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Jurisdiction

06-24Jurisdiction over Attorney

An attorney filed a complaint against another attorney alleging she may have violated the Code of Conduct because she filed a petition against him regarding suspension of his law license. The Commission found it had no personal jurisdiction over her. Further, even assuming such jurisdiction, it had no subject matter jurisdiction. Accordingly, it dismissed the complaint.

The statute requires a sworn statement for complaints. [29 Del. C. § 5810\(a\)](#). The statement was not sworn; however, as the Commission lacked jurisdiction, it did not require a refiling solely for that reason.

(A) FACTS:

At the time of her alleged acts, the complainant was representing a plaintiff in an action against a corporation's directors and officers. Her husband was not a director or officer, but was a corporate employee. Her petition, if approved, would allegedly bar the attorney from representing his client. Allegedly, at a conference on the matter, the attorney raised his concerns to the Court that she had a conflict under the Code of Conduct, and the Court removed her from participating in the petition based on that law. However, he said the conference proceedings were confidential and he cannot provide information to confirm the allegations, her response, actions taken by the Court, the law under which the Court acted, etc. Her petition was not granted, but he said he was later removed from the case.

(B) APPLICATION OF THE LAW TO THE FACTS:

He alleged she may have violated provisions barring State employees from:

(1) Reviewing and disposing of a State matter if a close relative has a financial interest in a private enterprise, which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise. [29 Del. C. § 5805\(a\)\(2\)\(b\)](#). "Matter" includes "petition"; "close relative" includes "spouse"; and "financial interest" includes employment if the income is more than \$5,000. [29 Del. C. § 5804\(7\)](#); § 5804(1); and § 5804(5)(b).

(2) Engaging in conduct that may raise suspicion among the public that the public officer is acting in violation of their public trust or creates a justifiable impression among the public that such trust is being violated, [29 Del. C. § 5806\(a\)](#). This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. It can only be applied to provisions of 29 Del. C., ch. 58.

(a) **Jurisdiction:** This Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2) and (3). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance. Legal and factual reasons preclude the Commission's jurisdiction over the attorney or the facts in the complaint.

(1) Personal Jurisdiction

Attorney Discipline

The Delaware Supreme Court has the "inherent power and authority over the regulation of the legal profession, the Court shall maintain appropriate standards of professional conduct for all lawyers subject to its jurisdiction, dispose of individual cases of lawyer discipline and disability, and administer the lawyer disciplinary system." [Delaware Lawyers' Rules of Professional Responsibility, I. Structure and Scope, Rule 1; See also, DLRPC Rule 5.7, comment \[11\] \(When the full protections of the DLRPC do not apply, principles of law external to the Rules govern\)](#). The ODC is an arm of the Court, and assists the Court in regulating the practice of law. It is to evaluate, investigate, and, if warranted, prosecute lawyer misconduct.

Here, the attorney was acting as an attorney in drafting and filing a petition in which it is alleged she had a "personal interest" because of her spouse's employment. The DLRPC specifically addresses situations where a lawyer has a "personal interest" because a spouse is involved in a matter. *See, Rules 1.7 comment [1]; and 1.8*. The specific rules, with exceptions, govern a lawyer's acts when there is a "personal interest," and when a lawyer should withdraw. The jurisdiction to discipline a lawyer is with the Supreme Court. Not only is that true under the DLRPC, but the Delaware Supreme Court has long recognized that under the rules of statutory construction, a more specific statute or rule applies over a more general statute or rule. "Where there is an irreconcilable conflict, a general clause must always give way to one that is specific; the general being treated as including only that which is not specifically given." *Culver v. Elliott, 40 Del. 578 (1940)(citing In Re Conner's Estate, 302 Pa. 534, 153 A. 730, 731)*.

Court Procedures

Also, DLRPC, Rule 5(d) provides: “These Rules shall not be construed to deny to any court the powers necessary to maintain control over its proceedings.”

Under a Court’s Procedural Rules, motions alleging conflicts and seeking withdrawal of an attorney may be filed. This allows the Court to rule on whether an attorney should withdraw. By bringing the alleged conflict to the Court’s attention, by formal motion or not, the complainant in this action effectively moved that she withdraw, and allegedly the Court so directed. Actions under Court Rules of Procedure, are not in this Commission’s jurisdiction.

Connection between the DLRPC and Code of Conduct

DLRPC Rule 1.11 specifically addresses the conduct of government attorneys. It defines “matter” as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation...or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency. *Rule 1.11, (e)(1) and (2)*. Here, the “matter” was a judicial conference, where the complainant in this action requested a ruling or other determination on whether she should withdraw. Moreover, the comment to Rule 1.11 provides that:

“[a] lawyer who is a public officer is personally subject to the Rules of Professional Conduct.... In addition, such a lawyer may be subject to the statutes and government regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under these rules.” *Rule 1.11, comment [1]*.

Before the Supreme Court adopted the rewrite of the DLRPC, the comments to Rule 1.11 said a lawyer is subject to the government’s ethics rules. [See, DLRPC compared with changes, comment \[1\]](#). The new comments provide that a lawyer may be subject to the government states and regulations. *Id.* The permissive jurisdiction appears consistent with DLRPC 5.7, which says that if the DLRPC protections are not available, then external law governs.

As noted the DLRPC has specific rules on when an attorney should withdraw, with a number of exceptions. The Code of Conduct has only one exception to withdrawal—when a government official has a statutory duty that cannot be delegated. [29 Del. C. § 5805\(a\)\(3\)](#). If the Commission limited a government attorney to only that situation, it would be contrary to the DLRPC which is not as limited as the Code of Conduct, and specifically addresses the issue for lawyers. In other words, the Commission would, in effect, deny the attorney the exceptions in the DLRPC.

(B) Subject Matter Jurisdiction:

Insufficient Facts

Even if the Code were applied, and assuming all facts as true, the Commission must base its opinions on the particular facts of each case. [29 Del. C. § 5809 \(2\) and \(3\) and § 5810\(a\)](#). Complainant in this action said he cannot provide the transcript of Court proceedings on this matter. As a result, the Commission does not have, and apparently will not have, all the facts. Delaware Courts have held that mere allegations, without articulating facts, are insufficient to establish a conflict. *Seth v. State*, 592 A.2d 436 (Del., 1991) 1991 Del. Lexis 191. Also, Delaware Courts have ruled that mere allegations of a conflict just because a State officer and her spouse in his private employment were involved in the same matter (investigation on physician's conduct and whether his license should be revoked), does not, without more, create a conflict. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November, 21, 1995).

Meaning of "Matter"

Again, assuming all allegations as true, it does not necessarily follow that the attorney violated the Code of Conduct. For there to be a conflict, the close relative must have a financial interest in the "matter." No facts suggest that her husband had a financial interest in the petition. This complainant identified the "matter" as the petition, and said its approval would result in his removal from the corporate case. However, no facts suggest she was seeking to remove him from that particular case. Rather, if granted, he would be removed from all cases. In interpreting the Code of Conduct, Courts have held that public officials are entitled to a "strong 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 (January 29, 1996). No facts were given suggesting that the petition was the result of a particular bias as it relates to the corporate case or other litigation. Thus, the legal presumption has not been overcome by the facts.

Delaware Courts have interpreted the term "matter" in the Code of Conduct as pertaining to a particular matter pending before the State. See, *Beebe*, supra (application to State Board was not the same "matter" the former State official was directly and materially responsible as he had not worked on that particular application while on the State Board who considered applications); See also, *Commission Op. No. 96-75* (interpreting the meaning of "matter"). The case was not the particular "matter"; the particular matter was the "petition."

Aside from the fact that her spouse did not have a financial interest in the particular matter, his financial interest in the suit against the corporation appears to be remote. He is not a party to the suit; he is not an officer of the corporation holding a fiduciary interest in the company. He is a company employee. No facts show he would benefit to a lesser or greater extent than any similarly situated person (company employee) by the outcome of the petition or litigation. The Code of Conduct's specific language says the State officer may not review or

dispose of a matter if their action “would result in a financial benefit or detriment than such benefit or detriment would accrue to others who are members of the same class or group of persons,” and/or if “the close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interest in the same enterprise.” [29 Del. C. § 5805\(a\)\(2\)\(a\) and \(b\)](#). No facts were given to show her husband or the company would benefit to a lesser or greater degree because she reviewed or disposed of the petition.

The complainant also said the Code provides if there is a statutory duty that cannot be delegated, that a full disclosure is to be filed with this Commission, [29 Del. C. § 5805\(3\)](#). He said the attorney did not file such disclosure. Again, assuming the facts as true, the law gives Courts the means to deal with an alleged conflict. If she fully disclosed the petition information which was allegedly confidential, she may have acted in violation of the Court’s confidentiality order and/or the statutory provisions governing her State duties which include confidentiality restrictions.

In *Camas, supra*, the Court noted that the State officer was under a statutory obligation not to improperly use or disclose confidential information, and the mere fact that the State officer and her spouse allegedly may have shared confidential information, was insufficient to state a claim because she was under a statutory obligation not to improperly use or disclose confidential information, and not facts suggested that she had.

(C) CONCLUSION

Based on the above facts and law, the Commission finds that it has neither personal nor subject matter jurisdiction. Moreover, even assuming all facts as true, the allegations are insufficient to establish a claim. Accordingly, the complaint is dismissed pursuant to [29 Del. C. § 5808A\(a\)\(4\)](#) and [29 Del. C. § 5809\(3\)](#).

06-41 – Jurisdiction: Entitlement to Records: A citizen filed a complaint alleging that she had not been given documents relative to her lawsuit against a State financial institution. The documents and the persons allegedly involved were in no way connected to State employees, officers, or officials, which are the persons to whom the Code applies. See, [29 Del. C. § 5804\(6\)\(12\) and \(13\)](#). Even if the persons were under the Commission’s jurisdiction, it can only apply the provisions of Title 29, Chapter 58. [29 Del. C § 5809\(2\) and \(3\)](#). The allegations did not pertain to any of those provisions. The complaint was dismissed for lack of jurisdiction.

06-55 - Complaint against Local Officials.The Commission reviewed a private citizen=s letter alleging that local Officials and their attorney violated the Code of Conduct. The Town Attorney and one of the officials authorized release of the opinion as it pertained to them. Because not all of the persons against whom the allegations were made have authorized release, the identity of the complainant and those persons, along with some identify facts are not provided to limit the possibility of identifying the persons charged.

Advisory Op. No. 06-55 - Complaint Against Local Government
Hearing and Decision by: Chairman, Terry Massie, Vice Chairman Barbara Green, Commissioners William Dailey, Barbara Remus and Bernadette Winston

Dear XXXX:

The Public Integrity Commission (PIC) received your letter alleging misconduct of several Ocean View officials/employees and the Town Solicitor. Your letter was not a sworn complaint as required by law. [29 Del. C. § 5810\(a\)](#). However, the Commission reviewed it. Based on the following law and facts, PIC dismissed the allegations for failure to state a violation of the State Code of Conduct. [29 Del. C. § 5809\(3\)](#).

I. Standard of Review:

In deciding if allegations create a reasonable belief of a Code of Conduct violation, PIC assumes all facts as true. [29 Del. C. § 5808\(A\)\(a\)\(3\)](#).

II. Personal and Subject Matter Jurisdiction

You allege violations by Council member Leroy Thomas, Town Solicitor Dennis Schrader, and other Town officials and employees, in acting in a personnel related issue matter.

Your correspondence alleges:

(1) **Town officials and the Solicitor are subject to the State Code of Conduct.** The Town has an independent contract with the Solicitor, and/or his law firm. The Code does not include independent contractors as persons subject to the law. [29 Del. C. § 5804\(6\), \(12\), \(13\)](#) and [5812\(n\)\(2\)](#). However, we will assume there is jurisdiction.

Your letter alleges that these persons violated the Code by:

(2) **Denying the individual in the personnel related matter State and/or Federal rights of due process and equal protection.** Assuming a third party could assert the Constitutional rights of another, we have no jurisdiction over Constitutional issues. *Commission Op. No. 95-5 (attached)*.

(3) **Denying the individual an adversarial process and requiring him to speak immediately after the decision was made.** You thought he was entitled to:

(a) the process used in criminal proceedings--the Town first presenting its case, e.g., witnesses, etc., and the “defendant” then having rights to cross-examine, present witnesses, etc. Nothing suggests this was a criminal proceeding, nor do we have jurisdiction to so decide, we only administer proceedings in *29 Del. C., Chapter 58*.

(b) the process due to those charged with violating the Code of Conduct. [29 Del. C. § 5810](#). The individual was not charged with violating the Code of Conduct, so would not be entitled to that process.

(4) **Failing to seek a Commission opinion.** It is optional, not mandatory, for officials to seek advisory opinions. [29 Del. C. § 5807\(c\)](#). If you are alleging the individual was denied his “rights” and “process” under the advisory opinion provision, because they did not seek an opinion, his “right” to that “process” was not denied. Any official may seek an opinion. [29 Del. C. § 5807\(c\)](#).

(5) **Using a process that was not identified and was improper.** The Town Solicitor identified the process and procedures under the Town’s revised Rules of Procedure, Rule 14.1 and Mason’s Manual of Legislative Process. *Town Minutes (attached)*. If you are alleging he misadvised his client, we have no jurisdiction over an attorney’s advice to a client, or over the Delaware Lawyers’ Rules of Professional Conduct (DLRPC), even assuming it applies. *Commission Op. No. 98-25 (attached)*. We also cannot interpret a Town’s Rules of Procedure or the Legislative Process Manual. Our jurisdiction, [29 Del. C., Chapter 58](#), does not include those rules or processes.

(6) **Not pursuing this Commission’s venue to hear the substance of the matter.** The matter did not arise under the State Code of Conduct provisions. The charges are identified, e.g., improper procurement practices, “verbal threats,” “cover-ups,” etc. Again, we cannot interpret Town ordinances, rules or practices. We also have no authority to prosecute or issue advice on claims of “verbal threats,” “cover-ups,” etc. Thus, this Commission is not a proper venue for the Motion.

(7) **Violating [29 Del. C. § 5806\(a\)](#).** This is the only State Code of Conduct provision allegedly violated. It prohibits conduct violating the public trust. *Id.* Delaware Courts interpreted an identical provision in Wilmington’s Code of Conduct. [City of Wilmington v. AFSCME, Council 81, Local 1102, Del.Ch., C.A. No. 19561-NC, VC Noble \(March 21, 2003\)\(attached\)](#). The City disciplined a City employee by removing him from his job. It alleged, among other things, “public trust” violations by using racial remarks, fighting with a citizen, etc. The Court held “public trust” allegations are insufficient to state a claim because it is a “general public policy provision.” It said there must be “explicit,” “well-defined,” and “dominant grounds” rather than allegations of violating a general public policy.

This Commission has held that the restriction on violating the public trust is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The

Delaware Supreme Court has held that allegations of “an appearance of impropriety,” must be supported by “articulated facts”—essentially the same language as the *AFSCME* decision. *Seth v. State of Delaware*, 592 A.2d 436 (Del., 1991)).

Seth alleged that an attorney, who was a part-time State prosecutor, violated the “appearance of impropriety” in the DLRPC because of a dual relationship between his State job and private job. The Court said: Absent an actual conflict, it would not remove him as a prosecutor based on an unarticulated concern for the “appearance of impropriety.” It said appearances of impropriety claims have been criticized as too imprecise, leading to ad hoc results. Further, unsubstantiated claims were sometimes used as a tactical weapon against an official, when, in fact, there was no conflict.

This Commission does not interpret the DLRPC, but under the rules of statutory construction, a case decision is relevant if the language of one statute is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Commission Op. No. 99-51*(citing *Sutherland Stat. Constr.* ‘45.15, Vol. 2A (5th ed. 1992)(extract attached). Here, the decision addressed the same issue: did the conduct of a State official “appear improper”?

Finally, we have held that evil motives cannot be ascribed to public officials based on suspicion and innuendo, not hard facts. *Commission Op. No. 00-18* (extract attached). Officials are entitled to a “strong 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). Here, without any “hard facts,” it is alleged that the conduct appeared improper. Allegations using only the “public trust” claim as a “hook” into government officials without a connection to an explicit conflict of interest do not overcome that strong legal presumption, nor do they state a claim under the State Code of Conduct.

(8) Hearsay and Confidential information were improperly given to the press. The Town’s official minutes show that Councilman Magill said he gave the information to the press. No facts suggest it was from Councilman Thomas.

(a) Allegations of hearsay articles. Hearsay is a legal term used in evidentiary matters in a Court based on the Rules of Evidence. It is basically, an out of court statement, (oral or written) not made under oath. That means most information in the media is “hearsay.” Hearsay allegations do not establish a Code of Conduct violation.

(b) Allegations of confidentiality: You pointed to such things as a letter by a Town employee allegedly concerning a statement made by the individual. Neither your correspondence or the Town minutes establish that the letter was confidential. The Town employee who wrote it made no such claim at

the meeting. The individual who made the statement never claimed it was confidential, only that the phrasing of his statement was incorrect, and he was just joking. Absent a scintilla of evidence of confidentiality, the allegation fails to state a claim.

III. Conclusion

Even assuming all facts as true, the allegations fail to State a violation of the Code of Conduct because the allegations are not within the jurisdiction of this Commission, and/or fail to provide facts sufficient to establish a reasonable belief of a violation of the Code.

Original Signed by Chair Terry Massie

[07-63 – Jurisdiction - Application of Code of Conduct to Charter Schools – Opinion was released by Department of Education.](#)

Valerie A. Woodruff, Secretary of Education
Townsend Bldg.
401 Federal St., Suite 2
Dover, DE 19901 **D370B**

**07-63 – Jurisdiction - Application of Code of Conduct to Charter Schools
Hearing and Decision By:**Chairman Terry Massie, Vice Chair Barbara Green;
Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.

Dear Secretary Woodruff:

The Public Integrity Commission (PIC) reviewed the Department of Education's (DOE) request for an opinion on whether:

- (1) Charter Schools are "State Agencies" or "private enterprises" under the Code of Conduct; and
- (2) Charter School Board members and employees are subject to the Code.

Based on the following, PIC finds that Charter Schools are "State agencies," and the Board members and employees are subject to the Code of Conduct.

The DOE subsequently released the opinion, so it is no longer confidential.

I. Code of Conduct Law

“State agencies” and “private enterprises” are distinct and separate entities:

(A) "State agency:" any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly[29 Del. C. § 5804\(11\)](#) (*emphasis added*).

(B) “Private enterprises:” any activity by any person, for profit or not for profit.... Private enterprise does not include any activity of the State...political subdivision...agency, authority or instrumentality thereof.[29 Del. C. §5804\(9\)](#)(*emphasis added*).¹

II. Application of Charter School Law and the Code of Conduct:

(A) Charter Schools fall within the definition of “State agency” because:

They are an act of the General Assembly. 14 Del. C. § 503 & § 504(c) & (d); they are “public schools” and “Reorganized School Districts.” *Id.* “School districts” and “Boards of Education” are “State agencies” in the Code. [29 Del. C. § 5804\(10\)](#).

(B) They are not “private enterprises” because:

“Private enterprise” excludes activities of the State and authorities thereof. [29 Del. C. § 5804\(9\)](#). Charter School Board members are “public agents,” authorized by a public school district or the Department [Department of Education] to control the Charter School.” [14 Del. C. § 504\(b\)](#)(*emphasis added*). See also, [14 Del. C. § 511](#) (*local schools boards and DOE approve Charter Schools and denials cannot be reviewed*). The Charter School laws repeatedly refer to the activities of the State by local school districts and DOE as they relate to Charter Schools, and many provisions treat Charter Schools in a manner different from “private enterprises.”² Other State activities are: the State

¹Entities may be a “State agency” for some purposes but not others. *Commission Op. No. 98-28*(citing *Skomorucha v. WHA*, 504 F. Supp. 831 (D. Del., 1980); *WHA v. Williamson*, 228 A.2d 782(Del., 1967)); *Atty. Gen. Informal Op. No. 93-1018* (July 21, 1993); *Atty. Gen. Op. No. 79-F013* (Nov. 30, 1979); *State v. WHA*, Del. Super., C.A. No. N-02-021177, 1178, 1179, 1180, J. Toliver (February 10, 1993). We do not decide if Charter Schools are State agencies or private entities for any purpose except the Code of Conduct.

²For example:

(1) Charter Schools may sue and be sued to the same extent and on the same conditions as a public school district; [14 Del. C. § 504\(d\)](#) –unlike a “private enterprise.”

(2) The employees, directors and officers enjoy the same immunities as employees, directors and officers of public school districts and other public schools; *Id.*–unlike private schools;

Auditor's mandate to audit the Charter Schools, [14 Del. C. § 513\(c\)](#); and the required approval by the State's Charter School approving authority, Budget Director, Controller General, and Secretary of Finance for Charter Schools to opt out of the State's accounting, payroll, purchasing, compensation, pension and/or benefits systems. [14 Del. C. § 512\(9\)](#).

These are "activities of the State" and excluded from "private enterprises."

Statutory Rules of Construction:

(1) Clear Language: Where the legislative intent is clearly reflected by unambiguous language, the language itself controls." [Cede & Co. and Cinerama, Inc., v. Technicolor, Inc.](#), 758 A.2d 485 (Del., 2000); [Coastal Barge Corp. v. Coastal Zone Indus. Control Board](#), 492 A.2d 1242, 1246 (Del., 1985).

The words of both laws are clear. Charter Schools are "public schools" and "reorganized school districts," under the Charter Law, and "school districts" are "State agencies," under the Code of Conduct.

(2) Legislative History: Statutes are to be interpreted consistent with the General Assembly's manifest intent. [1 Del. § 301](#). Aside from the plain language of intent, there are well-established constructional aids, to search for legislative intent. [Spielberg v. State](#), 558 A.2d 291, 293 (Del., 1989). It is helpful at the outset to trace the legislative history of the statutory scheme. *Id.*

(3) Charter Schools have the same standing and authority as a Reorganized School District, except the power to tax. [14 Del. C. § 503](#). While they may not tax, they receive tax dollars like public schools based on the number of students attending school; [14 Del. C. § 509](#). DOE calculates the costs based on a State formula; [14 Del. C. § 509\(d\)](#); -- unlike private enterprises.

(4) Charter School interests in real property are subject to DOE's rules with approval of the State Board of Education; [14 Del. C. § 504\(A\)\(3\)](#). -- unlike private enterprises

(5) Charter Schools must give a student roster to the local school district, [14 Del. C. § 504\(A\)\(9\)](#). -- unlike private schools.

(6) State Board of Education approves bus routes; [14 Del. C. § 508\(d\)](#); --unlike private schools

(7) DOE distributes information on Charter Schools; provides technical and other assistance on the same basis as to school districts; seeks federal or foundation grants for Charter School start-ups; administers the funds appropriated by the General Assembly for start-ups; [14 Del. C. § 510](#); -- unlike private schools.

(8) DOE and State Board, and approving authority may conduct financial, programmatic, or compliance audits; and State Auditor must conduct annual audits on the same basis as regular school districts; [14 Del. C. § 513\(c\)](#); -- unlike private schools.

Charter Schools were created in 1995. [71 Del. Laws, c. 180, July 10, 1995](#). After Charter Schools were created, the “school districts” wanted a separate Code of Conduct. Initially, proposed legislation created a separate Code. [H.B. 634](#). PIC has authority to recommend rules of conduct for public employees and officials. [29 Del. C. § 5809\(1\)](#). It explained to the House and Senate Education Committees its concerns about H.B 634. *PIC Ltr., Senator Sokola, June 21, 2000*. The proposed legislation was amended to make school districts subject to the Code. *H.B. 634, S.A. 1, June 30, 2000*. The next year, a law was signed making them subject to the same Code as other officials, employees, Board and Commission appointees, other State agencies, and local governments. [H.B. 54, signed 4/10/01; 29 Del. C. §§ 5802\(4\); 5804\(6\); 5804\(12\)\(a\); 5804\(13\)](#).

(3) Legislative Intent: Like the plain words, the history shows the General Assembly’s intent to include all school districts under the Code, when pre-existing law said Charter Schools are public schools and reorganized school districts. Had it wanted to exempt them from “school districts” under the Code it could have. For PIC to exempt Charter Schools is against the rule of construction that where the legislature is silent, additional language will not be grafted onto the statute. *Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, 132 A. 864, 876 (Del. Super., 1926))*.

(4) Public Purpose: Statutes with a public purpose are broadly construed to achieve that purpose. *3A Sands, Sutherland Stat. Constr., Chapter 71 (5th ed. 1992)*. The Code’s purpose is to instill the public’s confidence in its government; give standards for employees and officials to follow; and “guarantee a uniform maintenance of these standards.” [29 Del. C. § 5802\(1\) and \(2\)](#). Excluding Charter Schools would be a narrow construction; would not guarantee uniform maintenance of the standards between other public schools and Charter Schools, and would not serve the public purpose.

(5) Undesirable Results: If a statutory interpretation “would lead to an absurd and undesirable result,” the terms should agree with legislative intent. *Law v. Developmental Child Care, Inc., 523 A.2d 557, 560 (Del. Super., 1987); Helfand v. Gambee, 136 A.2d 558, 561 (Del. Ch., 1957); 2A Sutherland Stat. Constr. § 46.07 (5th ed. 1992)*. The undesirable result--excluding Charter Schools--does not agree with the legislative intent or public purpose.

Concluding that Charter Schools are “State agencies,” under the Code, is consistent with the rules of construction, legislative history and intent, and the purpose.

III. Application of the Code of Conduct to Board members

Charter School Board members are appointed public agents. The Code applies to: “State employees,” including any person: “who is an elected or appointed school board member.”[29 Del. C. § 5804\(12\)\(a\)\(3\)](#).

Again, we find the language is clear, and excluding Charter School Board members would be contrary to the language, intent, and public purpose, as discussed above.

IV. Application of the Code to Charter School Employees

The remaining administrative, professionals, teaching staff, etc., fall within another definition of “State employee”--“any person who receives compensation as an employee of a State agency.” [29 Del. C. § 5804 \(12\)\(a\)\(1\)](#).

As noted, Charter Schools use the State’s systems of accounting, payroll, compensation, pensions, etc., unless various State agencies approve opting out. [14 Del. C. § 512\(9\)](#). We understand from Deputy Secretary Nancy Wilson, and Deputy Attorney General Mary Cooke, that Charter School employees are paid by the State through the State system. Further, the Charter Law acknowledges the equivalency of Charter School employees to local school district employees, e.g., (1) same immunities as employees, directors and officers of public school districts and other public schools; [14 Del. C. § 504\(d\)](#); (2) same rights to organize and bargain collectively as employees of other public schools; [14 Del. C. § 507 \(c\)\(3\)](#); having State certified teachers unless exceptions are made on the same basis available to public schools. *Id.* The “same basis” creates like standards between these employees and other public schools. Making them subject to the same Code of Conduct also creates a uniform standard.

Based on the Code’s definition of “State employees,” and the facts that Charter School employees work for a public school, and have indicia of equivalent treatment, we find they are subject to the Code.

Again, to find otherwise would be contrary to the language, history and purpose.

IV. Conclusion

Based on the above law and facts, we find that the Code of Conduct applies to Charter Schools, their Board members, and their employees.

Original Signed

07-36- Jurisdiction: Dual Compensation – A complaint was filed against a State official alleging the official was receiving two government paychecks and had not properly tracked an overlap in the hours reported at each job. 29 Del. C. § 5822(a)&(b). However, the official is paid with private funds; not State funds so the Dual Compensation Law does not apply, as funding from each job must be from State or local governments to fall within the provisions. Id. It also was alleged that the official, in the State job had violated the Code of Conduct. The Commission had no jurisdiction over the official in the State job which is specifically excluded from the Code of Conduct.

07-46 - Local Election Qualifications - The Code provides that the Commission can give advisory opinions, grant waivers, or act on complaints at it pertains to “this chapter.” See, e.g., 29 Del. C. § 5809(2) & (3); § 5807 (a); § 5807(c); and § 5810(a). “This chapter” contains no election qualification provisions, so PIC has jurisdiction over election laws.

