do not have people with that particular type of experience on the agency's jobs. However, she was not trained to do that particular type of work when she began the job. While workers in the private sector, who consult on such work, may not have experience with this particular agency, there was no indication that such people were not available to perform the job.

The other option, would be to do what he said he has been forced to do lately--"to get people that may have some office experience but don't really have office experience in the [agency's] environment. So they're not familiar with all the terminology and what we do out on [agency] projects." Again, lack of familiarity of terminology does not mean they cannot perform the computer and book work required.

As there are other persons who could perform the job, we cannot find an "undue hardship."

(4) Conclusion

It would violate the clear language of the post-employment law if she accepted employment with the private company, within two years of leaving State employment, to work on the same project and perform the same work for which she was responsible as a State employee. A waiver is not appropriate as: (1) the literal application of the law is necessary to serve the public purpose; and (2) no facts substantiate an "undue hardship," as other consultants are available. ***(Commission Op. No. 01-19).***

Limiting Exposure to "Matters Involving the State"

A State employee asked if employment as the Director of Nursing at a long-term care facility would violate the post-employment provision. Based on the following law and facts, we concluded that the conduct will not violate that provision as long as the former employee was removed from activities related to the former Division's survey of the facility, as indicated below.

(A) Applicable Law

For two years after leaving State employment a State employee may not represent or otherwise assist a private enterprise on matters involving the State where the former State employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible, while employed by the State. *29 Del. C. § 5805(d).* They also may not improperly use or disclose confidential information gained from their public position. *Id*.

(B) Application of Law to Facts

The Director of Nursing at a long-term care facility was responsible for oversight of the delivery of care and nursing services to the clients. The former employee's State job, did not involve oversight of the delivery of care and nursing services to clients. Thus, the former employee was not "directly and materially responsible" for that matter while employed by the State. Also, most of the day-to-day work with the private facility would not involve any State contact. Thus, for the most part, the Director would not deal with "matters involving the State."

As a State compliance nurse, the former employee was on the team which surveyed long-term care facilities, on a periodic basis. Normally, a facility's Director of Nursing would be involved with the team during the survey. However, as the former employee gave an opinion and was directly and materially responsible for such matters as a State compliance nurse, to avoid a conflict, the Nursing Director should avoid any contact with the State's survey team. Rather, the facility's quality assurance nurses and the head of the facility would assume those responsibilities. Thus, the former employee would not "represent or otherwise assist" the private facility during the survey.

We understand that the survey team uses the agency's rules and regulations to determine if there is a problem. It only identifies the problem related to the rules and regulations. It does not identify the cause or the means of corrections. For example, the team may observe that clients have bedsores, and note that as a problem. However, it does not offer reasons, such as the bedsores are caused by not turning the client often enough, or the bedsores are caused by lack of cleanliness. Nor does it identify the measures for correcting the problem, e.g., telling the facility to turn the patient every two hours. Finally, no facts show that the survey identifies problems outside the scope of the rules and regulations, and certainly, you may have to deal with

such matters.

The former employee expected that nursing skills, acquired independently of the State job, rather than knowledge of the agency rules, would be the skill used as a Director of Nursing. Obviously, nursing skills are needed for the State job and the new job. In the State job, those skills were used to identify problems under the survey rules and regulations. However, those rules and regulations would not be a factor in all of the day-to-day activities a Director of Nursing would encounter, e.g., staff meetings, participating in decisions on whether a client should be moved to a hospital for immediate care, etc. Also, as it relates to the State survey, the skills to be used would be on the other side of the coin. Rather than identifying a problem under the rules, the Director and staff would determine the cause and the necessary care to correct the problem--which was not a duty on the survey team.

The Code does not ban former State employees from working in the same occupation. Rather, it limits their occupational work in areas where they gave an opinion, conducted an investigation or was otherwise directly and materially responsible for matters involving the State.

In a prior opinion dealing with a similar situation where a former employee served on a team that evaluated group homes, we held that as long as she did not deal with the team; was not present when the team inspected; her name was not used by the facility to influence inspectors; and she did not advocate for the facility before the inspectors, that her conduct would not violate the post-employment law. *Commission Op. No. 97-20.* We are to be consistent in our opinions. *29 Del. C. § 5809(5)*. Accordingly, with the above restrictions, we find no violation of the post-employment law. ***(Commission Op. No. 01-21).***