07-45 Violations of Local Laws: A local official, represented by Counsel, appeared regarding a filing by a local citizen. It was not a sworn complaint as required by the Code. 29 Del. C. § 5810(a). The filing referred to violations of local laws, not the State Code. The Commission only has jurisdiction over matters in “this chapter”—Title 29, Del. C. ch. 58. See, e.g., 29 Del. C. § 5809(2) & (3); § 5807 (a); § 5807(c); and § 5810(a). The official argued there was no jurisdiction. She said she did not want an advisory opinion, but wanted to assist the Commission in any preliminary questions about this filing. The Commission made it clear that this was no formal proceeding or anything to that effect. After a discussion on jurisdiction issues, the Commission held it has no jurisdiction over the local government’s Code provisions cited by the filer, only the Code of Conduct. Even assuming it alleged a Code of Conduct violation, it was not a sworn complaint, as required. 29 Del. C. § 5810(a).

08-07 –Private Citizen; Private Company - A private citizen filed a complaint against his private housing developer and the development's Board. The Commission has no jurisdiction over private entities or persons. Under the Code of Conduct, it has authority over Executive Branch "State employees," "State officers," and "Honorary State Officials."[29 Del. C. § 5804\(6\), \(12\) and \(13\)](#). It also has authority over local government employees and officials if they have not adopted their own Code of Conduct which must be approved by this Commission as being as stringent as State law.[29 Del. C. § 5802\(4\)](#). As the complaint did not encompass such persons, it was dismissed for lack of jurisdiction.

08-33, 08-34 and 08-39: Personal or Private Interest in Private Organization; Jurisdiction

The Commission was asked if a Council member had to resign from a private organization. When the Town Council provides some funding to the organization. Both the Council member, and the Council independent of him, made the requests. The Council had passed a resolution pertaining to the matter. Private citizens also requested advice.

(1) Who May Seek Advisory Opinions from PIC? One issue was whether a Council member could seek an advisory opinion, when the local Council had decided it would seek an opinion about his conduct. The statute allows employees, officers, officials, and agencies to seek opinions. [29 Del. C. § 5807\(c\)](#). Thus, both he and the agency (Council) were free to seek advice on the same issue. However, several private citizens also sought advice on the Council member's conduct. Unlike complaints, which can be filed by "any person", [29 Del. C. § 5810\(a\)](#), advisory opinions can only be sought by government employees, officers, officials and agencies. However, to the extent the private filings provided facts relative to the alleged conflict of interest issue, where relevant and material, they would be considered.

(2) Jurisdiction Over Council Resolutions: A question was raised about the validity of Council's resolution, saying that Councilman must resign from the organization. PIC'S duty to local governments is only to administer and implement the State Code of Conduct. [29 Del. C. §5802\(4\)](#). It cannot decide the validity of a Town resolution for Council members to resign from private organizations.

(3) Jurisdiction Over Other Conflict Laws: One request cited [29 Del. C., ch. 10](#), Legislative Conflicts of Interest, as the applicable law. That statute clearly says the House and Senate Ethics Committees, not PIC, interpret that law. [29 Del. C. §1003](#). It does not apply to local officials. The Code of Conduct, administered by PIC, applies. [29 Del. C., ch. 58, Subchapter I, §5802\(4\)](#).

(4) Jurisdiction Over Constitution Issues: As to a possible Separation of Powers violation, one requestor noted that PIC may not have jurisdiction over

this. He was correct. Administrative agencies usually have only the jurisdiction given by statute. 2 *Am. Jur., 2d Administrative Law* § 275 (1994). PIC's jurisdiction is limited as noted above. [29 Del. C. § 5802\(4\)](#). It has no jurisdiction over Constitutional issues. Courts have held that those issues are within the courts' expertise; not an administrative agency's. See, e.g., *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir., 1974); *Matters v. City of Ames*, 219 N. E. 2d 718 (Iowa Supr., 1974); *Hayes v. Cape Henlopen School District*, 341F. Supp. 823, 833 (D. Del., 1972).

(5) Jurisdiction over private enterprises and campaign activities and finance laws. An issue was raised alleging the private organization was engaging in campaign activities. Campaign and/or election laws are not in the State Code of Conduct [\[See, Title 15 Delaware Code\]](#). Also, to the extent the concern was about the acts of any non-government entity and/or private citizens, the Code only applies to government employees and officials. See, e.g., [29 Del. C. § 5802\(4\)](#).

(6) Jurisdiction over local government policies and laws not covered by the Code of Conduct. Issues were raised regarding the local government's "take home car" policy, and procurement rules. PIC's jurisdiction over local officials is limited to the code of Conduct. *Id.* Thus, it has no jurisdiction over Council's policies on taking home government vehicles, absent a link to the Code of Conduct. As to the concern that a Council member, two years ago, procured items not funded in the budget, without following Town procurement rules, or getting approval, such matters are not in PIC's jurisdiction, absent a link to a provision in the Code of Conduct. The official was apparently censured by Council. Even assuming PIC had jurisdiction, the only administrative penalty that it can impose on elected officials, would have been the same - a letter reprimand or censure. [29 Del. § 5810\(d\)\(1\)](#).

(7) Conflict of Interest: PIC does have jurisdiction over whether a Council member has a conflict of interest because of serving on the Board of a private organization if he reviews or disposed of matters related to that organization, [29 Del. C. § 5805\(a\)\(1\)](#), or if he represents or otherwise assists that private enterprise before his own agency. [29 Del. C. § 5805\(b\)\(1\)](#). However, its opinions must be based on the particular facts of each case. [29 Del. C. § 5807\(c\)](#). Here, there are insufficient facts to render a decision, e.g., in his official position did he participate in decisions about the organization or recuse? In his private position, did he represent the organization before Council, or assist them in preparing a request for funding, etc.?

(8) Confidentiality: [29 Del. C. § 5806\(f\) and \(g\)](#). The Council's letter alleged the Council member gave confidential information to the media. That allegation was factually incorrect, as the Council's own official minutes showed Council discussed the particular matter in public twice. The allegation was dismissed for failure to State a claim.

08-36 – Job Qualifications - PIC was copied on an anonymous letter sent to an agency's personnel office saying that an applicant was not qualified for the position sought. If the complaint were filed with PIC, it would require a sworn complaint. [29 Del. C. § 5810\(a\)](#). Further, the information did not allege any connection to any Code of Conduct provision as required by [PIC's Rules, III Investigations](#). PIC has no jurisdiction over the qualifications of any individual hire by the State. That is generally a personnel issue. The agency to which the anonymous letter was sent was so notified.

08-38 – No Jurisdiction/No violation - An attorney for a citizen whose profession was regulated by a State agency wrote to the regulatory agency about a complaint filed against her client. The complaint alleged that the individual, and her employer, were not following the rules for her profession. PIC was copied on the letter, as were others. The only reference in the letter to the Code of Conduct was that a Board member must recuse on the complaint because of a business relationship with the complainant. The agency provided information that the Board has not considered the complaint. It is still under investigation. After the investigation, the report goes to a State agency under which the Board does not fall. That agency can recommend dismissal. If dismissed, it would never come to the Board. If not dismissed, the procedure is for those with conflicts to recuse, and the Board member could recuse. The Commission ruled that it had no jurisdiction over substance of the complaint against her client. It also ruled that the Board member has not violated the Code as he has not reviewed or disposed of any part of the complaint. [29 Del. C. § 5805\(a\)\(1\)](#).

08-40 –Acts of Private Organization - A private citizen wrote that a landowners' association will not adopt by-laws language that local officials could not be part of their organization. She gave no facts saying the local officials were reviewing or disposing of matters related to the organizations; nor representing or otherwise assisting them before their own agency.[29 Del. C. § 5805\(a\) or 29 Del. C. § 5805\(b\)\(1\)](#).The Commission has no jurisdiction to tell any private organization to bar public officials from their organization. Its jurisdiction is limited only to acts of government employees, officials, or honorary officials if there is a connection to the Code of Conduct.[29 Del. C. 5802\(4\)\(jurisdiction over local officials\)](#).The Commission copied the Town's attorney, and advised that if their officials want an advisory opinion they can seek one.

09-15 – General Assembly Members/Campaign Contributions - An anonymous person wrote that a State Representative improperly accepted campaign contributions. The letter was copied to a number of State officials. The Commission prepared a letter to those officials who were copied, saying: (1) PIC was sending them its position as they were copied, which was: it has no jurisdiction over: (a) Legislators as they have their own conflict laws[29 Del. C., ch 10](#); and (b) campaign laws are administered by the Elections Board. [15 Del. C. ch. 80, et al.](#)

06-51 Non-State Employee Disclosure of Contract with State [The Code of Conduct applies to State employees, officers, and honorary officials. [29 Del. C. § 5804\(6\), \(12\) and \(13\)](#). A non-State employee filed a disclosure of his contract with a State agency. The individual was notified that the Commission has no jurisdiction over non-State employees.

07-37 – General Assembly Member/Private Employment - A citizen filed a complaint against a State official alleging a violation of the Code of Conduct. However, the alleged acts were done as a General Assembly member. The Commission has no jurisdiction over the conflict of interest law for Legislators in their official capacities. [29 Del. C. ch. 10](#). The Legislator’s second job was not as a State employee. The Commission has no jurisdiction under the Code of Conduct of non-State employees. Even assuming jurisdiction, the Commission found that the complaint failed to state a claim because the individual did not review or dispose of the matter which allegedly created a conflict. [29 Del. C. § 5805\(a\)](#). Even the complaint said that the Legislator had not even commented on the particular matter. The complaint was dismissed for lack of jurisdiction, and even assuming jurisdiction, failure to state a claim. [29 Del. C. § 5809\(3\)](#).

Personal or Private Interests

06-57- Personal or Private Interest as a Board Member: When a violation is found, the proceedings may become a matter of public record. [29 Del. C. § 5807\(d\)\(2\)](#).

Advisory Op. No. 06-57 BA Personal or Private Interest@ Board Member
Hearing and Decision by: *Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, Barbara Remus, and Dennis Schrader*

Dear Mr. Zaback:

The Public Integrity Commission reviewed the correspondence of CHEER, Inc., a State contractor, and your three letters, on whether it is a conflict if, as the Division Director responsible for the home-delivered meals (HDM) program, you also are a Meals on Wheels Delaware (MOWD) Board member. Beyond the written materials, we heard your statements and Ms. Nirmala Abraham=¹ the Division=s nutritionist for HDM.

¹CHEER asserts Ms. Abraham is a MOWD Board member. Mr. Zaback states she is not. The 2006 MOWD Cookbook does not list Ms. Abraham as a Board member.

First, we note that CHEER² did not file a formal complaint. It asked that you seek PIC=s advice. You did so. Second, you and CHEER do not agree on most of the facts in CHEER=s letter. As a State official, you are entitled to a presumption of honesty. [Beebe Medical Center v. Certificate of Need Appeals Board](#), Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995). However, even with your facts and looking only at financial areas, your dual duties create conflicts which recusal cannot remedy.

I. Application of Law to Facts

The Code of Conduct provides that:

(1) State employees may not review or dispose of State matters if they have a personal or private interest that tends to impair judgment in performing official duties. [29 Del. C. ' 5805\(a\)](#).

Your personal and private interest is as an MOWD Board member. Board members have a fiduciary duty to their organization. [Oberly v. Kirby](#), 592 A.2d 445 (Del., 1991)(Board Director owes fiduciary duty as corporate officer and member). MOWD is directly linked to your review and disposal of HDM contracts. Your State duties include:

(A) staying current on HDM State and Federal rules governing program aspects;

(B) negotiating with, and selecting contractors to provide HDM;

(C) managing HDM State and Federal funds and contractors= administrative and meal costs;

(D) working with contractors to cut costs or find other funds if they exhaust State and Federal funds; and

(E) monitoring contract compliance, including use of MOWD funds. In your State job, you negotiate the contracts, considering availability of State and Federal funds, etc. If a contractor is selected, you suggest how they may cut costs on administration or meals to stretch funds. If they deplete State and Federal funds, MOWD funds only for unfunded meals, not administrative costs. Your actions affect MOWD.

(A) *Your State decision to not award a State contract:* Your non-selection cuts off MOWD as a resource for those entities. Your State decision bars *any* decision by MOWD=s Board on funding that entity. You, alone, make the Board=s decision through your State decision. Interestingly, while depriving the Board of its power, your State decision helps MOWD. When you make a State decision that is also the Board=s decision, you are *Aserving two masters@--the essence of a conflict. [In re: Ridgely](#), 106 A.2d 527 (Del., 1954).*

²Mr. Zaback says CHEER Director, Arlene Littleton, is an MOWD Board member so she has a conflict. If he is alleging a conflict under the State Code, it applies to State employees and officials not private vendors. [29 Del. C. § 5804\(6\), \(12\) and \(13\)](#). If he is alleging a conflict under MOWD rules or by-laws, we have no jurisdiction over MOWD=s corporate by-laws and rules.

(B) *Your State decision in Negotiating Contracts.* In negotiating, you work to get contractors to reduce administrative and meal costs. Again, your decision affects MOWD. If you get the contractor to reduce meal costs, it stretches State and Federal funds, but also reduces MOWD=s costs for unfunded meals.

(C) *Your State decision to Grant a Contract.* Once you award a contract, you monitor compliance, including use of Federal and State funds. Once those funds are gone, MOWD may fund unfunded meals. You discuss with contractors what MOWD will or will not fund. You and/or your staff attend MOWD meetings on funding a contractor. Those meetings are not always limited to just funding unfunded meals. At the MOWD meeting on whether to fund CHEER=s unfunded meals, your nutritionist said that CHEER=s administrative costs were too high. Administrative costs are not MOWD funded. Those costs are what you negotiate. In discussing that information, when it apparently was not necessary, you were in a position to have your official judgment questioned (if administrative costs are too high, why did you enter the contract?) Also, if you/your staff say administrative costs are too high, it calls into question on whose behalf you are acting. It reads like a non-funding recommendation, although MOWD does not pay those costs. Your fiduciary duty to MOWD includes trying to save costs. Oberly, supra. (*Board members have special duty to advance charitable goals and protect assets of non-profit*). . Also, as a Board member, you may influence its decision. Your duty to MOWD and ability to influence it, casts a shadow over whose interests you are serving.

(D) *Monitoring Use of MOWD=s Funds.* When MOWD pays for unfunded meals, you monitor use of its funds. You said this is not your official duty. That means you are working for the State and a private company concurrently. As a Board member, you have a fiduciary interest in the funds, which overlaps your State duties. Your dual duties could certainly clash, if your monitoring did not catch improper use of MOWD=s funds.

(2) Division Directors may not represent or otherwise assist a private enterprise on matters before any State agency. [29 Del. C. ' 5805\(b\)\(1\)](#).

You said that as a Board member, you give MOWD information on contractors; State and Federal funds; State and Federal rules; monitoring of contract compliance, etc. In effect, at MOWD you perform your State job.

As a Board member, with a fiduciary duty, you are to know MOWD=s finances. In fact, you raised funds for MOWD as a member of its AKitchen Cabinet.@*Meals from the Masters,@ Cookbook, 2006, p. 17.*

The Board listens to and evaluates your State performance as part of its decisions on fund raising, expenditures of funds, etc. For example, it seeks some funds through State grants-in-aid. In other words, you assist the private enterprise in deciding if it will seek a State grant.

Further, your State program, in part, depends on MOWD. When you go through your State budget process and seek funds, you also, as a Board member, know about MOWD=s finances. If the State is low on funds for your program, you know MOWD may have to pick up the costs of more unfunded meals. When you go to the State for funding, it is likely your Department head, the Budget office, and the General Assembly are (or should be aware of) MOWD funding assistance to your contractors. Questions about that funding would be directed to you in your official capacity. However, as you are a Board member, expected to know MOWD=s finances, your response could be seen as an MOWD decisionBwhich would be representing the private enterprise before the State.

In other words, your two roles come full circle. Your State job drives MOWD activities, and your MOWD role drives your State activities. It blurs the line of where you start and end your State and MOWD duties.

(3) State officials may not engage in conduct that may raise suspicion among the public that they are engaging in conduct that may violate the public trust.[29 Del. C. ' 5806\(a\)](#). This is basically an appearance of impropriety test. *Commission Op. No. 92-11*.

The Code does not require actual misconduct, only the appearance of misconduct. *Commission Op. No. 92-11*; *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987)(interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government." Court held that *an actual or apparent conflict of interest need not be found@*). Here, your dual roles raised a contractor=s concern. Before that, MOWD discussed not having a Board member from your Division. *Refine, supra*. (where just one person suspected a conflict, the Court considered that fact as some evidence of at least the appearance of a conflict). Whatever their concerns, there is a clear and significant overlap in your State and MOWD duties. State duties *must command precedence@* over personal and private interests. *In re Ridgley, supra*. When you simultaneously perform the same duties, the State duties are not commanding precedence. See, *Van EE v. EPA*, 55 F. Supp. 2d 1 (D. C. District Court (1999)(interpreting Federal restriction on representing or assisting a private enterprise before Federal agency or the appearance of suchC*there is a clear public interest in preventing government employees from allying themselves actively with private parties.@*).

Also, in negotiating contracts you are privy to confidential information. In fact, the contract you signed with CHEER, as the approving State official, had a confidentiality provision. That contract was active when CHEER met with MOWD and was subject to renewal in September 2006. See, *Contract extract attached*. CHEER was concerned about confidentiality. You said no names or salaries of CHEER=s staff were given. The contract language does not identify what

information is confidential, and we have no authority to interpret the State's contract language.

However, this is another area where contractors, or the public, can call your dual roles into question. You gain confidential information in the contract process. Your dual roles make you closely identified with MOWD. When your State and private duties are so overlapping, the public may well suspect that your private interests may raise suspicion that even inadvertently, you would disclose such information to MOWD.

II. Conclusion

We explained how your State job impacts on MOWD, and how your MOWD decisions impact on your State job. As a result, contractors and the public could well suspect that in reviewing and disposing of the State contracts, your judgment may tend to be impaired. They also could well suspect that you are representing or otherwise assisting the private enterprise. Because of the significant overlap in your State and MOWD activities, recusal cannot cure your conflict. To insure your State duties command precedence, you are advised to resign from the MOWD Board.

Original Signed By Chair Massie

06-65 – Personal or Private Interest: Personal Relationship of Roommates

A State agency asked if it would violate the Code if one of its employees input certain data into a State database for a large number of part-time employees. The data was given to her by another agency employee, and they were roommates. It was possible that if she entered the data, it could benefit that individual.

State employees may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. [29 Del. § 5805\(a\)](#).

Courts have held that close personal relationships can create conflicts. *Ford v. Dep't of Public Instruction*, C.A. #96A-01-009, J. Gebelein (Nov. 24 1997); (conflict for State employee to review and approve contracts for roommate); *State v. Ford and Thornton*, Cr. A. #s 951001830186 and 951001870191, J. Graves (Del. Super., March 26, 1996) (State employee prosecuted for awarding contract to fiancé).

The agency has the Supervisor review all data before it is input by the employee, and then review again after it is input. However, regarding her roommate, the Supervisor inputs that data. If they did not handle it that way, the supervisor would have to make the entries. The agency said it would be a

hardship because of the small number of employees and the large number of entries for part-time employees if the Supervisor had to input all the data to insure the employee did not change it. However, the agency could continue to monitor the entries on that particular individual.

The Commission found the Code was not violated as long as she did not review or dispose of the entries for her roommate. It said the restriction insures State employees do not show bias for or against an employee with whom they have a personal relationship. *Jones v. Board of Educ. of Indian River Sch. Dist.*, C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994)(*bias imputed to School Board member in terminating teacher because he had a negative personal experience with teacher*). Regarding any appearance of bias, the Supervisor's oversight is a check and balance against actual bias against others similarly situated to the roommate. Moreover, no facts suggest her personal interest in her roommate would make her alter records of others. In fact, his data was not relevant to that of the other persons.

07-05 – Personal or Private Interest: Appointing Brother to Local Government Board

On request for an advisory opinion from a local official, the Commission found the Conduct of another official violated the Code. In a motion for reconsideration, the Commission still found a violation. He was censured, as that is the only administrative penalty that can be imposed on an elected official. Tabs are not included, but are public records. He appealed to the Superior Court. The Court upheld PIC's process and decision. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008).

John F. Brady, Esquire
Brady, Richardson, Beauregard & Chasanov, LLC
10 E. Pine St.
P.O. Box 742
Georgetown, DE 19947

Advisory Op. No. 07-05 - Nepotism

Hearing and Decision by: Vice Chairs Barbara Green and Bernadette Winston;
Commissioners William Dailey, Dennis Schrader and Wayne Stultz

Dear Mr. Brady:

The Public Integrity Commission (PIC) reviewed nepotism allegations that Milton's Mayor when he nominated his brother as a Board of Adjustment alternate. (*Complaint*) Based on the following law and facts, we find reason to believe a violation occurred.

I. Jurisdiction:

The State Code of Conduct gives PIC jurisdiction over local governments unless they adopt a PIC approved Code. [29 Del. C. §5802\(4\)](#). Milton has not.

II. Standard of Review

All facts are assumed as true at the preliminary stage. [29 Del. C. §5808A\(a\)\(4\)](#). A Commission majority must find reason to believe³ a violation occurred. Officials have a "strong legal presumption of honesty and integrity," which the facts must overcome. [Beebe Medical Center, Inc. v. Certificate of Need Appeals Board](#), Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996). [Town of Cheswold v. Vann](#), Del. Supr., C. A. No. 05C-08-07, No. 445, 2006, J. Ridgely (April 23, 2007) (facts did not overcome presumption).

III. Application of Law to Facts:

Officials cannot review or dispose of matters if a personal or private interest may tend to impair judgment in performing official duties. [29 Del. C. §5805\(a\)](#).

(1) FINANCIAL INTEREST: A conflict is automatic if financial interests in the decision exist. [29 Del. C. §5805\(a\)\(2\)\(a\)](#). No facts suggest any financial interests.

(2) OTHER PERSONAL OR PRIVATE INTERESTS. The Code covers more than pecuniary interests. *Commission Op.. No. 97-24*. Associative relations can be a "personal or private interest." [Shellburne, Inc. v. Roberts](#), 238 A.2d 331 (Del. Super., 1967)⁴ (*alleging "personal interest, " " conflict of interest," "using public office" due to "personal interest," and the decision was not on the merits but: (1) a desire to help coreligionists; (2) a close attorney-client and business relationship with the attorney for the group seeking action; and (3) a colleague's wife's membership in the Church affected by rezoning*). These facts, even absent a financial interest were enough to deny dismissal. *Id.* This relationship is even closer.

³"Reason to believe" means "probable cause." *Coleman v. State*, 562 A.2d 11 71, 11 77 (Del., 1989). "Probable cause" means facts and circumstances are enough to warrant a person of reasonable caution to believe an offense occurred. *State v. Cochran*, 372 A.2d 193, 195 (Del., 1977).

⁴*Shellburne* was a common law case. However, conflict laws do not generally abrogate common law unless expressly stated. *63 Am. Jr. 2d Public Officers and Employees* §253. Abrogation not expressed. [29 Del. C. §5805\(a\)](#).

Town Charter and ordinances duties are that: "the Mayor shall appoint all committees." His "personal interest" was a family member whom he appointed.⁵ These are not conclusory allegations without support. Independent of the allegations, the official Town minutes show that it occurred. Those facts meet the statutory elements. It is of no moment that he took no other action.⁶ Even without facts to show "undue influence," "indirect" and "unsubstantial" participation is "undoubtedly improper" when a close relative is involved. [Prison Health Services Inc. v. State](#), C.A. No. 13,010, Ch. Ct., KC. Harnett III (June 29, 1993). In interpreting this very restriction, the Court said an official's comments were "neutral" and "unbiased" and showed no "undue influence" but still said he should have recused himself. [Beebe](#), *supra*.

(3) GENERAL PUBLIC PURPOSE: The Code's general purpose is to instill public confidence that officials do not actually violate the law, or create a justifiable impression of a violation. [29 Del. C. § 5802\(1\)](#).

(4) PUBLIC! PURPOSE OF "PERSONAL INTEREST" RESTRICTION:

Barring action if a personal interest exists insures fair decisions. Apparently, the Mayor's brother has some experience with historic land use. That may show some merit in the act. However, the letter of the law has no exemptions if the official's act has merit or is unbiased. Again, Delaware law says "unbiased" participation is improper. [Beebe](#), *supra*. Here, the brother would have a public office which has significant community prestige because of land use issues. The benefit to the Mayor would be having a relative involved in historic preservation when his political platform includes "expanding and protecting the Town's historic district" and "preserving Milton's heritage." [Town of Milton, website](#). While they may be good causes, the public may suspect the Mayor may be "stacking the deck," to advance his political programs, or may suspect the brother would act to benefit those platforms rather than decide on the merits.

A complete bar insures-actual compliance with the letter of the law; it also insures compliance with the spirit of the law-instilling public confidence. Thus, with or without actual bias, recusal limits the public's "justifiable impression" of a violation.

⁵ He tabled the appointment when it was challenged as a conflict, saying he would seek a legal opinion. That opinion was not from PIC which has sole statutory authority to interpret this law, although he availed himself of PIC services previously. Subsequently, it was determined that he had no legal authority to appoint alternates, even absent a conflict.

⁶ Had the appointment proceeded, his brother's work for the Board would be subject to the Mayor's review, as the Zoning Ordinance gives a right to appeal the Board's decision to the Mayor and Council.

IV. Conclusion:

Based on the above facts and law, we find that appointing his brother is sufficient reason to believe that both the letter and the spirit of the law were violated.

Original Signed by Vice Chair Bernadette Winston

Cc: George Dickerson, Town Manager
Don Post, Mayor
Marion Jones
Keith Brady, Assistant State Solicitor

07-05 Motion for Reconsideration

Hearing and Decision by: Terry Massie, Chairman and Vice Chair Barbara Green; Commissioners Dennis Schrader, William Dailey and Wayne Stultz

Dear Mr. Brady:

The Public Integrity Commission considered the Motion for Reconsideration of its prior decision that concluded Milton's Mayor, Donald Post, should not have appointed his brother as an alternate on Milton's Historic District Commission. *Tab A, Motion; Tab B, Op. No. 07-05*. Based on the following law and facts, we reach the same conclusion.

I. Standard for Reconsideration

Reconsideration is not addressed in the statute. [29 Del. C. §§ 5807\(c\)&5810](#). PIC's Rules specifically allow reconsideration in complaint proceedings; not advisory opinions. [PIC Rules, Rule IV \(C\)\(P\)](#), p. 7. PIC treated the filing as an advisory opinion. ([¶ \(B\)\(3\) below](#)). However, PIC has reconsidered advisory opinions. *Op. No. 96-21*.⁷ We do so here.

We use Superior Court Rule 59 as the standard. Rule 59 motions are to correct errors; not add new arguments. [Beatty v. Smedley](#), C.A. No. 00C-06-060 JRS, *J. Slights III (Del. Super., March 12, 2003)*. It is denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

⁷Public bodies exercising judicial functions inherently have powers, like Courts, to reconsider, vacate judgments, etc. *Henry v. Dep't of Labor*, 239 A.2d 578 (Del. Super., 1972)(State Commission acting in a judicial capacity, like a court, needs an opportunity to correct errors, change of mind, etc. *Id.* at 581); *Family Court v. Reeves*, Del. Super., C.A. 97A-10-001 RCC, *J. Cooch (Nov. 21, 1997)*(State Board had no Procedure for Reconsideration but had inherent authority to hear the motion as it was like Superior Court motions).

II. Application of Legal Principles and Facts

Argument 1. Mayor Post did not receive written notice of the hearing as required in the Public Integrity Commission Rules, nor was he able to attend that meeting in person.

(A) Legal Principle: Mr. Post may be alleging denial of notice and opportunity to be heard.

(1) Constitutional Due Process. If he is alleging Constitutional due process denial, PIC has no jurisdiction. Generally, administrative agencies have only the jurisdiction conferred by statute. *2 Am. Jur. 2d Administrative Law* § 275 (1994). PIC's jurisdiction is only the Code of Conduct. [29 Del. C. §§ 5809\(2\) & \(3\)](#) and [5810\(a\)](#). Courts have held that Constitutional issues are in the courts' expertise; not an administrative agency's. *Plano v. Baker*, 2d Cir., 504 F.2d 595, 599 (1974); *Matters v. City of Ames*, Iowa Supr., 219 N.W.2d 718 (1974); *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, 833 (D. Del., 1972).

(2) Complaint Process: If he is alleging due process denial under the statute or rules, those rights apply only to the complaint process. [29 Del. C. § 5810\(a\)](#); [PIC Rules](#), Rule IV (C), (D) and (E), p. 5. This filing was treated as an advisory opinion. See, ¶ (B) (3) below.

(3) Advisory Opinion Process: The statute does not require appearance. PIC may proceed on a "written request." [29 Del. C. § 5807\(c\)](#); [PIC Rules](#), Rule VI (A)(1) and (4), pp. 8-9. The Rules address attendance. [PIC Rules](#), Rule VI (A)(5), p. 9. It is the Commission's option. *Id.*

(B) Process in this Particular Case.

(1) Complaint Process: A sworn complaint, or PIC acting on its own, triggers this process. [29 Del. C. § 5810\(a\)](#). Either way, PIC can refer it for investigation and a report. [PIC Rules](#), Rule III (A) and (E). Then, its Counsel, the Attorney General, or Special Counsel may file a complaint. [PIC Rules](#), Rule III (C)(1). If a complaint is filed, notice and hearing rights arise. [29 Del. C. § 5810\(a\)](#); [PIC Rules](#), Rules III (D) and IV (D) and (E). This was not a sworn complaint. *Tab D, Jones Filing*. PIC did not pursue a complaint on its own.

(2) Advisory Process: Official's written filing. Marion Jones is a Commissioner, Board of Adjustment-Historic District Commission, and on its Ordinance Review Committee. *Tab E, Minutes*, pp. 2, 3. She was present at the meeting. *Tab E, Minutes*, pp. E-4. She wrote the filing. *Tab D, Jones Filing*.

(3) Notice of the Advisory Process and Written

Statement: Advisory requests do not require notice. However, the Town Solicitor was told by phone that PIC could treat the filing as an advisory request. A letter to him cites advisory opinion sections—[29 Del. C. § 5807\(c\)](#), not the complaint section—[29 Del. C. § 5810](#). It says “if an official obtains advice,” and calls it a “filing.” Mr. Post was copied. *Tab F, PIC Counsel ltr., June 5, 2007, p.1 ¶(3)*.⁸ The Solicitor reviewed the filing; asked for dismissal; and copied Mr. Post. *Tab G, Brady Ltr, April 30, 2007*. Informing Mr. Post is consistent with Mr. Brady’s duty of client communication, not PIC’s Counsel. *Delaware Lawyer’s Rules of Professional Conduct (DLRPC), Rules 1.2, 1.4 & 4.2*.

(4) Notice of PIC’s meeting and Opportunity to Be Heard:

(A) The dismissal request was one opportunity to be heard. Like advisory opinions, they are decided on the pleadings—the “paperwork.” *Super. Ct. Rule 12*. As a responsive filing, it is equal to a general appearance. *Canaday v. Super. Ct., 119 A.2d 347(Del., 1956)*.

(B) A second opportunity was when PIC set a meeting date and time for Mr. Post and Counsel to appear. They did not, as they were at the County’s budget hearings. *Tab A, Reargument Motion ¶ (3)*. The Town Manager appeared. *Id.* He contacted the Solicitor on whether to proceed. He proceeded. (*Tab H, PIC Transcript, pp. 1-2*). It was presumed then, and confirmed by the Reargument Motion, that he was the Town’s representative. *Tab A, Reargument Motion, ¶ (3)*. He said his knowledge was from “review of the files and minutes” and “meetings.” *Tab H, PIC Transcript, p. 4*. He also was copied on correspondence. See, *Tab G, Brady Ltr, April 30, 2007*. PIC presumes Mr. Post and his Counsel, communicated on the decision to have Mr. Dickerson speak, and knew where his knowledge came from. *DLRPC 1.2 and cmt 1. (With respect to the means by which a client’s objectives are pursued, the lawyer shall consult with the client and take such action as impliedly authorized)*. An extension of time or rescheduling was not sought. Mr. Dickerson was not treated as, nor acted as, an attorney. He was a fact witness. *Tab H, PIC Transcript, pp. 1-11*.

Argument 2: PIC’s Counsel did not ask the Town Solicitor questions about Mr. Post except on another appointment.

No facts or laws are cited requiring PIC’s Counsel to ask questions about Mr. Post’s appointment of his brother. If this seeks Counsel’s work-product or thought processes, those are privileged. *Carlton Investments, v. TLC Beatrice International Holdings, Inc., C.A. No. 13950, Del. Ch., M.C. Parker (Sept. 17, 1996)*. Mr. Post’s Counsel had the filing. *Tab G, Request to Dismiss*. The filing specifically refers to Mr. Post appointing his brother. *Tab D, Jones Filing ¶ 2*. The

⁸Mr. Post is personally knowledgeable of the statute and Rules process, as he has not only sought advice but has filed at least three “complaints” about other officials, which were treated as advisory opinions. *Commission Op. Nos. 05-44, 46, 49 and 63*. Most of them dealt with questions on relatives of officials.

Minutes were attached in support. *Tab E, Minutes pp. 2, 4.* These facts could have been challenge if desired. The motion to dismiss did not do so. *Tab G, Request to Dismiss.* PIC considered the facts in the filing, the minutes, Mr. Dickerson's statements, and the Request to Dismiss. It did not consider questions that PIC's Counsel *did not* ask.

Argument 3. (A) Due to a required appearance of the Town Solicitor's other duty as the Recorder of Deeds for Sussex County, Counsel did not arrive in time for the hearing.

(B) The Town was represented by the Town Manager, George Dickerson, who is not a member of the Delaware Bar.

(C) No questions were asked about Mr. Post.

(A) *See, (B)(4) above.* PIC learned the morning of its meeting that the Solicitor would; be late. *Tab H, PIC Transcript, p. 1.* The Solicitor authorized Mr. Dickerson to proceed. *Id.* *See discussion, Argument 1, ¶(B)(4)(b) above.*

(B) Mr. Dickerson was a fact witness. PIC had the legal position--a motion to dismiss.

(C) The transcript shows questions and discussions about Mr. Post. *Tab H, PIC Transcript, pp. 3, 6, 7, 8, 9, and in general.*

Argument 4. (A) The opinion characterizes that Mayor Post "appointed" his brother. When in fact, Mayor Post who was reading a list of nominees, withheld his brother's name to seek a legal opinion.

(B) No appointment took place and Mayor Post's brother does not, nor has he held any position on a Board since Mayor Donald Post was sworn into office in April of 2006.

(A) "Appointments" are the selection or designation of a person, by the persons having authority to do so, to fill an office or public function and discharge those duties. *Black's Law Dictionary, p. 99, (6th ed., 1990).* The Mayor has the authority; used it; and no one except those on his list was "nominated" or "appointed" by any person for any position. The law on his "appointment" authority was attached to the underlying opinion. *See, Tab B, p. 2, III (2), ¶2.*

(B) The Mayor did not just read. "Someone" created the list and named the positions. That was his duty. Also, the Minutes show he did not just read; he commented on his brother's qualifications. *Tab E, Minutes, p. E-4.*

(C) The Mayor did not withhold his brother's name. It was on the list that he moved for acceptance. *Tab E, Minutes, p. E-2.* The Minutes say a vote occurred before Ms. Jones asked about a conflict. *Tab E, Minutes, p. E-4.* The Mayor then said he wanted to see the law precluding his brother from serving. *Id.* At best, he tabled the name.

(D) The issue is not if his brother held or holds a position. It is if the Mayor, in his official duties “reviewed or disposed” of his brother’s appointment. [29 Del. C. § 5805\(a\)](#). The underlying opinion cites the law and facts establishing the elements. See also, *Response to Argument 4(b)*. “Someone” exercised the Mayor’s duty, giving specific names for specific Boards. Mere logic says he, at a minimum, “reviewed” those before acting. Moreover, the law does not require Council’s approval so he has legal authority to completely “dispose” of the matter. Even the Reargument Motion concedes that the Town Charter may not require Council to approve. *Tab A, Reargument Motion*, ¶ 5. We address the Council’s “practice” in Argument 5.

(E) The Minutes do not show he withdrew his brother’s name. *Tab E, Minutes*, p. E-4. They say the vote was taken with no discussion before Ms. Jones raised the conflict issue. *Id.* The Mayor then said he wanted to see in writing what precluded his brother from serving⁹. *Id.* At best, he tabled the appointment, as he did with Ms. Louise Frey, when a conflict was raised. Only after learning that another law barred him from appointing any alternates, did he cease to proceed.

(F) At the reargument meeting, it was said that the Minutes are not always accurate. That argument was not in the motion to dismiss, although a copy was sent with that motion. It was not in the motion to reargue, although the opinion cited the Minutes as a fact basis, and Mr. Post relies on them in the next argument. Reargument is not for new arguments. However, we address it.

They are the official Minutes. Mr. Dickerson relied on them, and meetings, for his knowledge. He was asked to be the factual representative, presumably with knowledge of where he obtained his facts, and what those facts were. The Minutes show the facts which Ms. Jones also personally observed. No one says the Minutes are inaccurate in the list of appointees which include the Mayor’s brother. The Minutes call the acts “appointments.” It is the statutory term for the Mayor’s duty, so that is not inaccurate. Even the reargument motion says his acts were “appointments,” except somehow it was not an “appointment” of his brother. We address that below.

Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor nor the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General’s office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).

⁹Relatives can be public servants; but relatives who are officials cannot review or dispose of that decision.

(A) The legal issue is not Council's duties or practice. The fact issues are not if Council approved or not; or if the Solicitor or Town Manager were present. The issue is the Mayor's duties and acts. The "process" he used was consistent with his statutory duties to appoint, and he appointed his brother. Delaware Courts have held that officials do not have to be the final decision maker, or show actual bias or undue influence. [Beebe, supra; Prison Health Services Inc. v. State, Del. Ch., C.A. No. 13,010, V.C. Hartnett III \(July 2, 1993\)](#). In those cases, the officials were not the final decision makers; did not vote; had only "indirect" and "unsubstantial" involvement, or made only "neutral" and "unbiased" comments. Their interests still required that they not participate. Thus, even if the law or practice was for Council to approve, by appointing his brother, the Mayor's conduct still would be prohibited. Similarly, even if the conduct were not an actual violation, it has been that it would be "prudent" for the Mayor of Odessa and certain Council members to recuse themselves because of their close relative's interest in a zoning matter, even without a financial interest. [Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. \(November 27, 2000\)](#).¹⁰ In essence, the Court was saying that even without a legal conflict, the appearance of impropriety could require recusal.

(B) PIC had the Attorney General opinion to consider. However, that does not protect Mr. Post from PIC's conclusion. Only PIC has statutory authority to interpret the Code of Conduct. Courts have held that if an official gets advice from sources other than the one designated, the advice cannot be used as a defense. [Ethics Bulletin 009 ¶¶ 6-9](#). Also, it cannot be argued that he did not know the law required PIC to make the decision. "Ignorance of the law" is no excuse in Delaware. [Kipp v. State, 704 A.2d 839 \(Del., 1998\)](#). Moreover, as a factual matter, he knows PIC decides conflicts.¹¹ We do credit officials who seek advice, even if not from PIC. However, it is only one fact, among the rest. PIC gave him the presumption that he did not intentionally "create"¹² alternate positions and appoint his brother to circumvent the Code or others laws. PIC did not go forward with a complaint or refer it for prosecution. It merely advised that the conduct was improper.

Argument 6: The issue appears to be one of first impression and the Mayor has not had the opportunity to appear before the Commission in order to respond in a formal manner.

¹⁰In [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." However, on 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. The Court and Counsel were notified of the application to local governments.

¹¹See footnote 2.

¹²See, Tab H. Mr. Dickerson stating that the Mayor wanted to "create" the alternate positions.

(A) This is not an issue of first impression. Delaware case law on officials' participating if close relatives are involved is cited in the underlying opinion. [Prison Health](#), *supra*; [Harvey](#), *supra*. Also, as a factual matter, Mr. Post has obtained advice from PIC on an official participating if a relative may be involved, and filed complaints against other officials on close relative issues.

(B) We addressed his opportunity to be heard. Also, he appeared at the meeting on this motion, with Counsel. He made statements at the meeting.

III. Conclusion

The motion is denied. Controlling precedents or legal principles were not overlooked. PIC, as the fact finder, did not misunderstand the law or facts that would change the underlying decision.

Original Signed by Chair Terry Massie

07-42 & 07-47 – Personal or Private Interest – Personal Bias in Decision Making

In the following opinions, the Commission advised a local official it would violate the Code of Conduct if he participated in decisions pertaining to a developer when he had issued statements against the developer and the development, and knew the matters would come before him on the Zoning Board. After the first opinion, he moved for reargument. The Commission again advised him it would be a violation. He then filed an appeal in Superior Court. It had already ruled that advisory opinions cannot be appealed. [Post v. Public Integrity Commission](#), C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). PIC moved to dismiss, and he withdrew his appeal. However, he apparently decided to act against the Commission's advice. Subsequently, he was personally sued in Federal Court by the developer for participating in the decisions when he had a conflict. [Dewey Beach Enterprises, Inc. v. Town of Dewey Beach; Dell Tush in her individual capacity; David King in his individual capacity; Diane Hanson, in her individual capacity; and Richard Hanewinckel, in his individual capacity](#); C.A. No. 09-507-GMS, J. Sleet, (July 30, 2010). That case was dismissed without prejudice after the Town and the developer reached an agreement. However, Town residents challenged it. [Murray v. Town of Dewey Beach](#), C.A. No. 6785-VCN, V.C. Noble (Del. Ch., May 21, 2012). The Court dismissed the case. On reargument, it was again dismissed.

July 24, 2007

John F. Brady, Esquire
Brady, Richardson, Beauregard & Chasanov, LLC
10 E Pine St.
P.O. Box 742

Georgetown, DE 19947

Advisory Op. 07-42 – Local Land Use Issue

Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey and Wayne Stultz

Dear Mr. Brady:

At your request, the Public Integrity Commission reviewed the letter from Michael Eisenhauer, Vice Chair, Dewey Beach Ruddertowne's Architectural Committee. He asked if it was a conflict for David King, Vice Chair, Planning and Zoning Commission to write to all Residents and Property Owners on a land use issue. Based on the following law and facts, we find he should not participate in his official capacity on the re-development of the Ruddertowne Property.

Under the Code of Conduct, officials may not have any interest that may tend to substantially conflict with their official duties. [29 Del. C. § 5806\(b\)](#).

The letter clearly expresses his position, which is against the Architectural Committee and developer before any hearing by his Board. His "loud and clear" position may, at a minimum, raise the specter of bias in participating in the zoning decision. Delaware Courts have imputed bias to a School Board member who made negative public statements in advance of an individual coming before his Board for a decision. *Jones v. Board of Educ. of Indian River Sch. Dist.*, C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994). Such action is considered prejudgment, when the official duties require an official to hear all the facts, and without bias render a decision. The Court considered the argument that officials are entitled to a strong presumption of honesty and integrity. However, it concluded that even with that legal presumption, it still must impute bias.

Accordingly, he should not participate as a board member in decisions on this matter.

Original Signed By Chairman Terry Massie

Mr. Craig A. Karsnitz
110 West Pine St.
P.O. Box 594
Georgetown, DE 19947

[07-47 Motion for Reconsideration](#)

Hearing and Decision By: Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, Barbara Remus and Dennis Schrader

Dear Mr. Karsnitz:

The Public Integrity Commission (PIC) reviewed the Motion for Reconsideration of its advice that David King, Vice Chair, Dewey Beach Planning and Zoning Commission, recuse from matters on the Ruddertowne property. *Tab A, Op. No. 07-42*. No controlling precedents or legal principles were overlooked; nor were the law or facts misunderstood. The advice is the same: Mr. King, as Zoning Commissioner, must recuse on the Ruddertowne development matters¹³.

I. Standard for Reconsideration

PIC's statute does not address reconsideration. [29 Del. C. § 5807](#) and [§ 5810](#). PIC's Rules allow it in complaints. [PIC Rule IV \(C\)\(p\), p. 7](#). Mr. King's reconsideration motion acknowledged that the Rule applies to complaints, but not advisory opinions. *Tab C, Motion for Reconsideration, p. 1. (July 31, 2007)*. Mr. Eisenhower's filing was treated as an advisory opinion request. See, *infra*. While the statute, nor the Rules, provide for reconsidering advisory opinions, we do so here.

[NOTE TO READER: The Tabs referred to in this opinion are not included, but are public records]

Superior Court Rule 59 is the standard.¹⁴The motions are to correct errors; not add new arguments.¹⁵*Del. Super. Ct. Rule of Procedure 59*. They are denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

II. Background

Dewey Beach's Town Council appointed the Ruddertowne Architectural Committee (RAC) to evaluate and negotiate development of the Ruddertowne property. *Tab E, RAC Chair Eisenhower, e-mail filing (June 14, 2007); Tab F, Town Minutes, December 9, 2006*. As an appointee,¹⁶Mr. Eisenhower, may seek an advisory opinion. [29 Del. C. § 5807\(c\)](#). He asked PIC if Mr. King's conduct in

¹³We discuss the term "matter" later in this opinion.

¹⁴Tab D, Commission Op. No. 07-05, fn. 1 (State Commission's inherent authority to hear rearguments).

¹⁵In some instances, but not all, we note the new arguments. We address them anyway.

¹⁶Under the Code, appointees are "Honorary Officials" or "employees." [29 Del. C. § 5804\(6\)](#) and (12)(b)(2). Delaware Courts have applied the Code's "personal and private interest" provision, [29 Del. C. § 5805\(a\)\(1\)](#), to unpaid appointees to a State Board. Tab N, [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).

expressing a personal opinion on RAC's work and the development violated the Code since the Zoning Commission considers these matters. *Tab E, Eisenhower email*. The Mayor appoints and Council confirms Zoning Commissioners, such as Mr. King. *Dewey Beach Code, ch. 185 § 33-2*. The Zoning Commission acts on developers' draft ordinances affecting their property; building height, site plans, etc. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.; Tab G, Transcript, PIC meeting, see, e.g., p. 20, line 272 (Zoning Commission makes recommendations to Council on "substantive matters"); pp. 39-40, lines 530- 546 (Zoning Commission reviews draft ordinances and the Ruddertowne developer has submitted a draft)*.¹⁷

III. Arguments and Responses

Argument 1. The Advisory Opinion was not in accord with [29 Del. C. § 5802\(4\)](#); and is outside PIC's jurisdiction. See, also, [29 Del. C. § 5812](#). – New Argument.

Mr. King gives no legal or factual understanding of why PIC has no jurisdiction. He only gives the two Code sections without any reasoning on why they preclude PIC's jurisdiction. Accordingly, we will try to cover numerous legal principles as they relate to jurisdiction under those two provisions.

RESPONSE (A): Jurisdiction Under [29 Del. C. §5802\(4\)](#)

The statute provides:

"It is the desire of the General Assembly that all counties, municipalities and towns adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. *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 by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of *Subchapter I*, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as *Subchapter I*, Chapter 58, Title 29. Any change to an approved Code of Conduct must similarly be approved by the State Ethics Commission to continue the exemption from Subchapter I, Chapter 58, Title 29." [67 Del. Laws, c. 417, §§ 1, 2](#); [68 Del. Laws, c. 433, § 1](#) (*emphasis added*).

To the extent it is argued that Subchapter I does not apply to local officials because Subchapter I defines "State agency" as exempting "political

¹⁷Mr. King sometimes says the Zoning Commission has no power over such things as height restrictions, site plans, etc., but Dewey's Code shows otherwise.

subdivisions,” that is a definition, not the substantive law. [29 Del. C. § 5804\(11\)](#). Substantive law is clear: “This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993....” [29 Del. C. § 5802\(4\)](#). That law specifically tells local governments how they can be “exempt” and how to “continue that exemption.” *Id.*

Application of Facts and Law: (1) Dewey is a Town; and (2) has no approved Code.¹⁸ Thus, it has not established the “exemption.” Its employees, elected, and appointed officials are subject to Subchapter I. [29 Del. C. § 5802\(4\)](#). Mr. King is a Zoning Commission appointee. Subchapter I gives PIC jurisdiction.

RESPONSE (B) - Jurisdiction under [29 Del. C. § 5812](#).

The motion does not refer to a specific provision in § 5812. Section 5812 defines the terms in *Subchapter II*, Financial Disclosure. It applies to “public officers” as specifically listed, but exempts “elected and appointed officials of political subdivisions of the State...” [29 Del. C. § 5812\(n\)\(2\)](#). If it is argued that by exempting them from Subchapter II that they are exempt from Subchapter I, that is contrary to the plain language. Subchapter I says the only way local officials are exempt, and can “continue the exemption from Subchapter I,” is to have their own Code and changes approved by PIC.

Legal Principle: “Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.” See, generally, [Cede & Co. and Cinerama, Inc., v. Technicolor, Inc.](#), 758 A.2d 485 (Del., 2000); *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, 492 A.2d 1242, 1246 (Del., 1985).

Application of Facts and Legal Principle: The language of both Subchapters is clear. Subchapter I gives PIC jurisdiction over local officials; Subchapter II does not.

RESPONSE (C) - Jurisdiction - Consistency with Rules of Statutory Construction

¹⁸Local officials were notified of the General Assembly’s desire on or about April 15, 1992. Later, a letter was sent specifically to then Mayor, Patricia Wright, saying local Codes need approval. *Tab I, Ltr to Mayor Wright*, ¶ 2, January 6, 2003. In April 2003, an ordinance was passed. It was never sent for approval. The 2003 version was replaced July 8, 2005. The 2005 version was not sent for approval. Dewey’s Code was submitted for review at PIC’s September 2007 meeting, but was not as stringent as State law. *Tab I, Commission Op. No. 07-55*. Dewey has not submitted any changes to make it as stringent.

(1) Legislative Intent. The law requires construction consistent with the General Assembly's manifest intent. *1 Del. C. § 301.*

(a) In deciding legislative intent, Courts look first to the statutory language. *Tab N, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991).* Where the persons and things to which a statute refers are affirmatively or negatively designated, it infers the legislative intent. *Id.* (citing *Norman v. Goldman, 173 A.2d 607,610 (Del. Super., 1961)*).

Application of Principle: The law affirmatively declares local officials subject to Subchapter I, absent an approved Code. It negates Subchapter II application to them.

(2) Legislative History: Courts also look to the legislative history to aid in deciding legislative intent. *Cede & Co., supra.* The original Subchapter I did not mention local officials. *59 Del. Laws, c. 575 and 64 Del. Laws, c. 110.* Later, the 135th General Assembly asked the Delaware State Bar Association's Special Committee on Public Officials' Code of Conduct¹⁹ *to assist in drafting ethics legislation. Tab H-1, Committee Report, June 7, 1990.* The Committee said to General Assembly leaders:

"Your request indicated an intent that our proposed legislation should provide rules for the Executive branch of State government and for local government officials similar to the rules we proposed in 1986 for the members of the General Assembly." *Id.* (emphasis added).

In discussing local officials and employees, they noted that elected and appointed officials of political subdivisions... "are not deemed public officers within the meaning of the financial disclosure law." *Tab H-4 and 5. (emphasis added)* Regarding the Code of Conduct, [Subchapter I], the report said local political subdivisions could enact their own Codes. *Tab H-4. (emphasis added).* It also said local ordinances were not reviewed for purposes of the report. *Id.*

The Committee proposed that the legislation include the General Assembly's "desire" that local governments adopt their own Code within two years. *Tab H-2 and 3.* In 1991, when Subchapter I was rewritten, passed and approved, it included the language about its "desire" that all local governments adopt Code of Conduct legislation similar to the act to apply to their public officials. *Tab H-6, 67 Del. Laws, c. 417 § 2.* It also directed the State Ethics Commission [now PIC] to report to the General Assembly within two years the existence of local legislation and make a recommendation on legislation to be adopted and to cover such officials. *Id.* The exemption of local officials from Subchapter II, Financial Disclosure, was not changed.

¹⁹Hereinafter "Committee."

In 1992, the General Assembly adopted new language. Rather than a “desire,” for local Codes, it mandated that local officials were subject to Subchapter I, unless they had an approved Code. *Tab H-6, 68 Del. Laws, c. 433*. That is the present law. [29 Del. C. § 5802\(4\)](#).

Application of Principle: The legislative history repeatedly reflects the manifest intent of the General Assembly that local officials are subject to Subchapter I, absent a PIC approved Code, with changes also approved. It is the only means of “continuing exemption.”

(3) Unreasonable results: Interpretations of statutes should not lead to a result so unreasonable or absurd that it could not have been the legislature’s intent. *Synder v. Andrews, 708 A.2d 237 (Del., 1997)*.

Application of Principal: To conclude PIC has no jurisdiction would lead to the unintended result that most local governments would not have a Code of Conduct.²⁰ Such conclusion would be an attempt at an implied repeal of [29 Del. C. § 5802\(4\)](#). Implied repeals are not favored at law. *Silverbrook Cem. v. Board of Assm’t Review, 355 A.2d 908 (Del. Super., 1976)*, *aff’d.*, as modified, *378 A.2d 619 (Del., 1977)*. Further, that conclusion would ignore: (1) the clear language in Subchapter I mandating application; (2) the clear distinction between Subchapter I jurisdiction, as opposed to Subchapter II; (3) the repeated legislative acts that lead to including local officials; and (4) the rules of statutory construction.

(4) Consent to Jurisdiction: Delaware Courts have long recognized the ability to consent to jurisdiction. “The consent doctrine has been enunciated in many judicial decisions and is a satisfactory enough explanation of the basis of jurisdiction where consent is in fact given.” *Standard Oil v. Superior Court, 44 Del. 538 (Del., 1948)*. Jurisdiction is appropriate when persons waived defenses to personal jurisdiction by their conduct. *Hornberger Management Company v. Haws & Tingle General Contractors, Inc. 768 A.2d 983 (Del. Super., 2000)*.

Application of Law and Facts: At the time of the filing, Dewey Town Solicitor, John Brady, represented Mr. King. He had a copy of Mr. Eisenhower’s filing; was advised it would be treated as an advisory opinion; advised of the meeting date; and said PIC could proceed, but he would not be available. PIC’s underlying opinion states that the decision was “at your request.” *Tab A-1*. That is not disputed. No jurisdictional objection to jurisdiction was made between the time of the filing through the issuing of the underlying opinion. Jurisdiction issues can be considered waived if they are not raised. Here, it was newly raised in this motion. Motions for Reconsideration are not for new arguments. *Del. Super. Ct. Rule of Procedure 59*.

²⁰Seven of 57 local governments have approved Codes: Dover, Lewes, Millsboro, Newark, Smyrna, Wilmington, and New Castle County. PIC Annual Report, March 2006

CONCLUSION: No jurisdictional precedents or legal principles were overlooked. No law or facts were misunderstood. The underlying decision is not changed. PIC has Subchapter I jurisdiction of local officials, including Mr. King. [29 Del. C. § 5802\(4\)](#). It does not have Subchapter II jurisdiction over locals. [29 Del. C. § 5812\(n\)\(2\)](#).

Argument 2. This complaint was not based on sworn testimony and is in violation of the law and the Rules of this Commission. [See, Public Integrity Commission Rule III.](#)

RESPONSE: [29 Del. C. § 5807\(c\)](#) and [29 Del. C. § 5810\(a\)](#).

Complaints require a “sworn complaint of any person” or PIC may act on its own. [29 Del. C. § 5810\(a\)](#). If PIC acts on its own, after an investigation, a complaint must be filed with PIC by Commission Counsel, the Attorney General, or Special Counsel. [29 Del. C. § 5809\(a\)](#); [PIC Rules, III. INVESTIGATIONS, \(C\) \(1\) Report of Investigation](#).

Application of Law to Facts: Neither Mr. Eisenhower, nor PIC, instigated a complaint. It was a request for an advisory opinion which only requires a “written statement.” [29 Del. C. § 5807\(c\)](#). They may be filed by employees, officers, honorary officials, an agency or a public officer.²¹*Id.* Mr. Eisenhower was appointed to RAC, a Town Council created body. RAC acted on Council’s behalf on Ruddertowne negotiations.²²Mr. Eisenhower was authorized to seek an advisory opinion. *Id.* The law and procedures used were for advisory opinions, not complaints. *Id.*; [PIC Rules, \(VI\) “Requests for Advisory Opinions and Waivers,” § \(A\)\(1\)-\(5\)](#). PIC treated the filing as an advisory request at the proceeding. The underlying opinion was captioned “Advisory Op. 07-42.” *Tab A*. Mr. King’s motion acknowledged it as such, and called it an “advisory opinion.” *Tab C, Motion for Reargument, pp. 1 & 2*. The motion also acknowledges that [Rule IV\(C\)\(p\)](#) “applies to hearings and decisions on complaints and does not appear to apply to requests for Advisory Opinions.” *Id. at p. 1*. The argument that it was a “complaint” was made at the reargument motion. PIC’s deliberations covered the “complaint” versus “advisory opinion” issue. *Tab G-58 lines 778-817 and G-79 lines 1062-1064*. PIC again concluded it was an “advisory opinion.”

Aside from the use of the word “complaint” in this argument and argument 4, the motion refers to a “complaint” one other time. It says: “it is believed” that “the true nature of this dispute is a complaint...” *Tab C-1 ¶ 1*. No facts are given to support

²¹As discussed above, “public officers” are specifically identified at those who must file financial disclosure reports. [29 Del. C. § 5812](#). Local officials are exempt from that requirement. *Id.* The 1994 law increased PIC’s authority to interpret and administer more than Subchapter I. [29 Del. C. § 5809\(15\) & \(16\)](#). When it gave that authority, effective January 15, 1996, for the Financial Disclosure law, it amended the Advisory Opinion section to include “public officers,” as those who could seek and receive advice from PIC.

²²RAC has been disbanded.

that belief. Mere allegations, without supporting facts, are insufficient. *Del. Super. Ct. Procedural Rules 6(b) and 56.*

CONCLUSION: No law or facts change the underlying decision, nor is it shown that any legal principle was ignored in treating the filing as an advisory opinion.

Argument 3. This entire process violated Mr. King's right to due process since he had no notice of the complaint against him and no opportunity to be heard on any of the issues. - New Argument

RESPONSE: Notice and Due Process

(A) The complaint provision provides for "notice and opportunity to be heard." [29 Del. C. § 5810\(a\)](#). Again, it was not a "complaint," or treated such. *See, above.* The advisory opinion provision does not require appearance, only a written statement by the requesting official. [29 Del. C. § 5807\(c\)](#) (*emphasis added*). PIC's Advisory Opinion rules only require written statements. *Tab B, PIC Rules, Advisory Opinions and Waivers.*

Attendance is at PIC's discretion:

Rule IV(A)(5) Attendance at Meeting - Decisions Without Attendance - Prior to reaching its decision on the Application for a Waiver or an Advisory Opinion, the Commission *may* require the applicant and others, with pertinent knowledge of the facts necessary for the Commission to reach a decision, to attend a meeting of the Commission and testify. The Commission may in its discretion require that the testimony be under oath. The Commission may in a clear case grant or deny a Waiver or issue an Advisory Opinion based on the written application without requiring the attendance at a meeting of the applicant or others. (*emphasis added*).

Application of Law and Facts: It is undisputed that: (1) Mr. Eisenhower had authority to make a request; (2) he filed a written request with pertinent knowledge of the facts, attaching Mr. King's e-mail; and (3) it is undisputed that Mr. King wrote the e-mail. Mr. King does not deny the contents, but says the email was: a "note;" "a draft;" "a brain dump," and/or a "scenario." No matter what it is called, the factual contents are not questioned. Those facts were used for the underlying decision. *Tab A, Commission Op. No. 07-42.* This argument does not identify the basis of any notice and due process denial. Assuming the basis of this argument is that he was entitled to notice and process under: (1) a Constitutional right; (2) the Code and Rules for complaints; or (3) the Code and Rules for advisory opinions, we previously addressed those issues in Commission Op. No. 07-05. *Tab D-2 and D-3.*²³ We also addressed Counsel's duty of notice. *Id.* To the extent those notice and due process requirements are the basis of this argument, the same laws and procedures apply.

²³It was sent to the Town Solicitor and to present counsel before this reargument. *Tab J.*

Even the complaint provision, says “notice and the opportunity to be heard.” That does not necessarily mean physical appearance. For example, a motion to dismiss may be filed by Counsel, and the subject of the motion need not physically appear. He is “heard” through Counsel. *Commission Op. No. 07-05*.

Aside from notice and opportunity to be heard given prior to the first ruling, Mr. King had the opportunity to physically appear, and did so, to give facts at this motion.

CONCLUSION: The facts nor the law were ignored, and no facts or law in the reargument change the underlying opinion.

Argument 4: The complaint against Mr. King is factually incorrect. At the time of the preparation of the material of which Mr. Eisenhower now complains, there was no pending proceeding by any individual regarding “Ruddertowne” before the Planning and Zoning Commission. In addition, Mr. King’s notes were talking points only and in no way indicated any prejudice for or against any particular development. - New argument

RESPONSE: Use of term “complains.”

Argument 5: The filing was not a “complaint.” *See, above.*\

Argument 6: There were no pending proceedings.

RESPONSE: In his e-mails, Mr. King repeatedly refers to upcoming zoning matters as they relate to the Ruddertowne Development. The Town ordinance identifies specific areas with which the Zoning Commission deals, e.g., height, footage, site plans, Comprehensive Development Plan (CDP). *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.*

(a) June 3, 2006 –“Thoughts from the last RAC meeting.” *Tab K.* He specifically identified the Ruddertowne developer selected by Highway One LLP, Harvey Hanna & Associates (HHA). He said the developer “had read the new Comprehensive Development Plan (CDP)...walked into this deal planning to build a mega mall and include a large hotel...with an understanding that they could build to a height that is more than twice the current height limit ...planned on an expanded structured parking which will require developing to a higher total square footage...a primarily residential along the Van Dyke side --image six or seven floors of new condos from SR-1 to the Bay...they want a major re-development statement and intend a convention hotel as the keystone to this project.”

He said three meetings were scheduled, June 15, 22 and 29...that “will build sequentially to a final design concept that will be launched into the Town’s preliminary zoning approval process at the July Town meeting. *Id.*

(b) June 5, 2006-- “HW1 coming through the back door.” He said RAC is talking about special zoning for the proposed RB1, to permit 70 feet. ...there is strong concern from many town residents that this will spread to other zoning districts, it is clear that this dramatic change in zoning will apply to the Highway One Rusty Rudder property.” *Tab K.*

(c) June 7, 2006 - “Call to arms.” Said there was a “strong concern that the starting point will be “too high/too big.” *Tab K.* He then proposed a course of action on these particular issues as it related to opposing the Ruddertowne Development:

(1) “get as many like-minded residents and property owners to-” “attend the Town meeting, we need voices to say they strongly favor retaining commercial or mixed us in Ruddertowne, but not at the cost of a too-massive development. He said “see talking points in my earlier e-mails.” *Id. at ¶1.*

(2) “get as many like-minded residents and property owners to”-“meet on Saturday at 2:30 behind my condo to discuss what we heard at the Friday meeting and to plan a contingent course of action pending the 6/15 presentation by HHA. I am assuming we will respond to an undesirable proposal with a two-to-three page mailing to all town voters and would like to collect names of residents and property owners who support our efforts and are willing to be identified in any such mailing at this meeting and/or are willing to help finance this mailing.” *Id ¶2.*

(3) “get as many like-minded residents and property owners to” attend, listen, and as appropriate voice their concerns at the June 15th RAC meeting at which HHA is to present their design concept-presuming including drawings, specifications, etc., of their proposed development. *Id. at ¶3.* He said he was hopeful that when the RAC and commissioners were confronted with strong community opposition to any massive development project “grossly exceeding current zoning restrictions” that they will require a downscaling of the proposed development or rejection of such a plan.”

(d) June 8, 2006. “Change in plan and role.” He said he was advised by a Town official that it was premature for him to appear to be “taking sides” in the developing Ruddertowne discussions. *Tab K.* He continued:

“It has been my intent in circulating the ‘convention/resort hotel complex’ scenario—now as throughout the entire comprehensive plan development process....”...Although I have not taken a position for or against any specific proposal or future zoning applicant, there is the possibility that convening/hosting

a meeting that might lead to the formulation of a defensive plan of action against a potential future zoning applicant might be perceived as bias on my part against any such application. This would be improper and has not been/is not my intent."

"Therefore, to avoid an appearance of conflict of interest I must retract my offer to host a meeting of Dewey Beach citizens concerned about any potential developments inconsistent with current town zoning" (emphasis in original). Tab K.

The e-mails alone identify areas where, as a Zoning Commissioner, he could expect to be involved. He confirmed that at PIC's meeting on this motion.

(e)December 9, 2006–The Town minutes show he discussed the CDP. He was specifically asked how he about the recent site plan²⁴from Highway One would affect the CDP. *Tab F, Town Minutes, "Discuss and Vote–To approve a draft of the Town of Dewey Beach Comprehensive Plan."*(December 9, 2006). The facts show Mr. King knew about the Ruddertowne development; its connection to the CDP and zoning approval process. He repeatedly spoke against it on zoning issues, and specifically said zoning issues would be considered the very next month after his e-mails were sent. *Tab K.* To say nothing was pending pertaining to the Ruddertowne zoning, or that he did not recognize zoning issues in which he would be involved, is inconsistent with:

- (1) his undisputed correspondence, and the Town minutes;
- (2) his presumed knowledge of his legal and official duties to act on Zoning matters. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.;*
- (3) his own recognition that he had to make a "change in role and plans," because of his official position;
- (4) his own concern that his actions could raise an appearance of impropriety because of his remarks as they related to his official duties;
- (5) his own concern that his actions could be perceived as "bias." If he did not believe any of this would come before the Zoning Commission, what would be his reason for any concern about appearance or bias?

CONCLUSION. The facts were not incorrect. The facts used were Mr. King's own statements. PIC arrived at the very same conclusion he did– his conduct could raise an appearance of impropriety and of bias. It said it could "raise the specter of bias."

Argument 3: Mr. King's notes were talking points only and in no way indicated any prejudice for or against any particular development.

²⁴At the reargument motion, Mr. King said the Zoning Commission does not review site plans. It is unclear why he would have been asked about the site plan impact if the Zoning Commission does not review them.

RESPONSE:

(a) The e-mails show that Mr. King's "note" refers only to the Ruddertowne development—a "particular development."

(b) The "note"—the initial e-mail—is five pages, formatted with headings, bullets, issues, etc. The plain and ordinary meaning of "note" is "a condensed or informal record;" "a brief comment or explanation." *Webster's Collegiate Dictionary*, p. 794, 10th ed. (1994). It means "to make a brief written statement." *Black's Law Dictionary*, p. 1060, 6th ed. (1990). Mr. King's e-mail initial e-mail refers to it as a "draft" and a "brain dump." *Tab K-1*. In later emails, he says he is proposing "the following course of action;" that "like-minded residents," use them as "talking points." *Tab K-8*. At the reargument motion, he says it was a "scenario" that "I thought" the town should discuss. *Tab G-11 and 12, lines 150 to 163*. He referred to that scenario as a "massive development" with townhouses and hotel. *Tab G-12*. That is the same description in his initial e-mail. *Tab K-3*. Although he said it thought was for the "town" to discuss, he then said his e-mails were sent to about 12 people who were "friends." *Tab G-12*. He had asked those "friends" to pass the talking points to their network of "concerned friends." *Tab K-7*. As a factual matter, just his initial e-mail was more than a mere note. He wanted it used for much more.

(c) In the e-mail he: expressed "disappointment that these developers:

(1) seemed so poorly informed/mis-informed about the needs and desires of the Town's residents and property owners, and;

(2) seemed into a massive redevelopment rather than something more in scale with the rest of Dewey Beach and more closely mated to the 'way of life' that brought us here." He called it a "white elephant."

(d) He consistently found faults. After just one meeting, he said RAC "seems unwilling to make critical comments and/or to take a hard stand." *Tab K-2*. That comment is interesting in light of his many statements that he did not know what the proposal would be. RAC's officials, like all public officials, are to stay open-minded and base their decisions on the merits. Courts have noted that requirement when decision makers are involved in zoning. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island*, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6("Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); *Brittingham v. Board of Adj., City of Rehoboth Beach*, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another). If the proposal is not known, taking a hard stand would be inconsistent with the need for open-mindedness. Mr. King was the one who took a hard stand, when he says he did not know the proposal. *Tab K-2 through 8*. Assuming he did not know the proposal, he still was able to find faults with the developer and the development. The developer was "poorly informed/misinformed;" had "no sense" of the Town's "needs/desired;" did not "read the new Comprehensive Development Plan;" etc. *Tab K-2*. Again, assuming he did not know their proposal, he was able to identify very specific items that were problems: the

footage size, the height, the “structured parking lot” that would “raise the construction costs;” result in a “twenty-fold” increase in vacant stores; etc.

(e) He acknowledges that “then it hit me. The RAC is talking about special zoning.” *Tab K-7*. After sending out more e-mails, he notified his “friends” that a Town official advised him that it was “premature for him to ‘take sides’ in the developing Ruddertowne discussions.” *Tab K-9*. Regarding his earlier offer to have “like-minded residents” meet at his home to “plan a contingent course of action,” *Tab K-8*, he said: “there is a possibility that convening/hosting a meeting that might lead to the formulation of a ‘defensive plan of action’ against a potential future zoning applicant might be perceived as bias on my part against such application” and “this would be improper...” *Tab K-9*.

CONCLUSION: The Town official’s concern and Mr. King’s concern about, at least the perception of, bias were on target. Contrary to the argument, the facts show he: talked only of one “particular development;” criticized the developers and the project; even before he allegedly knew the proposal; sought to ally a force of “like-minded” persons to develop a “defensive” plan, etc. The plain and ordinary meaning of “prejudice” is: “an adverse opinion or leaning formed without grounds or before sufficient knowledge.” *Webster’s 10th Collegiate Dictionary, p. 919*. It arises from: prejudging or “bias.” *Id.* The facts are his written facts. We find as before—his acts at least raise the “specter of bias.”

Argument 5: The citation to Jones v. Board of Edu. of Indian River Sch. Distr., C. A. No. 93A-06-003, Graves, J. (Del. Super., January 19, 1994), is inapposite. The reasoning in the Jones case involved the review of a decision maker in a teacher dismissal case whose own children had been taught by the teacher in question and had certain negative experiences in that teacher’s classroom. This is far from the circumstances of this case. Had the Board allowed a full record to be developed, this distinction would have been made clear.

RESPONSE: The Code of Conduct states that an official cannot review or dispose of official matters where he has a “personal or private” interest that tends to impair judgment in making official decisions. [29 Del. C. § 5805\(a\)\(1\)](#). In *Jones*, a government official’s “personal or private interest” was the result of a familial relationship with a teacher, when he knew his official duties were to hear termination proceedings for that particular teacher. Before performing those duties he made negative statements about her. It was decided his statements showed pre-judgment and he should not have reviewed or disposed of that matter. Here also, Mr. King expressed his “personal and private interest” on a particular matter --the Ruddertowne development--when he knew, or should have known, his official duties were to participate in proceedings on that particular development. He made personal and negative statements about the particular development and developer. His “personal and private statements” were negative and showed prejudgment. Thus, *Jones* is not inapposite.

“Personal or private interests” need not be familial as in the *Jones* case, nor do the proceedings have to be termination proceedings. They are “any matter” in which the official has a “personal or private interest.” [29 Del. C. § 5805\(a\)\(1\)](#). If the “personal or private interest” may result in a financial benefit or detriment to the official or their close relatives, those are automatic conflicts under the law, rather than a conflict that must be decided on the particular facts. [29 Del. C. § 5805\(a\)\(2\)](#).

Delaware Courts have held under the common law that personal interests can arise from a relationship between an official and parties to planning and zoning matters. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del., 1967)(alleging “personal interest” or “conflict of interest” where church of decision maker would benefit from decision was sufficient to raise factual issue for Court). The common law has not been abrogated; it is codified in [29 Del. C. § 805\(a\)\(1\)](#). *Tab L-and 2*.

Thus, it is an issue of fact of whether the relationship is sufficient to create a “personal interest” or “conflict.” Recusal, when there is an interest that rises to the level of a conflict, is so that judgment will not even *tend to be impaired*. [29 Del. C. § 5805\(a\)](#). No actual impairment is required; only the appearance thereof. *Commission Op. No. 92-11*. Recusal insures that the conduct will not “raise suspicion among the public” that the public trust is being violated. [29 Del. C. § 5802](#) and [§ 5806\(a\)](#). Thus, in a re-zoning case, the Court found no actual violation of the requirement to recuse when close relatives and/or the official had no financial interests, but as a factual finding said the Board members would be “prudent” to recuse themselves, but because of the rule of necessity—recusal was not possible. [Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007, J. Goldstein \(January 12, 2001\)](#).²⁵ As in *Harvey* and *Jones*, this case does not show Mr. King has any financial interest. PIC has never said he did.²⁶ That does not mean he should not recuse. He still has a “personal or

²⁵In *Harvey*, the Court said the local officials were not subject to the State Code of Conduct. That misstates the law. Local governments which do not adopt their own Codes of Conduct are subject to the State Code. [68 Del. Laws, c. 433](#); [29 Del. C. § 5802\(4\)](#). The Court and attorneys for each party were notified by PIC after the opinion came out. Despite the statement that the Code did not apply to locals, the Court used it as the legal measure of their conduct. Further, the Court’s decision that it would be “prudent” to recuse because their relatives were involved, even though there was no violation of [29 Del. C. § 5805\(a\)\(2\)](#), is consistent with our prior decisions where there was no technical violation, but recusal was required to avoid an appearance of impropriety. In this underlying decision, PIC found Mr. King’s conduct created at least an appearance of impropriety—“specter of bias.”

²⁶Mr. King has raised the issue of the reason for citing [29 Del. C. § 5806\(b\)](#), indicating that it appears to relate only to financial interests, e.g., in a private enterprise, other employment, compensation, gifts or anything of value. While it specifically identifies those interests, it also says “or incur any obligation” which substantially conflicts with performing their duties. Statutory terms “must be construed according to the common and approved usage of the English language.” [1 Del. C. § 303](#). The common and ordinary meaning of “any” includes “every - used to indicate selection without restriction” and “all - used to indicate a maximum or whole.” *Webster’s Seventh*

private interest” in a matter for which he would also have official authority, and, thus, should not “review or dispose of the matter.” [29 Del. C. § 5805\(a\)\(1\)](#).

In interpreting that very provision, Delaware Courts assumed a conflict because a Board appointee to an unpaid position said he might have a conflict. The Court said even though his statements were “neutral” and “unbiased,” and he did not participate in the final vote, he should have recused himself “at the outset.” [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).²⁷ The Board member’s participation was challenged by an applicant who was not successful with the Board, and alleged the Board member had a “personal or private interest” because his private employer had an indirect business relationship with the other applicant, and his failure to recuse rose to the level of a violating his due process rights before the Board. Thus, it does not matter if the official statements are unbiased, nor is actual bias required.

Like [Beebe](#), Mr. King is an unpaid appointee. He has a “personal and private interest” in an official matter that would come before him. Unlike [Beebe](#), his comments were not neutral and unbiased, but slanted against the party who would have to deal with Mr. King’s Board. Once a conflict arises, recusal should occur “from the outset.” [Beebe](#). The reason is not only to avoid actual bias, but the appearance thereof. As in [Beebe](#), we gave Mr. King the strong presumption of honesty and integrity, even though his biased remarks were made when the CDP was to be considered the next month, and he spoke about the site plans at the December Town meeting. These final facts may suggest he did not recuse himself on the matter, however, he was given every benefit of the presumption of honesty.

CONCLUSION: [Jones](#) is not inapposite. Not only does [Jones](#) apply, but so does [Beebe](#), which interpreted the same provision at issue here—[29 Del. C. § 5805\(a\)\(1\)](#). Again, PIC did not misunderstand the law or facts, or the legal principle.

Argument 6: The opinion of the Public Integrity Commission is so broad and sweeping as to cast doubt on Mr. King’s ability to participate in any zoning decision. The decision itself is not clear in what “decisions on this matter” Mr. King should not participate.

(a) “Matter” is the term used in the statute. [29 Del. C. § 5805\(a\)\(1\)](#).

(b) “Matter” is defined in the statute. [29 Del. C. § 5804\(7\)](#). It means: “any application, petition, request, business dealing or transaction, of any sort.”

New Collegiate Dictionary, p. 40 (1967). To limit the provision to only things that have a monetary value would be contrary to the plain word “any.” Further, it would ignore the fact that non-monetary items can create conflicts, e.g., relationships with civic associations seeking decisions. See, *Shellburne*, *supra*.

²⁷The official in [Beebe](#), like Mr. King, was a non-paid appointee to a government board.

(c) “Matter” is framed in the context of the “personal or private interest,” as it relates to Mr. King’s duties pertaining to the Ruddertowne development, as the Commission bases its findings on the law and the “particular fact situation.” [29 Del. C. § 5807\(a\)](#). That was identified in the underlying opinion. As the decision must rest on the particular facts, we cannot speculate on all of the “matters” that could arise for Mr. King, as it would be engaging in hypotheticals, not “particular facts.”

(d) At least one “matter” example was given by Mr. King at the meeting. (*Tab G, transcript, pp.26, lines 349-355*). He said “it was his understanding” that if read literally it [the underlying opinion] would mean he could not participate in a review of a site plan on the Ruddertowne property. He then said that site plan review would not come to the Zoning Commission. Again, that statement is contrary to the Dewey Code which says the Zoning Commission reviews site plans. It also is contrary to the Town Minutes which show he was asked to comment on this specific site plan. *Tab F-2*. However, the significance of his statement is that he identified an action [review of a site plan] and the particular property [Ruddertowne] on which he made his statements. This shows the layperson’s grasp of the term “matter.” In fact, Argument 9 of this motion asks that Mr. King be able to respond on “this matter” but “this matter” is not specified. It is from the particular facts—the context—that it is understood that “this matter” means the subject of this particular motion—PIC’s opinion, just as Mr. King understood the advisory opinion as referring to “matter” within the factual contents.

(e) As “matters” arise, if clarification is needed, Mr. King can request additional guidance, just as guidance was requested on the same day as a Town meeting he was attending after the underlying opinion. Guidance was given to the Town Solicitor for him that same day. *Tab J-14*. The guidance given was also sent to Mr. Karsnitz that same day. *Id.* Guidance, when the Commission is not available, is Commission Counsel’s duty, based on PIC’s prior rulings. [29 Del. C. § 5808\(A\)\(a\)\(1\)](#).

Any upcoming matters of which he is now knowledgeable can be asked now. As agendas for the Zoning Commission’s upcoming meetings are normally posted at least 7 days in advance of a hearing, he would have time to get guidance. To be able to post in advance, he might even know before the posting date if he has any need for guidance.

CONCLUSION: This argument does not change the underlying opinion. That opinion found he should recuse from “matters” on the Ruddertowne Development/its developer. It does not apply to other zoning “matters” unrelated to that development. The statute defines “matter,” and examples of the definition are that, “application” or “petition” or “request” would include such things as requests for variances (e.g., height, footage), review of site plans, review of draft ordinances, etc., as they relate to the particular development/developer which was the subject of Mr. King’s statements.

Argument (7): Fundamental due process requires an ability to respond on behalf of Mr. King in this matter.

RESPONSE: “Due process” is the opportunity for notice and the opportunity to be heard. No facts or law suggest this argument is different from Argument 3 on Mr. King’s right to “due process” was denied. *See, Argument 3 response.*

(C) The following arguments were not raised in the written reargument motion, but raised at the meeting for the first time.

Argument (8): Mr. King does not know the length of time the advice should be followed.

RESPONSE: Again, this argument would require speculation rather than “particular facts.” [*29 Del. C. § 5807\(c\)*](#). It could entail such speculation as: *If* the development submits a proposal; *if* the proposal is accepted by the Zoning Commission; *if* it is accepted by the Town Council put in the CDP, *if* the CDP is kicked back; *if* a basis of the rejection relates to this development; etc. The basic rule is that he recuse in the Ruddertowne development “matter.” He has indicated an ability to spot a “matter.” Further, he can seek guidance from the Commission.

CONCLUSION: This argument does not change the underlying opinion. He is to recuse from matters on the Ruddertowne Development.

Argument 9: The Zoning Commission acts in a legislative capacity, not a quasi-judicial capacity.

RESPONSE: Mr. King said the Zoning Commission does not act as a legislative body. *Tab G, p. 4, line 50, e.g.* The Zoning Commission is appointed by the head of the Executive Branch (the Mayor). No law or facts are given to substantiate that the Zoning Commission is an arm of, or operates as, a legislative body. No facts or law suggest the Zoning Commission can pass laws, which is the purview of the legislative body. Delaware Courts have recognized the quasi-judicial nature of Zoning entities. *Tab N, [Mackes v. Board of Adj. of the Town of Fenwick Island](#), C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6 (“Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); [Brittingham v. Board of Adj., City of Rehoboth Beach](#), Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).*

In a prior decision, we discussed at length why the judicial standard is relevant in interpreting the State Code of Conduct. *See, Extract of Commission Op. No. 02-23, see fn. 18, infra.*

CONCLUSION: No law or facts were misunderstood.

Argument (10) Right to Free Speech: Mr. King is entitled to free speech.

RESPONSE: To the extent this is a Constitutional question, PIC has no jurisdiction. See, *Argument 3, supra, citing Commission Op. No. 07-05*. The State statute does limit the matters on which an official can speak. Applicable here is that they may not review or dispose of matters where they have a personal or private interest. [29 Del. C. § 5805\(a\)\(1\)](#). When they have such interests, they are required to recuse themselves from speech in their official capacity. *Id.* Delaware Courts have recognized that it can restrict speech. *Beebe, supra. (State Board appointee should not have made even “neutral” or “unbiased” statements because of possible conflict)*. This restriction is not uncommon in conflict of interest rules for both public officials and private persons, e.g., Judicial Code of Conduct; Legislative Conflict of Interest Law, [29 Del. C. § 1002\(a\)](#) (Legislator cannot participate in debate nor vote if there is a personal or private interest). The ban on General Assembly members voting if they have a “personal or private interest,” is also found in the Delaware Constitution. *Del. Const., art. II § 20*. Corporate entities can have by-laws on such restrictions. *Commission Op. No. 02-23*. Attorneys can be made to withdraw from a case because of a conflict. *Delaware Lawyer’s Rules of Professional Responsibility*.

To the extent it is argued that elected officials can speak on their platform on a particular issue, they have the right to political expression to their constituents because their duty is to represent those persons. Mr. King is not an elected official who can run on platforms. He was not elected to office to represent the people. He was appointed to a board to make fair and unbiased decisions in his official duties. If there is a “personal and private interest,” the government duties must “command precedence.” *In re Ridgely, 106 A.2d 527, 530-31 (Del. Super., 1954)*.²⁸ The Court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “his private interest must yield to the public one.” *Id. at 531*. In *Ridgely*, the Court concluded the official duties were so significant that it did not need to interpret the Lawyer’s canons which also would apply to Mr. Ridgely. *Id.* Mr. King placed the “personal interest” before the public one, so he must now recuse himself from his public responsibility on this matter.

CONCLUSION: Mr. King’s argument is contrary to the statute and case law. The argument does not change the underlying decision.

²⁸ [Ridgely](#) was decided before the Code of Conduct was enacted, but interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. See, *Tab L-1 and 2*.

(B) Ms. Joan Claybrook’s letter was incorporated into the motion for reconsideration.

RESPONSE: She states that she is not a lawyer. Yet, her letter makes strictly legal arguments on such things as jurisdiction, due process, statutory interpretation, etc. *Tab C-4 thru 7*. She also is not a Town employee, officer or appointed official. We first address a concern about her right to intervene and then a concern about incorporating her letter, as it relates to the legal arguments as part of the motion.

(1) Right to Intervene:

Delaware Superior Court Rule 12 addresses the circumstances of intervention. A person desiring to intervene must state the grounds for intervening. She states no grounds to intervene.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when an applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The advisory opinion statute limits the persons who can seek an opinion and to whom an opinion can apply. [29 Del. C. § 5807\(c\)](#). It authorizes only government employees, officers, officials or agencies to seek opinions, and the advice applies only to government officials. *Id.* Ms. Claybrook is not a government official. The statute does not confer any unconditional or unconditional right to intervene. She has no legal interest or claim or defense in the “matter.”²⁹The disposition of the action would not impair or impede her ability to protect a legal interest, as she has none in this “matter.” She may have a personal and private interest, but not a legal interest. *Tab N, e.g., Gamble v. Thompson, Del. Super., C.A. Number 98A-07-007-JOH, Herlihy, J. (October 27, 1999)(individual had no standing as a complainant).*

(2) Practice of Law: As noted, she is not a lawyer but mainly makes legal arguments, statutory interpretations, etc. They are mainly the same legal arguments as in motion submitted by Mr. King through his Counsel. As her legal arguments were incorporated into the motion for Mr. King, the question is if her acts constitute representation of him, and if she is interpreting the law, preparing legal instruments, etc. *Tab N, see, e.g., In re Mid-Atlantic Settlement Services, Inc., Board on the Unauthorized Practice of Law, File No. UPL 95-15.* Again, we

²⁹This time, the term “matter” is the term in the Court Rules.

note the concern, but have do not entertain whether her conduct is contrary to nonlawyers acting as lawyers.

(3) Fact Witness: To the extent Mr. King may want her considered a “fact witness,” that has not been indicated. However, as the letter supports him, and it includes many of the same things in Mayor Tesh’s letter and the facts she stated at the PIC meeting, we will assume Mr. King wanted her as a fact witness. We also received additional correspondence and calls supportive of him, and considered them.

(a) Letters of Good Will and Good Intentions: Ms. Claybrook’s letter and letters from others, and phone callers spoke to the important role of Mr. King on the Zoning Commission, his value to the community, that he is honest, etc. (e.g., *Tab C-4 thru 7, Ms. Claybrook; Tab M, Mr. Cooke and Mayor Tesh*). We have never suggested Mr. King’s work is not of value to the Zoning Commission, the community, etc. However, the law does not distinguish between the “good” and the “bad,” the “honest” and “dishonest. [29 Del. C. § 5805\(a\)\(1\)](#). It applies to all officials--that is what insures the public’s confidence in its government. [29 Del. C. § 5802](#). Mr. King, and these persons, say he had no intent to violate the law. He is entitled to a strong legal presumption of honesty and integrity, as are all public officials. *Beebe, supra*. Mr. King was given that presumption, even though he apparently did, at a minimum, review the draft ordinance. He was given an advisory opinion, which requires no sworn statements, from Mr. King, or any others. [29 Del. C. § 5807\(a\)](#). A violation of this law may be found during an advisory opinion request, and may then be referred for prosecution. [29 Del. C. § 5807\(b\)\(3\)](#). The filing was not treated as a criminal prosecutorial matter. If so, the law would require “knowingly or willfully violating any provision,” carrying up to a year in prison and/or up to a \$10,000 fine. [29 Del. C. § 5805\(f\)](#). Thus, he received the benefit that he did not intend to violate the law.

What the advisory opinion section requires is “full disclosure” of all the material facts. [29 Del. C. § 5807\(c\)](#). Although Mr. King did not disclose he wrote e-mails other than the June 3, 2006 e-mail, PIC and the Town Solicitor were sent copies of additional e-mails by him attached to a “complaint.” That complaint alleged violations of the Dewey Beach Code, not the State Code. It was dismissed because, among other things, PIC has no jurisdiction to interpret the local ordinance, only the State law. *Tab J, Commission Op. No. 07-47*. Specific reference to the June 8 e-mail was made in PIC Counsel’s e-mail to Mr. King’s Counsel, as was the letter from Mayor Tesh. *Tab J-13*.

It is PIC’s Counsel’s statutory responsibility to “review information coming to the attention of the Commission relating to potential violations of this chapter.” [29 Del. C. § 5808A\(a\)\(3\)](#). Mr. Eisenhower’s request was already pending at the time of the “complaint” referred to above. Counsel, pursuant to those duties, brought

the information to PIC's attention, to aid in "full disclosure" as required by [29 Del. C. § 5807\(a\)](#).

Mr. King cannot have it both ways—have PIC consider the letters of goodwill, but not the e-mails he wrote on this matter.

Ms. Claybrook's other facts:

(1) She repeatedly refers to PIC's ruling as an advisory opinion. (*Tab C-4 and 5*).

RESPONSE: Her factual statement, like the fact that the motion refers to PIC's ruling as an advisory opinion, supports PIC's position that the filing was, as a factual matter, treated as an advisory opinion. Using that term is also contrary to the argument previously addressed that there was a "belief" that it was a "complaint." See, *Argument (3)*. An argument that had no factual basis.

(2) PIC is inconsistent in its opinions because it previously ruled it had no jurisdiction over a school board member under [29 Del. C. § 5812](#) [financial disclosure].

RESPONSE: PIC is not inconsistent. Had it had been asked to consider how the financial disclosure law applied to Mr. King, it would have found no jurisdiction under that Subchapter. See *Tab H-1, Legislative History, and Response to Jurisdiction argument. (Subchapter I, Code of Conduct, applies; Subchapter II, Financial Disclosure, does not apply)*.

(3) PIC's decision was "a very brief opinion less than one page in length" on a "highly controversial issue" and "800 voters" who registered their concerns.

RESPONSE: This argument is factually and legally incorrect.

(a) As a factual matter, the 800 registered voters were not expressing their concern about PIC's opinion, but about the development.

(b) As a matter of law, no Code provision or rule gives the number of voters as a basis for the length of an opinion, or the basis to exempt officials from the law. *Commission Op. No. 01-20*. In that opinion, it was argued that a local official had been elected by a large number of voters, and so he should not have to recuse. PIC said: "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 ever have to recuse themselves when they had a conflict of interest. The restrictions would then become meaningless." In essence, we would be putting an exemption in the law. Language cannot be grafted onto the law. *Goldstein, supra*.

(c) As a matter of law and fact: Land use issues are usually controversial, so that fact is not unique to Dewey. Delaware Courts have recognized some issues can be so “highly controversial,” that a State official should not even serve on a committee at all. *Tab N, Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999.*³⁰ The Court concluded that even though it was unlikely any matters related to the education committee, on which he wished to serve, may come before him, or that he could recuse himself, that it may raise the appearance of impropriety if he served on the committee at all. Similarly, PIC concluded that Mr. King’s participation (but only on this particular matter) could “raise the specter [appearance] of “bias” [impropriety]. PIC did not go so far as to bar him from being on the Zoning Commission; it only required that he properly recuse.

(4) PIC cited only one case.

RESPONSE: No law or procedure mandates the number of cases to cite. No facts are given to suggest that when a person goes for advice on the law that the advice must be a legal treatise.³¹ It is advice--non-binding--not a Court briefing. As a factual matter, when advice is given, including legal, it is difficult to imagine that every case, regulation, etc., would be identified.

(5) PIC’s practice is to treat correspondence about the behavior of third parties as a complaint.

RESPONSE: Ms. Claybrook gives two opinions she believes support that fact. *Commission Op. No. 00-28 and 93-15.*³² Both were filed by private citizens, not

³⁰Extract - *Commission Op. No. 02-23*. “While your letter indicated that the standards for judges’ may not necessarily be the same standards that apply to Executive Branch officials, we note that both Codes impose duties to:

- (1) uphold the integrity of the office;
- (2) avoid impropriety and the appearance thereof;
- (3) perform official duties impartially and diligently; and
- (4) attempt to avoid activities that risk a conflict with official duties.

Interpretations of one statute can be used in interpreting another statute if language of one is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr. § 45.15, Vol. 2A (5th ed. 1992)*. Here, both persons are public officers and subject to Codes of Conduct with similar purposes and obligations. See also, *Harvey*, supra. (using judge’s recusal standard for local government officials on land use issue, e.g. rule of necessity.”

³¹It appears that this document is turning into a legal treatise as a result of duplicate arguments, arguments made so broadly without facts and law to identify exactly what the claim is, etc.

³²Ms. Claybrook noted that in Op. No. 93-15, PIC concluded it had no jurisdiction of the individual in his School Board capacity. It is unclear what she believes is the factual relevance. In 1993, at

officials or agencies. Advisory opinions are not given to private citizens. [29 Del. C. § 5807\(a\)](#). Any person, including private citizens, can file complaints, but they must be sworn. [29 Del. C. § 5810\(a\)](#). The private citizens did not file a sworn statement. They were told of the law and rules on the requirement. PIC also advised that “even assuming a complaint,” the law gave PIC no jurisdiction over a school board member or General Assembly members. Ms. Claybrook is factually incorrect about the implications of those opinions. Aside from the law given in the opinion, as a factual matter, it would be a waste of the citizens’ time to be told only about the need for a “sworn complaint,” and not be told about the jurisdictional limits. They would then file a sworn complaint, only to have it dismissed for lack of jurisdiction.

(6) Mr. King has no “financial” interest in the matter, and no “personal” interests have been asserted for Mr. King.

RESPONSE: As addressed in detail above: (1) PIC has never said or suggested that he has a financial interest; (2) the law is not limited to pecuniary interests; (3) his “personal interest” was given in his own e-mails; identified in the underlying opinion; and (4) his own remarks at reargument. *Tab A, Tab G* (“I personally would have started at the other extreme, start low and build up rather than start up and build low....”)and *Tab K*.

Ms. Claybrook refers to his e-mail as “the musing of a private citizen.” That shows even a layperson’s understanding of the “personal” or “private interest.” A “personal and private interest” for Mr. King has been established, and he should not “review or dispose” of matters related to the Ruddertowne development. [29 Del. C. § 5805\(a\)\(1\)](#).³³

the time of that decision, the law was: (1) PIC had jurisdiction over local officials in towns, municipalities, etc. See, Legislative History discussion above. School districts and Board members were not subject to the law until it was amended in 2000 to include “school districts,” “Boards of Education,” and “Board members.” [29 Del. C. § 5804\(11\) and \(12\)\(a\)\(3\)](#).

³³Ms. Claybrook says: “Many, including David King, believed that the Ruddertowne project would go before the Board of Adjustment for a zoning variance rather than coming before his commission.” To the extent Ms. Claybrook can speak to the facts of who believed what, regardless of what “many” believed, Mr. King knows, or should know, his official duties under the Dewey Code including such things as height variances, etc. He knew it would be considered as part of the CDP. He knew there was a concern about the potential conflict, and expressed that in his own e-mails, saying he would have to decline from hosting a meeting at his private residence for other like-minded people. *Tab K*. Recusal from hosting the meeting at his private residence, is not recusal in his official capacity, which is what the statute requires once the personal or private interest exists. [29 Del. C. § 5805\(a\)\(1\)](#). PIC’s advice was to recuse from the official duties on the “matters” before the Zoning Board.” Thus, even if the facts showed that it was “his belief” that it would not come before him, if and when it did, he was to recuse.

(7) PIC called Mr. King's e-mail an "open letter" to the community, but it was only e-mailed to nine people.

RESPONSE:

(a) PIC called it by the name Mr. King used. *Tab K-1, "Open Letter to Dewey Beach Residents and Property Owners."*

(b) Mr. King asked those persons to pass this along to "your network of concerned friends." *Tab K-8.*

(c) Regardless of the number of people to whom it was sent; who received it; saw it; had it read to them; were told about it, etc., the content is the same—it gives his personal position on the development. Conflicts are not based on the number of persons who are aware of an official's personal or private interest. It is the official's duty to recuse even if no one else is aware of the conflict. There is no legal or factual basis for such an exemption. [29 Del. C. § 5805\(a\)\(1\).](#)

FINAL CONCLUSION: Based on the above law and facts, we find that no law or facts were misunderstood, nor were facts or legal principles overlooked. The underlying opinion is not changed: Mr. King has a "personal or private interest" in the Ruddertowne matter. His personal statements about the development and developer, when he knew, or should have known, the development matter could come before him, at a minimum raise the "specter of bias," and he should recuse from those matters.

Original signed Terry Massie, Chair

07-47 - Follow-up guidance. Matter appealed to Superior Court so is a public record. **David King, Town of Dewey Beach, sought guidance on participating on matters that PIC previously found to be a conflict—reviewing and disposing of matters pertaining to the Ruddertowne Development. The only change to that situation was that an overlay, with the same information as before, was to be considered. As there was no substantial change, he was advised by Counsel and the Town's Attorneys to recuse. PIC's Counsel notified the Town's Attorney, as the official had not.**

At the meeting, PIC discussed concerns about officials waiting until the last minute before a meeting to obtain guidance. Specifically, Mr. King was advised in the prior opinion that as his agency, the Zoning Commission, had to post notice of meetings at least 7 days in advance under the Freedom of Information Act, he should have at least that much of a lead-time to get guidance, or the matter, or it could be tabled until PIC would meet. Here, Mr. King said he

was waiting for another Board to act on a matter. However, that matter was not something that was coming to his agency. .

PIC's discussion concluded the following:

(1) Send a letter reinforcing the above, with copies to the Town's Attorneys;

(2) State that the official needs to include the Town's Attorneys on his requests;

(3) When he seeks guidance, Counsel is to ask if he spoke with those Attorneys, the guidance they gave, etc.; and

(4) Counsel is to continue responding only in writing and copying the Town's Attorneys, as in this case.

07-52 Financial InterestAs Spouse– **A new State employee filed a disclosure of a financial interest in a private firm that does business with the State. Disclosure of such interest is a requirement of commencing State employment. [29 Del. C. § 5806\(d\)](#). He asked if he could work for a State agency when his spouse’s firm had some contracts with that agency. He said he will resign as corporate officer. He also would not work on matters related to her firm in his State job. [29 Del. C. § 5805\(a\)\(1\)](#) Further, he would not privately represent, or in any way assist her firm, before his agency. [29 Del. C. § 5805\(b\)\(1\)](#). Prior to the State job offer, he did some work for this agency as an independent contractor. The Commission found no violation if he followed the terms above, and also did not improperly use or disclose confidential information to her or others gained from his State job. [29 Del. C. § 5806\(f\) and \(g\)](#). As to his prior private work, if the agency cannot not obtain information it needs on that work from any other source, he may respond to questions *if asked*. [29 Del. C. § 5805\(a\)\(1\)](#).**

06-85– Personal or Private Interest – Renting Property. **A State officer asked if he could review and dispose of a matter before him. An applicant appearing before him was represented by an attorney who was renting from the officer. [29 Del. C. § 5805\(a\)](#).The attorney-tenant is vacating on, or about, the time of the hearing. The statute requires recusal if the official has a personal or private interest in the “matter” pending. *Id.* "Matter" means any application, petition, request, business dealing or transaction of any sort.” [29 Del. C. § 5804\(7\)](#). Here, the matter had nothing to do with the landlord tenant relationship or the rented property, or anything having to do with his relationship the attorney-tenant. Also, at the time of the hearing, the officer would no longer have a financial interest connected to the attorney. Thus, there was no technical violation of the statute. Further, other relevant facts were that the parties to the application were not opposed. Based on all the relevant facts, the Commission found his financial interest in the tenancy was too remote and speculative to create a conflict.**

06-74 – Personal or Private Interest Arising from Political Activities.

A State employee asked if it would be a conflict if he continued to participate in the review of a State matter when he knew the attorney who was representing one party, and the attorney’s spouse, through his own heavy involvement in a political party. Additionally, he was concerned that the other party’s counsel may file a complaint against him with the State’s professional board for his occupation. His supervisors were not so sure the political affiliation was

sufficient, in and of itself, to create a conflict. The applicant's written request and correspondence between the applicant and his supervisor were reviewed by the Commission. The State employee, and a Deputy Attorney General for the agency, appeared before the Commission. The State employee detailed his involvement in a political party at great length, identifying numerous persons in the political party and his personal involvement and private socialization with them. Also, the spouse of the attorney representing the company before the agency supervised him in the recent elections at the political party's headquarters to deal with calls for a specific Candidate. Beyond expressing and stressing his heavy involvement with the persons who happened to be involved in politics, the State employee specifically said he could not participate in the State matter with an open mind; that his personal or private interest would, in fact, impair his judgment. The statute prohibits review of matters if the "personal or private interest" would "tend to" impair judgment. [29 Del. C. §5805\(a\)\(1\)](#). Because of his emphatic and unequivocal statement that his judgment was, in fact, impaired because of his personal interest which coincidentally arose from politics; his personal and private fear that a complaint would be filed by one party to the action with the Board governing his occupational conduct; because the particular work involved more than ministerial duties; and as another individual could assume his duties, etc., the Commission found he should recuse, and no basis for a waiver existed.

[08-30 & 08-32 - Close Relative's Land Issues; Review of Decisions by Spouse & Close Personal Friend](#)

A local Town official called PIC's Counsel for guidance on recusal if a decision on a close relative's properties came before him in his official capacity. He said he would recuse if that occurred, PIC's Counsel's duties are to give guidance, which was to recuse. He did so.

He also asked about potential conflicts of two other officials. Any official or agency may seek advice on other officials. [29 Del. C. § 5807\(c\)](#). That

process was upheld by the Superior Court. [Post v. Public Integrity Commission](#), C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). He asked if they should recuse on certain matters because of personal and private relationships with persons who prepared the official matter for consideration. In one instance, it was a spouse, and in the other a close personal friend. Based on just the facts available at that time, and because PIC would not be meeting before the decision, Counsel notified the Town Solicitor suggesting recusal could be appropriate, and it would protect them against allegations of a conflict. Counsel sent a prior PIC decision ruling in a similar situation that a personal and private marital relationship between officials where one must decide on work prepared for a decision, would be a conflict, citing [Harvey v. Zoning Board of Adjustment of Odessa](#), C.A. No. 00-04-007CG, J. Goldstein (Del. Super. November 27, 2000), *aff'd.*, 781 A.2d 697 (Del., 2001). The Solicitor so advised the night of the meeting. However, both participated, saying without their vote there was no quorum. One also said he did not think the guidance applied to him as his was not a marital relationship. The other official said he believed the Town Charter precluded abstention.

PIC's Counsel, learning of the participation, advised the Town Solicitor that if an official cannot delegate their duty, they must promptly file a "full disclosure" with PIC saying why. [29 Del. C. § 5805\(a\)\(3\)](#). Both filed. One official, plus spouse, appeared before PIC. They explained that the substantive part of the matter was completed by the spouse's agency before the election of the other spouse. A review of the work also was completed by an outside agency. It returned comments pointing out only what were essentially typographical errors. Also, the Town Attorney suggested adding a standard legal phrase providing that if one part was invalid, the remaining parts would stand. The spouses discussed the work before the election. Any citizen may discuss such work. The issue is whether after being elected, one spouse may review and dispose of the proposed changes. PIC noted that the changes being considered were administrative changes, but apparently, the voting was on approving the entire package, not just the administrative changes.

Regarding the other official, the personal friend only began official duties a month or so before the vote. Again, the substantive work was completed before the friend became an official. Apparently, only one meeting was attended by the friend, and there was no substantial involvement.

(1) future work completed by the two officials should not be reviewed by their spouse and/or friend; or

(2) the two officials should recuse on matters that would be reviewed by their spouse or friend; or

(3) even the possibility of the appearance of a conflict could be resolved if the two who would be part of preparing matters to go to their spouse and/or friend elected to leave the agency to which they were appointed; and;

(4) In the future, if the officials cannot recuse when they have a conflict, full disclosure should be filed in advance (e.g., table the matter until PIC can review and give advice, protecting the official from complaints or disciplinary actions).

08-27- Father's Interest in Ordinance.

A local official asked if he could participate in a decision when the ordinance would apply to everyone in the Town. However, his father was the only citizen that approval would affect. The Code bars officials from reviewing or disposing of matters where they, or their immediate family members, would benefit to a great extent than others. [29 Del. C. § 5805\(a\)\(1\) and \(a\)\(2\)](#). The official said he would not vote on his father's application, but asked if he could vote on the package of options as a whole. PIC concluded that if he voted on the entire package, he was still voting on what might appear to be "private legislation" for his father. The Commission advised that the Councilman recuse. PIC specifically noted that this local government tabled decisions until PIC could give advice..

08-13 Brother's Financial Interest.

Local Town official sought advice on another Town official's participation in Town matters that might impact on his or his brother's financial interests. One official may seek an opinion on the conduct of another, if there can be full disclosure. [29 Del. C. § 5807\(c\)](#). See, [Post v. Public Integrity Commission](#), C.A. 07A-09-08, J.

Witham (Del. Super. April 30, 2008)(subsequently upholding PIC decision where one official sought advice on the conduct of another).

The official and his brother were found not to have any financial interests in the particular matter at this time, and recusal would be premature because too many events were speculative but would have to occur before recusal would be required. The official said he would recuse later if required. If he cannot recuse (e.g., lack of a quorum) he knows to file a disclosure on why he could not delegate. [29 Del. C. § 5805\(3\)](#).

08-39 Conflict of Interest – Local Officials’ private memberships

PIC previously disposed of some non-jurisdictional issues on this matter. This opinion focuses on just potential conflicts for three local officials. One is a social member of a Volunteer Fire Department. Under State law, volunteer Fire Departments are considered State agencies. [16 Del. C., ch. 66](#). The official would normally review matters related to funding, which generally includes funding decisions on the fire department. The official has never participated in any Fire Department decision. The last decision was made before he became an official. If the Fire Department comes before his agency for any purpose, he can recuse. [29 Del. C. § 5805\(a\)](#).

Another local official is a non-profit Board member. It also may seek funds. It uses a facility owned by the Town. The third official is a member of an organization that the local legislative body authorized the Chief of Police to create. It was solely at the Chief’s discretion to create the organization and seek volunteers to participate. The group has its own duty office; it uses Town space; it seeks funding; and for other reasons comes before this third official. The official is also a very active volunteer in the organization. The Commission found that none of the 3 officials should, in their official capacity, review or dispose of matters pertaining to the organizations. *Id.* If they cannot delegate on such matters as the Town’s budget, they must promptly file a full disclosure with the Commission explaining why they cannot recuse or delegate. [29 Del. C. § 5805\(3\)](#). They also have the option to resign from the private organizations and

avoid any possibility of a conflict. Approved by a majority with one Commissioner dissenting on 2 officials.

09-20 Appointment to Charter School Board

A State employee asked if it would be contrary to the Code if he served on a Charter School Board, concurrently while employed by the State, and after he terminated. He has no responsibilities for Charter Schools in his State job. While he is now employed by the State, he expects to retire in mid-2009. At that point the post-employment law would apply. It says for two years after leaving the State, former employees may not represent or assist an organization on matters where they were directly and materially responsible. [29 Del. C. § 5805\(d\)](#). Again, he had no occasion to work on Charter matters in his State job, which means he would not have been directly and materially responsible for the matter. He said that it was very unlikely that a Charter School issue, for which he was responsible, would come up in his current job or in post-employment. If so, he would recuse. The Commission found no conflict.

09-21 & 09-12 Local Government Conflict

Allegedly, a local government councilmember was participating in decisions where he has a personal or private interest, as it relates to a Planning and Zoning (P&Z) issue. He had submitted an application more than a year ago, but P&Z has not acted. This means that the matter has not come before Council, so he could not have reviewed or disposed of the subdivision matter in his official capacity. [29 Del. C. § 5805\(a\)](#). It also is alleged that he used his public office to secure unwarranted privileges for personal gain because he knew the Town would be re-writing its zoning ordinances and deliberately filed before that was completed. [29 Del. C. § 5806\(e\)](#). The choice of when to file is not unique to him—anyone could have done so. It was public knowledge that the Town's comprehensive development plan might require some changes to the existing zoning laws. Also, he voted "no" on having a newspaper ad announce a public hearing, which allegedly benefitted his personal interests. [29 Del. C. § 5805\(a\)](#). His vote was not on his subdivision application, so he still did not review or dispose of the application filed with P&Z. Moreover, PIC has no jurisdiction over

laws that govern notices of public meetings. It is alleged that he used his public office to force a consultant to quit assisting the Town on its comprehensive development plan. [29 Del. C. § 5806\(e\)](#). Even assuming the allegation were true, again, this is not a decision on his application. It also was alleged that he said he might speak to State Representatives. Any private citizen has a right to contact elected representatives, and elected officials have the right additionally under the speech and debate clause. Nothing suggests he made the consultant quit. It was the consultant's decision. Also, whether the consultant left or stayed, their conversation was not about his application. Also, PIC has no jurisdiction over how, when or where any consultant should perform their duties. Another allegation is that he filed complaints against other council members and appointees to the P&Z committee. The record shows that he did not file a sworn complaint. Rather, he sought advice on his conduct regarding recusal, but also asked if those persons should recuse in certain situations. By law, any official can request an advisory opinion, even if it pertains to another official. The statute permits that action, and it has been upheld by the Superior Court. [Post v. Public Integrity Commission](#), C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). It also is alleged that the P&Z cannot do its job without the consultant because they lack competency and lack funds to hire another consultant. PIC has no jurisdiction over the competency of any appointee, and no jurisdiction over any agency funding. The Commission dismissed the complaint for failure to state a claim, and reminded the official, as previously indicated to him, that he should recuse from decisions on his application.

[09-20 Appointment to Charter School Board—Concurrent and Post-Employment](#)

A State employee asked if it would be contrary to the Code if he served on a Charter School Board, concurrently while employed by the State, and after he terminated. He has no responsibilities for Charter Schools in his State job.

Thus, he does not review or dispose of matters related to Charter Schools. [29 Del. C. § 5805\(a\)](#). While he is now employed by the State, he expects to retire July 2009. At that point the post-employment law would apply. It says for two years after leaving the State, former employees may not represent or assist an

organization on matters where they were directly and materially responsible. [29 Del. C. § 5805\(d\)](#). Again, he had no occasion to work on Charter matters in his State job, which means he would not have been directly and materially responsible for the matter. *Id.* The Commission found no conflict, but if it should occur, he should recuse.

09-11 Review of Spouses' Official Decisions

Several local government Council members previously came for opinions on whether it was a conflict for them to make decisions on: (1) work by their spouse as an appointee to a Town Board; and (2) work by a close personal friend as an appointee to a Town Board. The Code bars officials from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5805\(a\)](#). PIC said it would not be proper to review each other's work. One appointee expected the Town Board on which both persons served would be disbanded as it had completed its project. That would totally remove any possibility of a conflict. Thus, the possibility of such review was unlikely. However, at this meeting, the Commission was notified that the Board had not been disbanded. One appointee tendered her resignation but the Board would not accept it. The Commission notified the Board that their charter makes Council President the appointing authority with Council's approval. The Code of Conduct provides that with respect to an honorary state official, the Commission can recommend that appropriate action be taken to remove the official from office. [29 Del. C. § 5810\(d\)\(3\)](#). However, if they have an "undue hardship," they can submit the facts.

09-10 - Spouse's Financial Interest

A State employee works at a facility where her spouse's business has some dealings on certain applications and licensing. By law, if there is a financial interest in a private enterprise that does business with, or is regulated by the State, they must file a full disclosure. [29 Del. C. § 5806\(d\)](#). Beyond the above facts, the State employee said her section had three separate offices, and her spouse would deal with one of the other offices. That was on rare occasions,

and might not continue after this year as he is considering giving up his private business. If he came to her office, she would recuse, and pass it to her Supervisor, as she was aware that she could not review or dispose of matters related to him. [29 Del. C. § 5805\(a\)](#). She also said that if the other office sent work related to his dealings because of a backlog, she would return the work to that office. The Commission found no conflict as long as she did not deal with her husband's business.

06-52 Interests Arising from Prior Participation in Private Law Suit

[State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5805\(a\)](#)] - The requestor is an appointee to a State Board. The Board asked if its member may participate in an appeal. *[State agencies may seek advisory opinions. [29 Del. C. § 5807\(a\)](#)]*. It stated that almost a year ago, the Board member acted in a private capacity in a law suit in opposition to an appellant in this action. The law suit has been resolved. The lawyers representing the appellant before the Board are not the same attorneys who represented the entity in the former action. Also, the Board member's private client is not involved in the appeal. The earlier action was about the entity's decision about the represented client only. The pending appeal relates to matters between two entities on unrelated legal issues. The Board representative said the requestor has never expressed a bias for or against the entity; the appeal does not pertain to the prior litigation. Further, at this time, no parties to the appeal have objected to the Board member's participation. The Board member's subjective opinion was that there was no bias against the entity. The Board member also went to the Lawyers' Board of Professional Responsibility and was told there was no conflict under the Delaware Lawyers' Rules of Professional Responsibility. However, it advised that the Judicial Canon applies when a Board member acts in a quasi-judicial matter. The Commission found that due to the length of time between the two actions, the unrelated issues of the two actions; the unrelated attorneys; no involvement of the other party in the prior litigation, no special knowledge gained about the appealing entity in the

prior litigation, and no facts indicating bias, that the Board member could participate in the appeal.

05-27-Misuse of Public Office To Benefit Self and Friends

[Law: State employers may not use their public office to secure unwarranted privileges, private advancement or gain. [29 Del. C. § 5806\(e\)](#)].

An anonymous letter was sent to the Commission alleging that a State employee had used his public office to benefit himself and co-workers who were allegedly his friends. [29 Del. C. § 5806\(e\)](#). Interviews were conducted by Commission Counsel of persons knowledgeable of the procedural processes in place on the particular matter within the agency to insure decisions were not based on preferential treatment for the employee or co-workers. Not only were the procedures in place and used, but the interviewees had personal knowledge of the actions taken, and the procedures were properly followed by a committee, not the State employee, to make the decisions. Further, the interviewees had personally observed that the alleged friends were not in any manner receiving any type of benefit in this matter, and that the State employee was actually performing his duties in an appropriate manner. The Commission found no merit to the complaint, and pursuant to [29 Del. C. § 5809\(3\)](#) dismissed for failure to state a claim.

05-57 & 60-27 Interest Arising for Litigation & Elections – Reconsideration

[Law: State employees may not review or dispose of matters if they have a personal or private interest which tend to impair judgment in performing official duties. [29 Del. C. 5805\(a\)](#).]

The Commission was asked to reconsider its prior Advisory Opinion No. 05-57. In that opinion it concluded that an employee should recuse himself from matters related to inspections of properties within a local government's jurisdiction, as a result of litigation and other contentions raised during several elections in which he and the property owner participated. The Commission reviewed the written request and heard statements from various supervisors, etc. According to the statements, the official had been transferred to another location to avoid a

conflict; and no complaints had been raised since the Commission's prior opinion. The Commission reaffirmed its earlier opinion that recusal was required; that the date of the prior opinion be corrected; the identity of the elective office referred to in the opinion be corrected; and the Commission has no basis to believe that a violation has occurred at this point.

Accepting Anything of Monetary Value

Gifts, Honoraria, Payment of Expenses

07-38 – "Gift"

A State employee had offered to buy a piece of outdated equipment from a company that did business with her agency. She was not directly involved in matters related to the company. Thus, she did not review or dispose of matters related to it. [29 Del. C. § 5805\(a\)\(1\)](#). It had advertised the equipment but had not received any "bites." Because the equipment was outdated and undesired, the firm offered to give it to her, if she would remove it from their property. "Gift" generally means nothing is expected in return. However, as this "gift" carried the condition that she had to remove it, it would no longer be a gift, but a "thing of value." The restrictions on accepting anything of monetary value are the same as accepting a gift. Acceptance may not 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\(b\)](#). As her duties did not involve matters pertaining to the company, she was not in violation of [29 Del. C. § 5805\(a\)\(1\)](#). Since she had no dealings with the company in her State job, she could not show it preferential treatment. No facts suggested she was being shown preferential treatment as any person who wanted the equipment could have it, if they removed it from the property. To reduce any appearance that she was trying to somehow trying to obtain a benefit because of her State job, she had offered to pay. The Commission held that she should reiterate the offer to buy, but if the company did not want a payment, she could accept under these particular conditions. .

08-51 Gift

An agency hosted an annual event to select a winner of a State art contest. The employee did not select the participants for the competition--anyone can compete. She did not judge the event. She did submit a list of potential judges garnered over the years so the Governor could select the judges. After the winner was decided, the employee was responsible for seeing the winning competitor's work through the printing process. The agency gets prints to sell, and the artist gets prints for personal use. The employee does not decide how many are printed. It is established by the agency. The artist offered a print to the employee to express appreciation for her help through the process. The value of the work at this time is approximately \$135. The Commission ruled that she could not accept the gift. Acceptance could result in an adverse effect on the public's confidence in the integrity of its government. [29 Del. C. §5806\(b\)\(4\)](#), which is an appearance of impropriety standard. See, also, *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government." Court held that an actual or apparent conflict of interest need not be found). Under that standard, the test is whether a reasonable person, knowledgeable of all relevant facts, would still believe the Code were violated. *In re Williams*, 701 A.2d 825 (Del., 1997). This is where the Commission had concerns. First, because he offered the gift to her personally, as opposed to giving it to the agency which sponsored the event. That may make it appear to the public that she was receiving preferential treatment from the artist, which would be prohibited. [29 Del. C. § 5806\(b\)\(2\)](#). Second, the gift's present value is at least \$135, but could gain value over the years, which may raise public suspicion that she may have used her State position to financially benefit [29 Del. C. § 5806\(e\)](#), as the gift was for and because of her performance of your State duties. **NOTE: A public servant is guilty of receiving unlawful gratuities if the public servant solicits, accepts or agrees to accept a personal benefit for engaging in official duties which the public servant is required or authorized to perform, and for which the public servant is not entitled to special or additional compensation. [11 Del. C. § 1206](#).**

09-01- Gift to Supervisor

Four State employees gave their supervisor a holiday gift, \$25 each, for a total value of \$100. They are the only employees who work for her. She initially declined the gift, but her employees wanted an advisory opinion to see if she could accept. The Supervisor said her agency gets Federal funds and federal rules restrict Supervisors from accepting gifts from employees, except on occasions when gifts are usually given, but even then, gifts are not to exceed \$10.00. The employees said each of them came up with the idea independently. In the past, they had gift exchanges of \$7 to \$10. The Commission found it was

likely an inappropriate gift under the federal standards, and they should go by the more specific Federal standard.

06-46 Gift from Former Client

A State employee asked if it was appropriate to accept a gift from a former client. She participated in the mediation of the client's claim and the matter was resolved. After resolution, and the client was no longer a client of the agency, a perishable gift was delivered to her. She had no expectation any gift was going to be tendered. She did not keep the gift as a personal gift, but made the perishable items available to all employees in her agency. She said she could recuse herself in the future on matters related to this client should he ever return on a new matter. The Commission found no violation. However, to avoid even an appearance of impropriety in the future, she should not accept gifts from clients.

07-43 Honoraria & Travel Expenses

A State employee asked if he can accept honoraria and travel expenses from an institution of higher learning for a one-day presentation. In his State job, he is not responsible for anything related to the presentation. He acquired his knowledge elsewhere before working for the State. He also is not responsible in any way for decisions about the institution. It is common practice for such institutions to offer to pay a fee and travel for their speakers. He contacted the Commission because this job will occur during the day, when he normally would be on State duty. He will take annual leave from his State job. The Commission concluded the employee could accept the honoraria and travel expenses, under these facts, but if they changed, the employee was to contact the Commission.

07-01- Payment of Expenses

A State employee had expenses paid by a private firm. The firm had responded to a request for proposals from her agency that was posted on its web site. Bids were due in 2005. After the bids, her job on the contract was to collect the score sheets of the various private enterprises that bid from the selection committee. Prospective vendors made presentations in January 2006, and the firm was awarded the contract effective January 2006. The contract expires in 2010. However, the employee said renewals would be considered prior to that time and her agency might extend the contract. The firm recently asked her to make a

presentation at its annual meeting on Delaware's procurement process because her job is to keep focus groups informed on State contracts. She said she attended the annual meeting on her own time, not State time. She had never attended this type of event in the past. At the conference, the firm gave her an award recognizing the performance of her duties in dealing with vendors and in assisting the "focus group."

No facts suggested her judgment would actually be impaired; she would actually give preferential treatment; or make official decisions outside official channels, to benefit herself or the private firm, which is prohibited by [29 Del. C. § 5806\(b\)\(1\),\(2\) and \(3\)](#). The fourth criteria is whether acceptance may have an adverse effect on the public's confidence in the integrity of its government. [29 Del. C. § 5806\(b\)\(4\)](#). It is basically an "appearance of impropriety" standard. See, e.g., *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government." No actual violation is required. *Id.* We have noted that when a private source pays a public official's expenses, it may evoke at least two ethical concerns in the minds of the public:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, US. Court of Appeals (D. C.) 56 F. 3d 85, 94 (1995))*.

(2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

The Commission held that while she had not done anything improper, to avoid even the appearance of impropriety in the future, she should not accept payment of expenses from vendors with whom she does business.

Employment

Private Sector Positions with No Connection to the State

07-58 – Private Consulting - Out of State Clients

A State employee asked if he could accept an outside consulting contract for out-of-State clients, both public and private. He has no State duties related to the prospective clients. The Commission found there was no conflict as long as he

complied with the following restrictions; (1) if any of his clients should ever do business with his agency, whether directly or indirectly, he must recuse, [29 Del. C. § 5805\(a\)\(1\)](#); (2) if any of his private clients do business with, or are regulated by any State agency, he must file a full disclosure with PIC as a condition of continuing State employment, [29 Del. C. § 5806\(d\)](#); (3) he may not use any State resources or time for his private business (he will be consulting by phone after his normal work day, and will not use State resources or time), [29 Del. C. § 5806\(e\)](#); (4) he may not use his State position in any way connected to his private job: e.g., not advertised to or discussed with clients, or used on stationery or other communications such as e-mail, business cards, etc.; *Id.* (5) he must follow any agency policy if it is more stringent; (6) he may not represent or in any way assist any of the private clients before his agency, if they ever have any dealings with it, [29 Del. C. § 5805\(b\)\(1\)](#); (7) he may not improperly use or disclose State confidential information to his clients, e.g., proprietary technical information, etc., [29 Del. C. § 5806\(f\) & \(g\)](#); and (8) he must screen for conflicts in his State job and private work. He is entitled to the strong legal presumption that he will follow these limitations. [Beebe Medical Center v. Certificate of Need Appeals Board](#), Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd.*, No. 304 (Del. January 29, 1996).

07-61 – Subcontractor on Federal Rule Proposal

A State employee asked if he could accept an outside consulting subcontract on a Federal rule proposal. As a contractor he would serve as a communications consultant, working with web platforms and other communications tools, e.g., media, etc., to publicize the opportunity for people to comment on the rule. None of the work is within the purview of his State job. Thus, he would not review or dispose of the matter in his State job. [29 Del. C. § 5805\(a\)\(1\)](#). His name will not appear on the web site, but if people end up contacting him through such things as a “contact us” link, he will not deal with any Delaware organizations or persons who do business with, or are regulated by, his agency. Someone in his agency might choose to comment on the rule, but he will not be involved in that activity. [29 Del. C. § 5805\(a\)\(1\)](#). The Commission found no conflict as long as the

facts did not change and if he followed the same restrictions identified in Opinion No. 07-58.

08-60 Private Employment of Elected Official

Confidentiality of the following opinion was waived by the Applicant, who authorized, in writing, release by PIC. [29 Del. C. § 5807\(d\)](#).

**Advisory Op. No. 08-60 -Private Employment of Public Officer
Hearing and Decision by:**Chairman Terry Massie; Vice Chair Barbara Green;Commissioners: William Dailey and Wayne Stultz

Dear Lt. Gov. Elect Denn:

You asked the Public Integrity Commission (PIC) for advice on accepting a private job as a lawyer after you take office as the Lieutenant Governor. If PIC found it contrary to the Code of Conduct, you asked it to consider a waiver. Based on the following law and facts, the proposed conduct is not contrary to the Code as long as the restrictions are followed. Under those conditions, PIC did not have to consider a wavier.

I. Background to the Decision

(a) As Lieutenant Governor, you will continue to be subject to the Code of Conduct and Financial Disclosure laws. [29 Del. C. § 5804\(13\)](#) and [29 Del. C. § 5812\(n\)\(1\)](#). As a lawyer, you are subject to the [Delaware Lawyers' Rules of Professional Responsibility \(DLRPR\)](#). We do not interpret the DLRPR as the Delaware Supreme Court regulates the practice of law. However, the DLRPR addresses special conflicts for lawyers who are current or former government officers. *Rule 1.11*. It says such attorneys may be subject to government conflict laws. *Rule 1.11(e)(2) and cmt. [1]*. That is to circumscribe the State's consent to the conduct of its officers under its conflict laws. *Id. at cmt. [1]*.³⁴ Delaware Courts have addressed State ethical concerns for a public officer who also practiced law. *In re Ridgley*, 106 A.2d 527 (Del., 1954). The Court chose not to rule on the lawyers' canons, saying when State officers have a "personal interest" in private employment, that as between the State and the private practice, "the public duty commands precedence."³⁵ That does not mean public officers may never hold outside employment; only that they comply with State conflict laws.³⁶

³⁴ Generally, for DLRPR conflicts, lawyers may not represent a client unless the client is fully informed and consents; no other laws or rules bar representation, etc. See, e.g., *Rule 1.7*. That may include State conflict laws. *DLRPR Rule 1.11*. By creating an independent body, PIC, to decide the extent of the State's consent under its conflict law, the Legislature added an extra layer for State scrutiny to insure public confidence. [29 Del. C. § 5802](#).

³⁵ *Ridgley* was a common law case on public officer conflicts. At that time, the Court noted no State conflict statute existed. Since then, State conflict laws were passed, including conflicts discussed in *Ridgley*, and herein. [29 Del. C., ch. 58](#).

³⁶ The Attorney General is specifically barred from practicing law while in office. [29 Del. C. § 2505\(h\)](#). We found no such bar for Lieutenant Governors.

(b) both Codes have similar purposes:

(1) to “instill public confidence” in government, *29 Del. C. § 5802(1) & (2)*, and in the “rule of law.” *DLRPR, Preamble [6]*;

(2) to insure public office is not used for unfair advantage or special privileges. *29 Del. C. § 5806(e), (f) & (g) and DLRPR Rule 1.11 cmts. [3] & [4]*;

(3) be restrictive enough to instill public confidence, but not be so “unduly circumscribed” as to discourage citizens from assuming public office. *29 Del. C. § 5802(3) and DLRPR Rule 1.11, cmt. [4]*.

(c) One statute’s interpretations can be used in interpreting another if both include the same language, or are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr. § 45.15, Vol. 2A (5th ed., 1992)*. Accordingly, we reference the Code of Conduct and the DLRPR.

II. Application of Facts and Law

As you said, the State Constitution prescribes the Lieutenant Governor’s duties: (1) preside over the State Senate, voting only to break ties; (2) preside over the Board of Pardons, which under its rules normally meets 10 times per year, and pays no compensation; (3) perform other duties as may be provided by law. *Del. Const. art. III, § 19 & § 20*. Senate Presidents are compensated the same as the House of Representatives’ Speaker—a part-time position. *Del. Const. art. III, § 19 & § 20*; *The Delaware State Constitution: A Reference Guide*, pp. 118 & 119, Holland, Randy J. (2002). We do not interpret the State Constitution, as that is the Courts’ expertise, not administrative agencies. *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, 833 (D. Del., 1972); *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir., 1974); *Matters v. City of Ames*, 219 N.W.2d 718 (Iowa, 1974). However, the plain language gives relevant facts on your official duties in ascertaining how they relate to your proposed private acts. You said the limited Lt. Governor’s duties would give you non-government time to practice law, particularly after the Legislative session ends. Your concern is the salary and its possible impact on your participation in government service. You were aware of the salary before being elected, and asked the State Bar Association if any DLRPR rules barred you from a concurrent private practice. You learned that your’s is not a unique situation, and provided PIC with Bar Associations’ advice on public officers also having a private practice.³⁷

The DLRPR and the Code of Conduct restrict, but do not completely bar other employment. *Rule 1.11*; [29 Del. C. § 5806\(b\)](#). We address the Code restrictions:

³⁷*Delaware State Bar Association Committee on Professional Ethics Opinion 1980-4 (concluding the Lieutenant Governor could also privately practice law without acting contrary to the DLRPR, and without creating an appearance of impropriety); DSBA Committee on Professional Ethics Opinion 1982-5 (similar conclusion for State Legislator to privately practice law). See, also, Mississippi State Bar Association Ethics Opinion 62 (December 5, 1981).* We note that the DLRPR “appearance of impropriety” provision has been removed, but the State Code retains it. [29 Del. C. § 5806\(a\)](#).

State officers may not accept outside employment if acceptance may result in:

(1) impaired judgment in performing official duties: To avoid impaired judgment, in your State capacity, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5806\(b\)\(1\)](#). Outside employment creates a personal or private interest. [29 Del. C. § 5804\(5\)\(b\)](#) and [§ 5805\(a\)\(2\)\(a\)](#). You expect to pursue legal work with firms that do not do business with any State agency. If you and the firm do no State business, you will have no occasion to “review or dispose” matters involving your private interest.

However, unexpected circumstances may arise. If so, you would recuse and/or seek PIC’s further guidance. We do offer this general advice if that occurs.

(a) Recuse from the outset. [Beebe Medical Center v. Certificate of Need Appeals Board](#), C.A. No. 94A-01-004, Terry, J. (Del. Super., June 30, 1995), *aff’d.*, Del. Supr., No. 304 (January 29, 1996).³⁸

(b) Recuse even if you are not the final decision maker. Participation can constitute a “review” of the matter. [Beebe](#), *supra*. Even “neutral and unbiased” statements are barred. *Id.*

(c) File disclosures with PIC where appropriate under the Code of Conduct.

(1) If your private entity decides to do business with the State, you must file a full disclosure, even if there is no conflict, or recusal can occur if there is one. [29 Del. C. § 5806\(d\)](#). This insures PIC conducts an independent review of the particular facts that changed.

(2) If you cannot recuse, you must file a full disclosure with PIC explaining why. *Id.* at [§ 5805\(a\)\(3\)](#). Courts have held that even if the officer, nor his family, have a private interest, some conflict concerns suggest it may still be “prudent” to recuse, except if recusal is impossible. [Harvey v. Zoning Board of Adj. of Odessa](#), Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000), *aff’d.*, [Zoning Board of Adj., of Odessa v. Harvey](#), Del. No. 590, 2000 (May 23, 2001).³⁹ In essence,

³⁸In [Beebe](#), a State appointee held outside employment and two hospitals submitted applications to the Certificate of Needs Board on which he served. Board decisions were not final, but a recommendation to an agency Director. The official thought he may have a conflict but participated in discussions. He recused from voting. The Board denied Beebe Medical Center’s application, but approved Nanticoke’s. Beebe appealed on the grounds that the official’s outside employer, Milford Hospital, was discussing a business deal with Nanticoke, creating a personal or private interest in the matter. The Court said, assuming a conflict, he should have recused from the outset, without even “neutral” and “unbiased” comments.

³⁹ In [Harvey](#), the alleged conflict was for local officials. The Court said they were **not** subject to the Code of Conduct. However, local governments without a PIC approved Code are subject to the State Code. [29 Del. C. § 5802\(4\)](#). The Court did use the State Code as a legal measure of their conflict. It found no financial interest of the official or his family, but still said under the facts, it would be “prudent” to recuse, except no one could make the decision. PIC’s decisions are consistent with that approach, and the filing requirement insures PIC can properly advise. We note that had the officials filed with PIC, they may have used an estoppel defense. [Ethics Bulletin 009, ¶¶ 6, 7, and 8.](#)

exercising “prudence” relates to appearances of impropriety.”[29 Del. C. § 5806\(a\)](#). *Harvey* essentially applied the judicial standard for these other public officers: “the rule of necessity.” Executive Branch officers, by filing the required disclosure in that situation, again insures PIC’s independent review of those particular changed facts.

(d) Financial Disclosure Law filings. Regardless of circumstances, you must disclose the source of your outside employment, reimbursements or payment of expenses from that source, etc., in your annual financial disclosure report--a public record. [29 Del. C. § 5813\(a\)\(4\)\(a\)](#).

(2) preferential treatment to any person: As noted above, the Code and DLRPR seek to avoid treatment that benefits the officer or his private entity. As long as you, nor the firm, do business with the State, you, nor the firm, would be in a position to receive preferential treatment. You expect you could find practice in the Federal Court system on such cases as bankruptcy, and would not practice in State Courts. You did note you were not sure if State Courts are a “State agency” under the Code of Conduct. As the term “State agency” can have different meanings under various Delaware laws, we clarify that for purposes of the Code of Conduct:

“State agency” means any office, department, board, commission, committee, *court*, school district, board of education, and all public bodies existing by an act of the General Assembly or the State Constitution. [29 Del. C. § 5804\(11\)](#)(emphasis added).

You also will not have your State position on the firm’s letterhead, etc., to avoid concerns about even appearing to use public office to attract clients for yourself or the firm.

Also, you nor your firm will lobby State agencies. DLRPC does not bar the firm from dealing with the State, but says to timely screen the member who is a public officer, and bar him from fees from the dealings. *Rule 1.11 § (b) & (c)*. This provision, like the Code of Conduct, is to insure no misuse of public office for an unfair advantage or preferential treatment, but at the same time “not be so restrictive” as to discourage public service. *Id. at cmt. [4]* & [29 Del. C. § 5802\(3\)](#). The Code of Conduct, like Rule 1.11, does not bar the firm from so acting. Rather, it bars Executive Branch State officers⁴⁰ from representing or assisting a private enterprise on State matters, whether paid or not. [29 Del. C. § 5805\(b\)\(1\) & \(b\)\(2\)](#). An example of “assisting” which would be preparing legal documents, but having another attorney sign the documents and appear before the Court or a State tribunal. *In re Ridgley*, 106 A.2d 527 (Del., 1954).

Based on the facts, you would comply with the State Code, but also have self-imposed a more stringent rule of not working for a firm that does business with the State.

⁴⁰ Under the Code of Conduct, “State officer” includes Executive Branch elected officials and Senior Level Executive Branch officials, e.g., Cabinet members and Division Directors. [29 Del. C. § 5804\(13\)&§ 5812\(n\)](#).

Again, your circumstances may change. If the firm decides to engage in lobbying, you may seek PIC's guidance on the Code of Conduct, and the State lobbying law, which it administers. [29 Del. C., c. 58, Subchapter IV](#). Also, if the firm engages in lobbying, it, like any lobbying organization, can request its own guidance on the law, as authorized. [29 Del. C. § 5807\(c\)&§5809\(2\)](#).

(3) official decisions outside official channels: This bars doing “thru the backdoor” that which you cannot do “thru the front door”—in essence, using your State position to influence other State decision makers on matters related to your private practice. The fact that you, nor the firm, will deal with the State eliminates that possibility. Moreover, under the Code, you are entitled to “a strong legal presumption of honesty and integrity” that you will comply. [Beebe, supra](#).

(4) any adverse effect on the public's confidence in its government's integrity. This is basically an appearance of impropriety test. The standard is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code was being violated. [In re Williams, 702 A.2d 825 \(Del., 1997\)](#).¹

Here, we find no improper appearance based on the above relevant facts which basically come down to the following:

- (a) your proposed conduct, at this stage, is not contrary to the above provisions;
- (b) you plan to comport your conduct in a manner more restrictive than required by the Code;
- (c) your proposed conduct is not unique, and is consistent with DSBA opinions you provided, concluding the conduct would not create a violation or an appearance of impropriety.
- (d) you plan to return to PIC if additional advice is necessary;
- (e) you will allocate your private practice time to insure your State job commands precedence over that work; and
- (f) you will not use State resources for your private practice.

III. Confidentiality

(a) The DLRPR and the Code bar misuse of confidential government information. [Rule 1.11; 29 Del. C. § 5806\(f\) and\(g\)](#).

(b) As to advisory opinions, generally, if no Code violation exists, the opinion is confidential. [29 Del. C. 5807\(c\)](#). You plan to provide the opinion to firms where you seek employment. As the confidentiality belongs to you, you are free to release it to anyone. However, if you desire that PIC provide the opinion, you must authorize us in writing. [29 Del. C. § 5807\(d\)\(1\)](#).

¹[Williams](#) interpreted the Code of Judicial Conduct. As noted, such interpretations may be used in interpreting the Code of Conduct as the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. [Background to Decision, I \(c\), supra](#).

IV. Conclusion

Based on the above facts, law, and restrictions, we find no violation of the Code.

Original Signed by Chairman Terry Massie

06-44 Out of State Clients

[State employees may not accept other employment 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\(b\)](#)]. A State employee created a private company with clients primarily from out-of-State. However, two Delaware firms have expressed interest in contracting with the private firm. As a State employee, the individual makes no decisions about the private company, as it does not do business with the employee's agency. Thus, he does not review or dispose of matters where he has a personal or private interest which may tend to impair judgment in performing official duties. [29 Del. C. § 5806\(b\)\(1\)](#). and. [29 Del. C. § 5805\(a\)](#). In a private capacity, the employee does not seek to contract with any State agency. Thus, he would not be dealing with his own agency. [29 Del. C. § 5805\(b\)\(1\)](#). This would preclude his colleagues and coworkers from showing him or the firm preferential treatment, as they would not be making any decisions about him or the firm. [29 Del. C. § 5806\(b\)\(2\)](#). The company is not involved in the type of work done by the individual or the employing Department. The private company advertises through the Internet and other ads to identify its services. The employee said it was possible that State employees would see those ads, but State employees are not "targeted" by the company. The Commission found no violation.

09-27 No Dealings with Own Agency

A State employee asked if she could take a part-time job in the private sector. The firm has no contracts with her agency. It is unlikely, but if the firm came to

her agency, she would recuse in her official capacity, and would not represent or assist it before her agency. [29 Del. C. § 5805\(a\)](#). She would not take State clients from her agency as her private clients. That means she would not be representing or otherwise assisting the private enterprise/its clients before her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). The Commission found no conflict as long as she recused if required.

09-28 Consulting Private Clients

A State employee asked if he could create his own consulting firm to aid private clients in matters for which he was not responsible as a State employee. He said that if any of his clients came to his agency, he would not participate in the matter. [29 Del. C. § 5805\(a\)](#). Also, he would not privately seek grants, or other services, for himself or his clients. Thus, he would not represent or otherwise assist his firm/clients before his own agency. [29 Del. C. § 5805\(b\)\(1\)](#). The Commission found no conflict, but he must recuse if matters arise where his private clients seek such things as grants, or other services, from his office.

08-41 – Private Employment With Company that at One Time Did Business with the State

A State employee asked if he could accept a private job with a firm that several years ago did business with his agency. He would not represent or assist the firm on any State matters, but would work on matters outside the State of Delaware. The Commission approved a prior request from him on outside employment. In that case, as in this one, he said he would not deal with any State agency, even though the law only requires he not represent or assist a private enterprise before his own agency. [29 Del. C. § 5805\(b\)\(1\)](#). He ended up not accepting that job, but wanted to know if the fact that this firm had previously done business with his agency would change PIC's guidance. The Commission noted that he was self-imposing a greater restriction than required by law. The only difference here is this firm previously did business with his agency, but is no longer. The Commission found no conflict as long as he followed the prior advice.

Private Sector Employment with a Connection to a Different State Agency

07-27 - Private employment with Contractor of State Agency.

A State employee expects to end a part-time job due to a promotion in a State job. However, an opinion was sought, for the time, at the private firm. A disclosure was filed, as required by law, if a State employee has a financial interest in a private firm doing business with, or regulated by a State agency. [29 Del. C. § 5806\(d\)](#). The private firm had a contract with a State agency, but not the agency where the employee worked. Thus, the employee would not review or dispose of matters pertaining to the company. [29 Del. C. § 5805\(a\)](#). The employee has no reason to represent or assist the private firm before her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). Totally different agencies refer clients to the private firm. The client has a choice of which private firm to go to. This firm is one provider. One job is with adult clients and the other is with adolescent clients. If any of the State clients were referred to the private firm, she would recuse. The Commission found no violation.

The employee is also is a licensed professional in a totally different field from her State job and her private job. She asked if she needed to file a disclosure of that part-time job or if the Commission would consider it at this meeting. As the Commission had no prior facts on that job, by consensus, it advised her to file a disclosure on that particular matter.

08-42 – Private Employment With State Agency Certified Company

A State employee asked if outside employment with a private firm, complied with the Code, when the firm has been State certified to provide certain services. [29 Del. C. § 5806\(d\)](#). It was not certified by her agency. In her private capacity, she has no State clients as she deals primarily with grants. The private company has no grants from her agency. She will not deal with her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). Her State section does not deal with the type of services offered by the private firm, or decide if the firm should be certified. Thus, she would have

no occasion to review or dispose of matters related to the company. [29 Del. C. § 5805\(a\)](#). The Commission found no conflict. .

07-60 – Newly Hired Discloses Private Employment

A newly hired State employee filed an ethics disclosure because as a condition of commencing employment she must file a full disclosure because she has a financial interest (employment) in a private business that does business with the State. [29 Del. C. § 5806\(d\)](#). She works in a completely different Department, and would have no occasion to make decisions about the private enterprise, nor does she have oversight of them or the contract. Thus, she does not review or dispose of matters pertaining to the company. [29 Del. C. § 5805\(a\)](#). She would also have no occasion to go before her own agency and personally help the private enterprise in terms of getting contracts. [29 Del. C. § 5805\(b\)\(1\)](#) The contracts that the company has with the other Department publicly noticed and bid. The employee discussed information about the State contract and a description of her duties within her Department. Those duties do not involve the same State clients. In fact, they are not even in the same zip code as any of her clients. There also is no other overlap with the company. Her supervisors are both aware of their employee's private obligations and both they, and the filer, know she cannot and will not use State time or resources for her private job, [29 Del. C. § 5806\(e\)](#), or misuse any confidential information about clients. [29 Del. C. § 5806\(f\) and \(g\)](#). The Division Director checked to make sure that there were no contracts with her Department. The Commission found no conflicts.

06-40 – Contracting with a Different State Agency

A State employee filed a disclosure that showed that he had privately contracted with a State agency. [29 Del. C. § 5806\(d\)](#). It was not with his own agency, which would have been prohibited. [29 Del. C. § 5805\(b\)\(1\)](#). The contract was publicly noticed and bid. [29 Del. C. § 5805\(c\)](#). In his State position, he was not in any manner responsible for matters pertaining to the private contract. [29 Del. C. § 5805\(a\)\(1\)](#). The Commission found that he had complied with the requirement to file a disclosure and that the contract did not result in any conflict.

07-41 – Private Employment in Regulated Practice

A State employee filed a disclosure for 2 reasons; (1) he is a licensed professional with a private practice that is regulated by a State agency; and (2) he has a financial interest (employment) in a private enterprise that does business with the State. [29 Del. C. § 5806\(d\)](#). Regarding the first reason for filing--a professional practice regulated by the State--in his State capacity, he makes no decisions, nor has any other involvement in the regulatory board. [29 Del. C. § 5805\(a\)\(1\)](#). Regarding his private employment, while he works with others in his profession, his State job does not require him to make decisions on any of the professionals he would work for, or with, in his private job. Also, he has no involvement in his Department's contracts for licensed professionals in his field. *Id.* His State job is primarily working with adults. His private job would deal with adolescents. Thus, he would have no occasion to represent or otherwise assist the private enterprise on matters related to his adolescent clients. [29 Del. C. § 5805\(b\)\(1\)](#). If his State clients came to his private job, he could recuse and let other professionals take them as clients. However, there is a very remote chance that he might not be able to refer such clients to another professional if there is an emergency. As he is only working very limited hours in the private job, the possibility he will deal with an emergency situation is also remote. The Commission found no conflict at this time, and he could return to the Commission if his circumstances changed.

08-43 – Private Employment with Agency Contractor

A State employee asked if she could accept a private job which does business with her State agency. [29 Del. C. § 5806\(d\)](#). She will not deal with her own agency; or its clients [29 Del. C. § 5805\(b\)\(1\)](#). She would have no occasion to make decisions about the private firm in her official capacity. [29 Del. C. § 5805\(a\)](#). She would recuse if her private clients came to her for State services, and refer it to another employee. In her private capacity, if her State clients came to the firm, the matter could be given to another of the firm's employees. The Commission found no conflict if she does not deal with her State clients in her private capacity, and vice versa.

07-51– Private Employment with Company Doing Business with the State.

A State employee wanted to accept a part-time job with a private employer which had been awarded a State contract. The contract is not with his State agency. He filed a full disclosure as required. [29 Del. C. § 5806\(d\)](#). The employee's State clients are not the same as the ones he will have in the part-time job. Thus, he will not review or dispose of matters in his State job where he has a personal or private interest. [29 Del. C. § 5805\(a\)\(1\)](#). He will not perform the private work during State hours or using State resources. [29 Del. C. § 5806\(e\)](#). PIC found no violation, but if the employee's situation changes he is to notify PIC.

07-30 – Private Tutoring with Company that Does Business with the State

A teacher filed a disclosure of her outside employment as a private tutor with a private firm that contracts with the State, as a condition of commencing and continuing employment with the State. [29 Del. C. §5806 \(b\)](#). The private vendor contracts with various school districts, but not her district. She makes no official decisions about the State contracts with the firm by which she is employed. [29 Del. C. §5805 \(a\)\(1\)](#). The State contract was publicly noticed and bid. [29 Del. C. §5805 \(c\)](#). The contract value, as it relates solely to this teacher, is less than \$2,000. She tutors during non-State work hours. Counsel provided a prior Commission opinion from a similar situation, where the facts were essentially the same and no violation was found. *Commission Op. No. 02-02*. The Commission is to strive for consistency in its opinions. [29 Del. C. § 5809\(5\)](#). The Commission found no violation.

08-03 and 08-16 – Two Tutors

Two teachers sought outside jobs as tutors with a private enterprise which contracts with the State. They filed disclosures as required. They will not tutor their own students or students from their educational facility; they do not make decisions on the State's tutoring contract; and will not represent themselves or the company before their own agency. As several such opinions have been issued, the language of the prior opinions was adopted as the circumstances were the same, and the Commission is to strive for consistency in its opinion. [29](#)

[Del. C. § 5809\(5\)](#). The sample language without identifying the applicants follows.

08-18 – Another Tutor

A State teacher wanted to contract with a private firm to tutor students. She did not participate in any State decision regarding any contracts with the firm; would not be tutoring her own students, or students in her school, etc. PIC previously ruled on a very similar situations and found no conflict as long as those teachers complied with certain restrictions (e.g., no tutoring of own students or students in her school). PIC is to strive for consistency in its opinions. Accordingly, it found she would have no conflict if she complied with those same restrictions, which are detailed in the redacted opinion below.

RE: Advisory Op. No. 07-30 - Disclosure- Outside Employment (Tutor)
Hearing and Decision by: *Vice Chairs Barbara Green and Bernadette Winston, Commissioners William Dailey, Dennis Schrader and Wayne Stultz*

Dear _____

The State Public Integrity Commission reviewed your full disclosure regarding your part-time job as a tutor with XXX, which contracts with State School Districts to tutor students. Based on the following facts, and law, we concluded that your part-time employment does not create a conflict.

As you are privately employed by a company that does business with the State, you must file a “full disclosure” with the Commission. [29 Del. C. § 5806\(d\)](#). We reviewed your worksheet and understand that you do not tutor any students from the school where you teach or even in your School District.

We previously addressed, at length, the restrictions on tutoring. *Commission Op. No. 02-02*. In that opinion, we noted that conflicts can arise if the teacher tutored students from their own school. You are not engaged in such conduct. Further, your worksheet reflects that in your official capacity, you have no authority to determine what company gets a tutoring contract [\[29 Del. C. § 5805\(a\)\(1\)\]](#); you do not represent or otherwise assist the private company before your own District, [\[29 Del. C. § 5805\(b\)\(1\)\]](#); etc., are not performing the private work during State hours or with State equipment, etc. [\[29 Del. C. § 5806\(e\)\]](#).

Based on these facts, we find no violation. However, if there is a substantial change in your circumstances, you should review our opinion, the full disclosure requirements, etc., and, if necessary, submit the new information. For example, if your phone number changes, you need not file an update. However, any substantial change, e.g., in your official capacity you become

involved in issuing contracts to private companies to tutor, should be filed so that we can determine if your changed status may result in a conflict.

08-37 Private Employment of Licensed Professional

A State employee, who is a licensed professional, asked if her outside practice would create a conflict as some of her clients may later qualify for some benefits administered by her agency. There is a very remote possibility that persons approved for the State benefits, might come to her private practice, as they select their own provider. Such State clients have not come to her in, at least, a 7-year period. In her State job, she deals with children. Her State job focuses on children who are State clients. Her outside clients are not clients of her Department, Division or Section. Thus, she does not review or dispose of matters pertaining to her private clients in her State job. [29 Del. C. § 5805\(a\)](#). Nor does she represent or otherwise assist her private enterprise before her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). She also is not referred clients by the State Courts. Although it is very remote, if her private clients came to her State job, she would recuse. [29 Del. C. § 5805\(a\)](#). In her outside job, she would not accept agency clients. [29 Del. C. § 5805\(b\)\(1\)](#). The Commission found no conflict at present. It held that a waiver may be granted *if* such clients come to her and for some reason she cannot recuse, but she must file a disclosure of her inability to delegate. [29 Del. C. § 5805\(3\)](#).

Private Sector Employment with a Connection to the Employee's Own Agency

09-04 - Outside Employment and Lobbying

A State employee asked if she could lobby on behalf of a non-profit organization, where she is the Director and Board President. The organization submits its budget to the Department where she is a State employee. The Commission found it would be a conflict because she would be representing or otherwise assisting the private enterprise before her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). It found that a waiver should not be granted because there are many other Board

members, and a registered lobbyist for the organization, who could act on the areas where she is not to participate, so there was no undue hardship, and literal application of the law was necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). In such situations, the public purpose is to insure that State employees do not use their public position within their own agency to benefit their private interest, and that they do not use their public position to unduly influence their coworkers and colleagues. [29 Del. C. § 5806\(e\)](#).

09-04 Reconsideration of Private Employment

After PIC ruled that it would be a conflict for a State employee, to represent or otherwise assist a non-profit before her own agency, [29 Del. C. § 5805\(b\)\(1\)](#), she contacted her attorney and said she had some problems with some of the things in the opinion. For example, it gave the name of the woman who is head of the organization that reviews the non-profit's budget before it goes to her State agency to be reviewed for funding, with their recommendation. The name was used because the employee gave that name in her statement to the Commission. To the extent she was seeking reconsideration, such motions are to correct errors; not add new arguments.⁴¹ *Del. Super. Ct. Rule of Procedure 59*. They are denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.* Changing such matters would not change the opinion.

09-03 – Licensed Professional Needs Job for Certification

A waiver was granted so the opinion is a matter of public record. [29 Del. C. § 5807\(b\)\(4\)](#).

09-03 – Outside Employment

Hearing and Decision by: Chairman Terry Massie, Vice Chair Bernadette Winston; Commissioners William Dailey, and Dennis Schrader

Dear Ms. Scott:

⁴¹ In some instances, but not all, we note the new arguments. We address them anyway.

The Public Integrity Commission reviewed your request for advice on accepting outside employment to obtain your Licensed Professional Counselor of Mental Health certification. Based on the following, we grant a waiver, with some restrictions.

I. Background

You work for the Division of Child Mental Health Services (CMH), Department of Services for Children, Youth and Their Families. CMH provides a statewide continuum of mental health and substance abuse (behavioral health) treatment programs for children and youth. The services have graduated levels of intensity and restrictiveness.

In this situation, clients come to CMS by two routes: (1) the majority are those in treatment with providers for mental health or substance abuse issues, but have no insurance, so may qualify for State services; or (2) those who go through the drug court, are found to need treatment for substance abuse, and CMH evaluates them for referral to a treatment center. Your State job is to work with providers, and the clients regardless of the route by which they arrive, to insure proper services to the State clients.

You seek a certificate so you can better serve CHM clients who go through the drug court. Certification requires supervisory hours from a qualified provider. Your agency contracts with two drug and alcohol treatment providers-- Aquila and Crossroads. You searched for a possible source other than those contractors, specifically Catholic Charities. However, they cover a more broad-based area. You wish to focus on the treatment areas related to your drug court clients. At present, the majority of your State clients are at Aquila. Most went through the drug court program. Aquila's focus is primarily alcohol abuse. Crossroads does not screen for alcohol abuse. You would like to work at Crossroads.

II. Application of Law and Facts

(1) As Crossroads does business with your State agency, you are required to file a full disclosure of your financial interest (employment), as a condition of commencing and continuing employment with the State. [29 Del. C. § 5806\(d\)](#). You filed the required disclosure. Disclosures are reviewed for conflicts. The review of your disclosure shows two areas of concerns, which you should deal with as follows:

(a) In your private job, you may not represent or otherwise assist a private enterprise before the agency which employs you. [29 Del. C. § 5805\(b\)\(1\)](#). To avoid this conflict, recuse in your private job from any dealings with your agency. For example: do not: (1) take any of your State agency's clients; (2) assist it in any manner in: (a) fulfilling its present contract; (b)

requesting a renewal, or (c) responding to a request for a proposal from your agency.

(b) In your State capacity, you may not review or dispose of matters if you have a personal or private interest in a private enterprise that may tend to impair your judgment. [29 Del. C. § 5805\(a\)](#). In your State job, you do not select your agency's contractors. Thus, you do not directly review or dispose of the contract matter. However, as a case manager, you recommend providers for your State clients based on client evaluations, family preference, availability, location and severity of substance use. The Director of Drug and Alcohol service, and the treatment team leader, make the final decisions. However, the law does not require you to be the final decision maker--it includes even "review." The final decision makers would certainly value your input on your clients' needs, and on a broader level, your input on the providers' capabilities.

This is not to, in any way, suggest you would directly or indirectly assist Crossroads in obtaining favorable treatment in terms of client assignments or contract decisions. However, no actual violation is required. Rather, State employees are to avoid conduct that would even "raise suspicion" that their official decisions may be affected by their personal interests. [[29 Del. C. § 5806\(a\) and \(b\)\(4\)](#)] Thus, we considered if we should grant a waiver.

(c) Waivers may be granted if there is an undue hardship on the State employee or State agency, or if the literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). First, we note that State employees are entitled to a strong legal presumption of honesty and integrity in performing official duties. [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). Here, the presumption is reinforced because you advised your colleagues, your immediate supervisor, your team leader, etc., of your proposed endeavors to obtain your certification, and that you are properly filing with the Commission for advice. They support your academic endeavors.

The hardship that could occur affects both you and your agency. First, you are limited in sources where you could receive the certification from an entity that would give you the possibility of working with clients (non-State clients), who have the same areas of counseling needs as the clients you work with who are part of the drug court program. Second, because your sources for working with similarly situated clients are limited, if you could not work with your agency's provider, then your agency could miss the opportunity for you to gather more education and experience in a more closely job-related client environment.

Aside from these hardships, the public purpose is meant to insure that officials are making decisions based on merits, not bias, favoritism, conflicts and

the like, which could impair judgment. Those concerns are diminished in several ways:

(1) Crossroads does not even screen for alcohol abuse. Thus, it could not generate, through such screening, a list of non-insured clients whom it could refer to you as needing CMH assistance, and have you then recommend those as clients for Crossroads.

(2) If a client uses alcohol, they will be sent only to Aquila. Courts have held that when the action is “ministerial”—meaning the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment—then judgment cannot be impaired. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209, 211(1975).

(3) In matters where there is a choice between Aquila and Crossroads, you said that your colleagues, or supervisor, or others could make the decision. [[29 Del. C. § 5805\(a\)](#)].

(4) As noted, your recommendations in your State job are valued. However, your team, the team leader, Dr. Charles Webb, and Martha Gregor, Program Director scrutinize your recommendations. Also, as you must consider the family’s desires, they will monitor your referrals for the result.

(5) The waiver becomes a matter of public record. [[29 Del. C. § 5807\(b\)\(4\)](#)]. That way, the public will know why we granted a waiver, and can see the steps taken to avoid even appearances of impropriety.

III. Conclusion

Based on the above, to avoid the potential conflict of representing or assisting the Crossroads before your agency, in your private capacity, you must not work on any matters related to your State clients, your agency, etc.

As far as reviewing or disposing of matters that may tend to impair judgment in your State job, we grant a waiver, under the above conditions.

Original Signed by Chair Terry Massie

09-06 Sole Proprietor Dealing with Own Agency

A State employee is an accountant in her State agency. In her private capacity, she is the sole proprietor of a business. Some of the documents she prepares in her private business do have to go through her State agency, thus she filed a disclosure [[29 Del. C § 5806\(d\)](#)]. The documents would not come to her in the normal course of business. As she may not review or dispose of matters in which she has a personal or private interest, [[29 Del. C. § 5805\(a\)](#)], if they did, she would recuse. The entries in the private documents are ministerial in nature, e.g., identification numbers, loaning institution, etc. She does not advocate for her business, or for the clients, with whom she has a subcontract on any

administrative or legislative decisions. [29 Del. C. § 5805\(b\)\(1\)](#). The entries could not assist them in effecting administrative or legislative changes. The Commission found no conflict.

09-07 – Would Private Business Conflict if Promoted by Agency?

A State employee was being considered for a promotion. Before the agency made any decision, the employee and the agency sought an opinion on whether her private business would create a conflict. Although some of the matters pertaining to her private business would go to her State agency, they would not come to her. Thus, she would not review or dispose of the matter. [\[29 Del. C. § 5805\(a\)\]](#). In fact, her documents would be processed in a different County, thus, her immediate colleagues and coworkers would not review the documents, which were primarily administrative in nature. She also was advised not to use State time and resources to perform her private work. [29 Del. C. § 5806\(e\)](#).

09-29 Private Work With State Supervisor

Two State employees who worked in the same office wanted to start a private business doing the same work for private enterprises as they do in their State office. One of the State employees supervises the other. The Code bars accepting other employment if it may result in, or appear to result in:

(1) Impaired Judgment in Performing Official Duties.

Courts have noted that where the official has supervisory control, and then has a personal relationship with an employee, it can raise concerns that the supervisor may be favorably biased in official decision related to that employee, e.g., evaluations, working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988))*. Conversely, the supervisor may “bend over backwards” to avoid showing favorable bias, and as a result, the judgment is still impaired. [29 Del. C. § 5806\(b\)\(1\) and \(2\)](#).

The doctrine arises out of the public policy that an officeholder’s performance not be influenced by divided loyalties. *63C Am. Jur. 2d Public Officers and Employees § 62*. Here, as the supervisor and employee have the same “personal or private interest,” the supervisor may be divided between that interest and the supervisory duties to fairly evaluate the employee’s State work.

Even if the supervisor recused from supervising the State employee who would be a private business partner, it would not cure other issues discussed below.

(2) preferential treatment to any person:

Preferential treatment can come from several directions.

By law, State employees may not “represent or otherwise assist” a private firm before your own agency. [29 Del. C. § 5805\(b\)\(1\)](#). “Agency” includes “Department.” [29 Del. C. § 5804\(11\)](#). This helps avoid impaired judgment of colleagues and co-workers who may tend to give preferential treatment to the State employees’ firm. Here, the private work would not only go to the State employees’ Department, it would go to their own Division. That is literally contrary to this law.

To avoid formally representing their firm before their agency, they said they would not go to the facility in their County. Rather, a relative of one of them would take the paperwork to a different facility. However, this does not cure the “otherwise assisting” aspect. The State employees’ would prepare the documents reviewed by co-workers and colleagues. Again, this would directly violate this law.

Appearances Issues: Aside from these direct violations, the State employee who would be working privately for his State supervisor would have his own “personal or private interest” in insuring job security in his State job.

Preferential treatment could arise in that it could appear that an employee might give preferential treatment to a supervisor’s wants and needs because the supervisor can hire, fire or promote the employee. *See, e.g., People Ex. Rel. Teros v. Verbeck, Ill. App. 3 Dist., 506 N.E. 2^d 464 (1987).*

Another preferential treatment concern is that the supervisor, in an official capacity, routinely deals with the State employee who would handle the transaction from the private company. They are “always back and forth on the phone,” and if the supervisor needs immediate answers to questions, that is who she calls. As a result of that relationship, it could raise public suspicion that the State employee who would handle the transaction, herself, or by and through her employees, might show preferential treatment to their firm.

Competing firms may also have concerns of preferential treatment. They may suspect that the State employees’ firm will get preferential treatment because of the supervisor’s relationship with the State employee who would handle the transactions, or because the two firm members are both State employees, even if a relative brings in the paperwork.

(3) official decisions outside official channels: This precludes employees from “back-dooring” when they cannot use the “front door,” e.g., recusing, and then trying to get favorable decisions from another official.

Appearance Issues: Even if both State employees recuse from officially reviewing or disposing of matters related to their firm, it could appear they could unofficially influence the State employee making the official decisions, because of the strong working relationship discussed above.

Another potential conflict is that even if the supervisor recuses from supervising the other employee, it may appear that the supervisor would be in a position to unofficially influence the official who would make the decisions to give the State employee, who works for the private firm, favorable evaluations.

(4) Any adverse effect on the public’s confidence in its government.

As noted above, there need not be an actual conflict, nor does it require that the public servant succumb to the temptation; rather it is if there is a potential for conflict. *63C Am. Jur. 2d Public Officers and Employees* ' 252.

In the paragraphs above, we have identified some appearance concerns. However, other relevant facts and law show other potential conflicts.

Appearance Issues: Courts have held that even if an employee recuses in a State job, a ban on accepting the private job “insures that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *People Ex. Rel. Teros v. Verbeck, Ill. App. 3 Dist., 506 N.E. 2^d 464 (1987); See also, O’Connor v. Calandrillo, N.J. Super., 285 A.2d 275, aff’d., 296 A.2d 325, cert. denied., 299 A.2d 727, cert. denied., U.S. Supr. Ct., 412 U.S. 940. Sector Enterprises, Inc. v. DiPalermo, N.D. NY, 779 F. Supp. 236 (1991).*

In *Sector*, the Court said “multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture@ if their private business offers the same services as they do for the State. One concern was:

“the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official

library, telephone and other facilities to accommodate the temporal and other necessities of private practices.@

Likewise, this Commission considered the time involved for the private job. Both said they would not work on their private business during State duty hours. A runner would take the documents to the facility. However, one relevant fact is that the State facility where the documents must be reviewed operate during the same hours that they perform official duties. If the runner is at the facility, and has questions for either of them, the runner would want to call while they are on State time. As the questions would arise during work hours, the public, which would include employees within the agency, could well suspect the use of State hours to work on their personal business because of those overlapping hours to perform their State duties and the private job.

Both said the private firm's work would be sent to the supervisor at another facility. However, she likely has the same work hours. She has an official duty to answer her employees' questions on their paperwork and, if necessary, she or her employees may need to contact one of them directly to answer questions on their private work. As the employees at the other facility would perform the official tasks of resolving questions during the same hours as these 2 employees work at their State job, again, it may result in the public, including agency employees, suspecting use of State time and resources for their private work.

When a government employee accepts something of monetary value, which under Delaware's statute includes money from other employment, Courts have said that it may raise the specter that government employees are "selling" their labor twice--once to the government and once to the private sector, thus creating at least an appearance that the employee is using public office for private gain. *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 3d 85, 94 (1995)*. As in this federal case, the Delaware Code bars State employees from using public office to secure unwarranted privileges, private advancement or gain. [29 Del. C. § 5806\(e\)](#).

II. Conclusion

As noted, the Commission found potential literal violations if the supervisor reviews or disposes of matters relating to the supervision of the State employee who would be part of the private business, and on the "representing or otherwise assisting" their private enterprise before their own agency. However, even if no direct violation were considered, with the multiple potential conflicts, the public may suspect that the Code would be violated if they undertook this private employment.

09-14 Private Consulting on Duties Connected to State Job

A former contractor with an agency was later hired as a full-time State employee. Her private consulting business dealt with the same issues as her full-time State job. She asked if she could continue to privately consult with local governments, private entities, or other private clients if they did not come before her agency. Some of those entities have approached her after she has given classes—an official duty--and asked if she could consult with them. They are not Delaware entities. She said she did not develop a long client list because she established it with no reason to think the agency would hire her. If she consults, she would not seek or advertise for clients. She said it is not unusual for her to use her State work as part of the training, and after that training she has been approached to consult. In the past two years, she spoke at national conferences. At the first conference she was not asked if she would consult. This year, two entities approached her. She has not yet pursued them as clients. She has been asked to speak in other States, and has done so. She sometimes is paid but has also provided services pro bono. She uses her agency's "best practices" in handling her private clients. She said her agency supports her on that. Her supervisor said she is the only one on a National Board related to her State work from the Mid-Atlantic area, and some other States. He said she is asked to speak at its conferences because of her expertise and wide understanding of regional and national needs. He said Delaware's program model is to share good ideas as seeds for the program, but implementing the ideas and process are the vital part for her private clients. He said the "best practices" she provides for them is part of her State duties. Opportunities for non-Delaware clients are outside the scope of her State duties. He said she was empowered by the agency to work with non-Delaware clients, even though it is not within her State job. However, she would consult in her private status. Her agency would approve what she would share with them, and it would have to be distinctly different from her State work. The Commission found that it would be a conflict as the two jobs are so intertwined that it would be

difficult to distinguish whether her role was in her official or private capacity, and it may appear she would be using public office to obtain private clients.

09-14- Reconsideration for Outside Employment

The Public Integrity Commission (PIC) reviewed a request to reconsider its advisory opinion on out-of-State private consulting on the same matters as a State employees official duties.⁴²

I. Standard for Reconsideration

Superior Court Rule 59 is the standard. Rule 59 motions are to give an opportunity to correct errors. It is not a device for raising new arguments. It will be denied unless a controlling precedent or legal principle was overlooked, or the law or facts that would change the outcome were misunderstood. [Beatty v. Smedley](#), C.A. No. 00C-06-060 JRS, J. Sights III (Del. Super., March 12, 2003).¹

ARGUMENT 1: PIC ignored the presumption of honesty principle and assumed the private clients may contact the State employee at work, and that the State employee would not refer potential clients to other resources.

RESPONSE: The State employee's honesty was specifically presumed: "This is not to say you would actually violate this or other provisions." *Op. p. 3, 1st full ¶*. It then cited the law that says "However, actual violations are not required; only the appearance thereof." *Id.*

USE OF STATE TIME/RESOURCES: Case law holds that using official time and resources is an "inherent" conflict when the jobs are the same. *Op. p. 3 ¶ 3*. "Inherent" means it is, by nature, part of the "essential character." It is not an issue of honesty; it identifies the "nature of the beast."

REFERRALS: PIC considered two ways referrals could occur to see if one or the other would solve the appearance issue: (1) including the State employee's business or (2) not including it. They are factual possibilities. Regardless of the employee's honesty, both would put the State employee in a no-win situation. *Op. p. 4 ¶*.

Regarding the State employee's statement that they would be honest, Delaware Courts, in a decision on a State duty and a private practice before an independent Commission existed, said if the result was to cast upon the official the burden of determining the limits which must be circumscribed for a private practice, it is easy to say that in a doubtful case the official should decide against their own interest. It went on to say that while that is true, officials are subject to human weakness, and the inevitable result is that in some cases considerations

⁴² The statute, nor rules, provide for reconsidering advisory opinions. However, we do so here.

of self-interest may entice the holder of the office away from the performance of their duty. [In re Ridgely](#), 106 A.2d 527 (Del., 1954).

The legal principle of honesty was not overlooked.

ARGUMENT 2: The State agency was not “vetting” the employee’s private business. It was “vetting” PIC’s process. With due diligence, the agency appropriately advised the employee to seek PIC’s advice, which should mitigate “public suspicion.”

RESPONSE: The Legislators passed the law vetting PIC’s process. *29 Del. C., ch. 58*. An agency’s vetting is not required. We did not suggest the agency’s advice to seek PIC’s advice was inappropriate in law or fact. We also address “mitigation” herein. *p.2 and Argument 5*. Moreover, State officials must comply with the law, whether they seek an opinion or not. [29 Del. C. § 5802](#).

Moreover, the record shows the State agency used the term “vet.” The State employee even used the term “vet” in this request, e.g., the State employee would refer potential clients to the agency to “vet the opportunity.” *p. 2, last ¶; p. 4 ¶ 2*. That is not “vetting” PIC’s process; it is “vetting” the State employee’s private work, by co-workers on State hours—an “inherent” conflict.

Approval by colleagues or co-workers does not mitigate public suspicion. That duty was specifically removed from State agencies or employees when this independent Commission was created to serve as the “public’s eye” to instill its confidence. [29 Del. C. § 5802](#) and [§ 5806 \(a\)](#). The very reason for the public’s concern when State employees decide if a conflict exists for another employee was the suspicion that they might “do each other a favor.”

The outcome does not change. This argument is contrary to the law and its purpose. Having an agency “vet” PIC’s process is not required by law, nor does it as a factual matter, determine if a conflict or the appearance thereof exists. Also, the underlying opinion pointed out the problems when the agency “vets” its employee’s work. *Op. p. 2 last ¶ though 3*.

ARGUMENT 3: If the agency did not support the request or recommend going to PIC, PIC would not have supported it, nor would it have been presented.

RESPONSE: PIC’s duties are not to rubber stamp an agency’s position. It is to independently apply the law and facts. [29 Del. C. § 5807\(c\)](#). A State employee has the legal right to seek advice even if the agency did not approve. *Id.*

This argument does not change the outcome. It is contrary to the law, and the facts do not determine if a conflict, or the appearance thereof, exists.

ARGUMENT 4: There is substantial precedent for, and value of, counterparts in other states acting in the same capacity as those being requested herein because of their expertise.

Comments of persons from other States are not legal precedence or legal principles. They do not interpret Delaware law, which PIC must apply. *Id.* Factually, they give the same reason as the employee and the agency--the "unique perspective and qualifications." That expertise directly resulted from the State job, which the State employee would then offer to private clients. That is the heart of the problem. *pp.* 2 ¶ 3; *p.* 3, *IV*, ¶ 5; *p.* 4, ¶ 4. We further note that Courts have said that when a government employee is compensated by a private entity for performing what would be their official duties, one ethical concern is that it may raise the appearance to the public that they are selling their official work twice—once to the government and then to the private sector. *Sanjour v. EPA*, *D.C. App. Ct.*, 984 *F.2d* 434,445 (1993).

This argument does do not change the outcome. As a matter of law the letters saying other States allow it is not legal precedence. The fact that they consult outside of their States was the very fact the State employee wanted PIC to consider. It did so. In applying Delaware law, it concluded that even limiting the work to out-of-State clients would not resolve the public concerns.

ARGUMENT 5: PIC should consider the following suggestions that the State employee believed would eliminate or minimize the appearance of impropriety.

(a) If asked to provide revitalization consulting, or training for out-of-state public or private entities, as a result of the agency's sponsored activity, the State employee would immediately tell the inquirer to contact a designated agency representative to vet the opportunity. Also, the State employee would disclose to the agency representative all opportunities for outside employment that may arise beyond the agency sponsored activity.

The opinion addressed "vetting." *p.* 4, ¶ 2, *and fn.* 5, as does this reconsideration. This proposal does not change those facts and/or the law.

(b) For out of state requests, if the agency declines funding or time to support the request, only then would the State employee be allowed to pursue those opportunities independently and then without encumbering the State or the State employee's availability to perform core official responsibilities in anyway, that determination ultimately to be assessed by the direct supervisor.

This raises "vetting" again, but now adds to the appearance of using public office for personal gain and/or official endorsement. If the agency declines a

request, “only then would I be allowed to pursue those opportunities....”, which to the public may create the appearance that the agency would be identifying projects, on State time, for the State employee’s private business.

This does not change the outcome. Rather, it reinforces the result.

(c) PIC or the agency could cap the number of requests that the agency would review for outside employment to not more than five per year.

PIC considered the fact that the State employee had two clients pending. *Op.*, p. fn. 5. If two clients could raise all the concerns expressed, increasing the number could result in even more public suspicion. Moreover, the private pay would be based on the amount of hours spent for each client, not how many clients the State employee has. The Commission dealt with the issue of “the money trail” and how the public may not be able to discern where one job began and the other ended. *Op.* p. 5, 1st full ¶.

This argument does not change the outcome.

(d) Stipulate that no one could promote, reveal, imply, or suggest the existence of a personal business at agency related or agency sponsored activities.

Those facts were considered in reaching the outcome. pp. 4 ¶, fn. 5.

(e) Stipulate no use of presentations and/or materials developed for the State for outside employment activities.

These facts were considered in reaching the outcome. p. 2, fn. 3.

CONCLUSION:

Reconsideration is denied. Controlling precedents nor legal principles were overlooked, nor were the law or facts misunderstood.

[07-68 Private Employment Disclosure; Waiver Denied](#)

The requester wants a part-time job with a company that is regulated by the StateOffice in which she works. By law, she must disclose that relationship to the Commission as a condition of commencing and continuing State employment. [29 Del. C. § 5806\(d\)](#). Her State duties involve responsibilities for licensing, certification and surveying such facilities, including the private employer. Her public and private duties differ to some extent. Her interest in the

part-time job is because she suffered a significant loss in State over-time pay when she left her last State job to accept this State position. She and her supervisor said she would be screened from any State involvement in decisions about that company, re: licensing, etc. Thus, she would not review or dispose of matters pertaining to her private employer. [29 Del. C. § 5805\(a\)](#). She said that in her private capacity she would not represent or otherwise assist the company on State matters before her own Office. [29 Del. C. § 5805\(b\)\(1\)](#) As far as confidential information, she said she believed surveys, licensing, etc., of such facilities are public records. She and her agency said that if she does have access to confidential information about such facilities she would be blocked by screening and would not use it to assist the facility. [29 Del. C. § 5806\(f\) and \(g\)](#). Her supervisor expressed the economic need for her to work part time. Her opportunities are limited as most part-time jobs would be at facilities regulated by her Office. However, the supervisor said her Office did not regulate some facilities that could use her professional services. The Commission found there was a conflict, or at least the appearance thereof, due to the overlap between her State duties and the private job. She would be in a position to assist the facility, and unable to ignore non-compliance with her State Office's regulations, etc. [29 Del. C. § 5806\(b\)\(1\)\(2\) and \(4\)](#)(*impaired judgment; preferential treatment, or the appearance thereof*) Other regulated facilities and the public may suspect she is violating the Code.

07-35 – Private Employment: Waiver Granted; opinion becomes public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op.No. 07-35- Outside Employment

Hearing and decision by: *Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader and William Dailey*

Dear Mr. [Ivan] Edmunds:

The Public Integrity Commission reviewed your disclosure on your private job with People's Place. Based on the law and facts below, we grant a waiver for you to engage in the outside employment.

I. Law and Facts:

(A) Disclosure: State employees must file a disclosure if they have a financial interest in a private firm that does business with any State agency. [29 Del. C. § 5806\(d\)](#). People's Place contracts with the Department of Services for Children, Youth, and Their Families (DSCYF), Division of Family Services (DFS), where you work.

(B) State Job: In your State job, you may not review or dispose of matters where you have a financial interest, including a private job. [29 Del. C. § 5805\(b\)](#). You are a DFS Family Crisis Therapist. You are not in any way involved with the contract.

(C) Private Job: State employees may not represent or assist a private firm before their agency. [29 Del. C. § 5805\(b\)\(1\)](#). People's Place contracts for Juvenile services. Your job is not to work on DFS's contract, but to counsel battered and abused adults. No facts suggest you represent or assist People's Place before your agency.

(D) Appearance Test: State employees may not accept private jobs, if it may affect the public's confidence in its government. [29 Del. C. § 5806\(b\)\(4\)](#). This is to avoid even an appearance of impropriety. *Commission Op. No. 92-11*. On the face of it, working for a firm that contracts with your Division may appear improper. However, the test is: if a reasonable person, knowing *all* the relevant facts that a reasonable inquiry would disclose, believes the official's ability to carry out State duties with integrity, impartiality and competence is impaired. *In re Williams*, 701 A.2d 825 (Del., 1997).

Here, other relevant facts are: (1) you are technically complying with the law; (2) your private work is screened so you do not get State clients; (3) you are entitled to a strong legal presumption of honesty and integrity; (4) to further instill public confidence in its government, waivers are made public so the public will know *all* the relevant facts for the waiver; and (5) the public purposes of the restrictions are to prevent preferential treatment for the private firm by you in your State job, or from your colleagues if you represented or assisted the firm before your agency; those purposes are served here.

II. Conclusion:

Based on the specific facts and law above, we grant a waiver, limited to these particular facts, for you to work for People's Place. If the facts change, you may need to file an updated disclosure.

Original Signed by Chair Terry Massie

06-75 & 06-81 Private Job with Agency Contractor: Waiver Granted.

A waiver was granted so the following opinions are not confidential. [29 Del. C. § 5807\(b\)\(4\)](#)

Advisory Op. No. 06-75 & 06-81 - Employment with Agency Contractor
Hearing and Decision by: *Chairman Terry Massie, Vice Chairs; Barbara Green and Bernadette Winston, Commissioners; William Dailey and Dennis Schrader*

Dear Ms. Barile and Ms. Short:

The State Public Integrity Commission reviewed your disclosures identifying your financial interest in a private firm, New Behavioral Network (NBN) that contracts with your agency, the Department of Children, Youth and Their Families. The facts are nearly identical. Based on those facts, we grant a waiver, with the restrictions discussed below, so that you can continue your outside employment with NBN.

The law requires that State employees file a disclosure if they have a financial interest in a private company that does business with or is regulated by the State. [29 Del. C. ' 5806\(d\)](#). As your financial interest is private employment with NBN, and it contracts with your agency, you filed the required disclosure.

You both are State employees in the Family Services Division of the Department. NBN contracts with a different division, Child Mental Health. In your State job, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. ' 5805\(a\)](#). Neither of you are in any manner involved in making decisions about NBN in your State job. As long as there is no change in those facts, there is no violation.

In your private job, you may not represent or otherwise assist a private enterprise on matters before your agency. [29 Del. C. ' 5805\(b\)\(1\)](#). In your private jobs, you are both Treatment Mentors. The Child Mental Health Division employees

do not evaluate your private work and you will not have contact with that Division's caseworker. Neither of you will work with children who are, or were, involved in abuse investigations by you or anyone in your division. To the extent your activities in your private job might literally mean that you are otherwise assisting NBN before your own agency, you both sought waivers.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). The public purpose of restricting State employees from representing or assisting private entities before their own agency is to ensure that the private entity does not get a leg up on its competitors because of your State connection. Further, it ensures that your co-workers and colleagues are not engaging in biased decisions in such matters as awarding a contract, etc., because of your private employment connection.

Here, the public purposes are achieved because the connections between your State and private employment are very remote. You are not involved in any of the contract actions; the contract is not even with your own Division; the contract was awarded before you were even hired; your clients are not the same in the two jobs; in your private capacity you do not report to, nor are you evaluated by anyone in your Division, or by anyone in the Department. Those facts indicate that the public concerns identified above are achieved because of that remoteness.

Accordingly, we grant waivers to each of you. However, should there be any change in your circumstances, you are free to return to the Commission for advice.

Original Signed by Chair Terry Massie

06-76-PrivateEmployer Contracts with Different Division; Waiver Granted.

Opinion is a matter of public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 06-76 - Employment with State Vendor

Hearing and Decision by: *Chairman Terry Massie, Vice Chairs; Barbara Green and Bernadette Winston, Commissioners; William Dailey and Dennis Schrader*

Dear Ms. McCormick:

The Public Integrity Commission reviewed your disclosure filing of your employment with Resources for Human Development (RHD). RHD contracts with your agency, the Department of Health and Social Services. You asked if employment with RHD created a conflict, and, if so, asked for a waiver. Based on the following law and facts, to the extent there may be a conflict, or the appearance thereof, we grant a waiver.

The law requires that State employees file a disclosure if they have a financial interest in a private company that does business with or is regulated by the State. [29 Del. C. ' 5806\(d\)](#). As your financial interest is private employment with RHD, and it contracts with your agency, you filed the required disclosure.

You are employed in the Department=s Division of Developmental Disabilities Services. RHD contracts with a different division, Substance Abuse and Mental Health. In your State job, you may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. ' 5805\(a\)\(2\)](#). You are in no manner involved in making decisions about RHD in your State job. As long as there is no change in those facts, there is no violation of this restriction.

In your private job, you may not represent or otherwise assist a private enterprise on matters before your agency. [29 Del. C. ' 5805\(b\)\(1\)](#). In your private job, you issue medications and complete shift program notes. In that job, you have no dealings with either your Division or the Division which contracts with RHD. You perform the private work during non-State hours. To the extent your activities in your private job might literally be read as meaning that you are ~~otherwise assisting~~ RHD before your own agency, you sought a waiver.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. [29 Del. C. ' 5807\(a\)](#). The public purpose of restricting State employees from representing or assisting private entities before their own agency is to ensure that the private entity does not get a leg up on its competitors because of your State connection. Further, it ensures that your co-workers and colleagues are not engaging in biased decisions in such matters as awarding a contract, etc., because of your private employment

connection.

Here, the public purposes are achieved because the connections between your State and private employment are very remote. You are not involved in any of the contract actions; the contract is not even with your own Division; the contract was awarded before you were even hired; your clients are not the same in the two jobs; in your private capacity you do not report to, nor are you evaluated by anyone in your Division, or by anyone in the Department. Those facts indicate that the public concerns identified above are achieved because of that remoteness.

Accordingly, we grant a waiver. However, if your circumstances change, you are free to return to the Commission for advice.

Original signed by Chair Terry Massie

06-86 – PrivateJob With Vendor for Different Division; Different Clients

As a waiver was granted, the opinion is a matter of public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 06-86 - Contracting with State Vendor

Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston, Commissioners William Dailey, and Dennis Schrader

Dear Ms. Gregor:

The Public Integrity Commission reviewed your disclosure of your private job with Kent/Sussex Counseling, which contracts with the Department of Services for Children, Youth and their Families. You are employed by the Department. If a conflict exists, you seek a waiver. Based on your written disclosure and comments at our meeting, to the extent your conduct would violate the Code, a waiver is granted based on the following law and facts.

State employees must file disclosures if they have a financial interest in a private firm that does business with, or is regulated by, the State. [29 Del. C. § 5806\(d\)](#). Your financial interest is your private job with Kent/Sussex Counseling. It contracts with your Department, so you filed the required disclosure.

The contract is not with your Division--Children's Mental Health—where you are the Director of Drug and Alcohol Services. The private firm contracts with a separate Division--Alcohol Services and Mental Health. While the general work is the same--counseling clients with substance abuse problems,--the clients are not the same in your two jobs. Your State job deals with children and substance abuse. Your private job deals with adults and substance abuse. You

have no involvement with the private firm's contract, nor any occasion to make other decisions about the firm in your State capacity.

Based on those facts, you are not violating the provision on reviewing or disposing of State matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5805\(a\)\(1\)](#).

By law, you may not represent or assist a private enterprise on matters before your agency. [29 Del. C. § 5805\(b\)\(1\)](#). In your private job, you do not have the same clients. Also, the Counseling firm screens incoming cases to insure you do not have clients from your own Division, but clients from any other Division. As you have no Departmental clients, you would not formally represent the firm before your Department.

However, to the extent your private job might literally be seen as "otherwise assisting" the firm, you sought a waiver.

Waivers may be granted if literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). State employees may not represent or assist private firms before their agency to ensure: (1) a private firm does not get a "leg up" on competitors because of your State connection; and (2) co-workers and colleagues are not biased in decisions about the firm because of your affiliation.

Here, any connection between your two jobs is very remote, as seen in the facts. Also, the contract was publicly noticed and bid, giving competitors a chance to contract. No facts suggest it was awarded to the firm because of you. All the facts help ensure the public concerns are achieved. Accordingly, we grant a waiver. However, if the above facts change, you are free to return to the Commission for advice.

Original signed by Chair Terry Massie

06-84 - Outside Job with Contractor of Different Agency; Different Clients

A waiver was granted so the opinion is a matter of public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 06-84 - Contracting with State Vendor

Hearing and Decision by: Chairman Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, and Dennis Schrader

Dear Ms. Harris:

The Public Integrity Commission reviewed your disclosure of your private job with Kent/Sussex Counseling, which contracts with the Department of Services for Children, Youth and their Families. You are employed by the Department. If a conflict exists, you seek a waiver. Based on your written disclosure and comments at our meeting, to the extent your conduct would violate the Code, a waiver is granted based on the following law and facts.

State employees must disclose their financial interest in a private firm that does business with, or is regulated by, the State. [29 Del. C. § 5806\(d\)](#). Your financial interest is your private job with Kent/Sussex Counseling. It contracts with your Department, so you filed the required disclosure.

The contract is not with your Division—Developmental Disabilities--where you are a Social Services Specialist. The private firm contracts with the Division of Alcohol Services and Mental Health. You have no involvement with the private firm's contract, nor any reason to make decisions about the firm in your State job.

Based on those facts, you are not violating the provision on reviewing or disposing of State matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5805\(a\)\(1\)](#).

By law, you may not represent or assist a private enterprise on matters before your agency. [29 Del. C. § 5805\(b\)\(1\)](#). In your private job, you do not have the same clients. Also, the private firm screens incoming cases to insure you have no clients from your own Division or any other Division. As you have no Departmental clients, you would have no reason to formally represent the firm before your Department.

However, to the extent your private job might literally be seen as "otherwise assisting" the firm, you sought a waiver.

Waivers may be granted if literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). State employees may not represent or assist private firms before their agency to ensure: (1) a private firm does not get a "leg up" on competitors because of your State connection; and (2) co-workers and colleagues are not biased in decisions about the firm because of your affiliation.

Here, any connection between your two jobs is very remote, as seen in the facts. Also, the contract was publicly notice and bid. giving competitors a chance to contract. No facts suggest it was awarded to the firm because of you. All the facts help ensure the public concerns are achieved.

Further, waivers may be granted if an employee has an undue hardship. [29 Del. C. § 5807\(a\)](#) You accepted the job so you could get the required credits to be certified in this field. As your Department contracts with most of the firms

who provide this service, you are limited in places to go to advance your certification.

Accordingly, we grant a waiver. However, if the above facts change, you are free to return to the Commission for advice.

Original signed by Chair Terry Massie

[09-33 No Dealings with Own Agency in Private Job](#)

A State employee disclosed that she would like to privately work for a firm that contracts with her State agency. [29 Del. C. § 5806\(d\)](#). However, it was not within her section, and she had no responsibility for the State contract, nor did she make referrals to the private firm. Thus, she did not review or dispose of matters related to the company as part of her official duties. [29 Del. C. § 5805\(a\)](#). Also, she would not accept any State clients as part of her private work. Thus, she would not have occasion to represent or assist the private enterprise/its clients before her own agency. [29 Del. C. § 5805\(b\)\(1\)](#). Further, she would be performing a different function than in her State job. While not expected to occur, she said if a matter was referred to her in her State job by the private firm, she would recuse, and vice versa. She is on a four-day work week with the State, and would work for the firm on her day off, and in the evening. Thus, she would not be using State time to perform her private work. [29 Del. C. § 5806\(e\)](#). She also said she would not use State resources for her private job. *Id.* The Commission found no conflict.

[Private Contracts with the State](#)

[06-04 Private Contract with Own Agency Denied](#)

State employee wanted to privately contract with own agency. The law bars State employees from representing or otherwise assisting a private enterprise before they agency with which they are associated by employment. [29 Del. C. § 5805\(b\)\(1\)](#). [Note: The Commission previously held that the broad definition of “private enterprise” includes private contracts with the State. “Private enterprise” is defined as: “any activity conducted by any person, whether conducted for profit

or not for profit and includes the ownership of real or personal property.”[29 Del. C. § 5804\(7\)](#).]

06-04 – Contracting with Own Agency Reconsideration; Again Denied

A State employee asked the Commission to reconsider its decision, Advisory Opinion 06-04, in which it concluded that it would not grant a waiver for the employee to contract with the employee’s own agency, which is prohibited. [29 Del. C. § 5805\(b\)\(1\)](#). The Commission affirmed its previous decision as no facts had been provided by the employee or agency indicating any “undue hardship” that would justify a waiver under [29 Del. C. § 5807 \(a\)](#). The agency had had more than a year to provide such facts.

06-37 – NoContract with own Agency

A State employee wants to contract with her own agency. The statute bars contracting with one’s own agency, [29 Del. C. § 5805\(b\)\(1\)](#), absent any facts that establish a need for a waiver. Waivers may be granted if there is an undue hardship on the State agency or State employee, or the literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). As the contract benefitted the State employee, if awarded, she could not speak on behalf of the agency’s need for a waiver. The agency had been given an opportunity to submit facts that would support a waiver on this matter, if it needed such waivers, but no facts were submitted. Absent any facts from the agency establishing a need for a waiver, the Commission would not waive the provision barring her from contracting with her own agency.

[06-63 – Foster Care Contract with Own Agency: Current and Post-Employment. Waiver granted; opinion public record. 29 Del. C. § 5807\(b\)\(4\).](#)

Advisory Op. No. 06-63 - Contracting with Own Agency - Foster Care

Dear Mr. and Mrs. Fisher:

The Public Integrity Commission (PIC) grants a waiver for Mr. Fisher to remain a foster parent to State clients, based on your disclosures, the letter from Tim McFeeley, Director, NorthEast Treatment Centers (NET), a private entity, and your statements at PIC’s October 17, 2006 meeting.

NET contracts with the Department of Children, Youth and Family Services--Mr. Fisher's own agency. In effect, he privately subcontracts with his own agency. State employees may not represent or otherwise assist private entities before their own agency. [29 Del. C. § 5805\(b\)\(1\)](#). Mr. Fisher needed a waiver of this rule to remain a foster parent.

Waivers may be granted if a literal application does not serve the public purpose. [29 Del. C. § 5807\(a\)](#). The rule's purpose is to insure the public that State employees do not: (1) receive preferential treatment from their agency; (2) influence agency decisions when they have a personal interest; and/or (3) use public office for personal benefit or gain. The particular facts show that these events are too remote to preclude a waiver: (a) Your experience as a Juvenile Parole and Probation Officer has greatly benefited children you have fostered, including one who will soon leave your care; (b) NET asked you to take another child with special needs that your experience and knowledge as a Juvenile Probation and Parole officer will provide; (c) Such children are hard to place; (d) Your State job is unrelated to foster care case decisions, funding, etc. When you foster children on probation or parole, your office insures you do not make decisions about the child's probation or parole compliance. An Officer in another district monitors that progression; (e) NET personnel, not foster parents, represent or assist NET on its contract with the State agency. A State case worker may visit your home, is not an employee with whom you work; (f) You have fully complied with the other Code sections: e.g., no official decisions about foster care; foster contract publicly notice and bid; filing of disclosure, etc.; (g) Mrs. Fisher, also a State employee, has fully complied with the Code, so needs no waiver.

Based on the total circumstances, the public concerns--improper use of public office; undue influence on colleagues; or preferential treatment—are too remote to require a literal application of the law.

We grant a waiver for you to remain a foster parent as long as you are not involved in overseeing your foster child on probation and parole compliance. If the parameters of your State employment change, you may return to the Commission for additional advice.

Original signed

06-61 – Representing Private Enterprise Before Different Agency

State employees must file a full disclosure with the Commission if they have a financial interest in a private enterprise which does business with, or is regulated by, a State agency. [29 Del. C. § 5806\(d\)](#). The disclosure is confidential unless a violation is found, and it must be filed as a condition of commencing and

continuing employment with the State. *Id.* A State employee filed a disclosure that his private company was seeking a contract with a Department other than the one which employed him. As he was not representing or otherwise assisting a private enterprise before the agency with which he is associated with employment, that was not a bar to the contract. [29 Del. § 5805\(b\)\(1\)](#). State employees also may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. [29 Del. § 5805\(a\)\(1\)](#). In his State job, he makes no decisions on contracts created by another agency. He did not prepare the contract or serve on the selection board, etc. Further, State employees may not seek a State contract of more than \$2,000 unless it is publicly notice and bid; if less than \$2,000 it must reflect arms' length negotiations. [29 Del. § 5805\(c\)](#). The contract was for less than \$2,000, so arm's length negotiations were required. Arm's length insures distance between the contracting parties. Some distance is built into the Code of Conduct by prohibiting any self-dealings on a contract, [29 Del. C. § 5805\(a\)\(1\)](#); and by not having other co-workers and colleagues make decisions about the contract. [29 Del. C. § 5805\(b\)\(1\)](#). Also, it requires a fair market value. *Commission Op. No. 98-32*. The State employee filed the disclosure based on the Commission's prior advisory opinion telling him to file once a year, and if there were no substantial change, he need not appear in person. The disclosure was similar to a prior contract he had with another State agency, which included information on the price for the services by his company and others in that same type of endeavor. In that case, the Commission found no violation. The Commission is to strive for consistency in its opinions. [29 Del. C. § 5809\(5\)](#).

07-56 – Husband and Wife Contracting with State

A current State employee asked if he could contract with a State agency. State employees are barred from privately contracting with their own agency. [29 Del. C. § 5805\(b\)\(1\)](#). The contract is not with his own agency. They also may not review or dispose of a matter in which they have a personal or private interest. [29 Del. C. § 5805\(a\)\(1\)](#). He was in no way involved in the contract as a State

employee because it was not even handled by his agency. The contract exceeded \$2,000. It was publicly noticed and bid, as required. [29 Del. C. § 5805\(c\)](#). His spouse was a State employee at the initiation of this request, but has now left State employment. As a former employee, for 2 years after leaving State employment, she may not represent or otherwise assist a private enterprise on State matters where she gave an opinion; conducted an investigation or was otherwise directly and materially responsible. [29 Del. C. § 5805\(d\)](#). As a State employee, she was in no manner involved with the contract, which was not with her agency either. The Commission found no conflict for either of them.

07-56 – Financial Interest in Private Enterprise that Contracts with State

The Commission (PIC) reviewed a request for advice asking if the private firm of two State employees would violate the Code of Conduct. It found no violation if the facts do not change.

1. Financial Interest Filing. Both were State employees when the request was filed. Both filed the required disclosure. [29 Del. C. § 5806\(d\)](#). One State employee subsequently left State employment.

2. Cannot review or dispose of State matters if financial interest exists. [29 Del. C. § 5805\(a\)\(1\)](#). In their State jobs, they were not involved in the State contract. It is not with their agencies. The current State employee has no reason to believe he would be involved in his State capacity in matters relate to the contract.

3. Cannot represent or assist a private enterprise on certain State matters. [29 Del. C. § 5805\(b\)\(1\)](#) and [§ 5805\(d\)](#). The current State employee will not engage in such conduct before his own agency on any matter. [29 Del. C. § 5805\(b\)\(1\)](#). As a former employee, the other person may not engage in such conduct on matters for which she was directly and materially responsible. [29 Del. C. § 5805\(d\)](#). No facts suggest that would occur. If the facts change, one may seek concurrent employment advice; the other may seek post-employment advice.

4. Public Notice and Bidding. State employees may not seek State contracts over \$2,000, unless publicly noticed and bid. [29 Del. C. § 5805\(c\)](#). This contract was publicly noticed and bid.

07-45 – State Contract as Trainer

A State employee disclosed that she wants to contract with a State agency; but not her own. [29 Del. C. § 5806\(d\)](#). In her State job, she is in no manner involved with the agency with which she seeks to contract. [29 Del. C. § 5805\(a\)\(1\)](#). In her State job, she is a counselor; under the contract, she will be a trainer. There would be no overlap in clients. She expects that she might make more than \$2,000 a year. The contract was publicly noticed and bid, which is required when for a State employee to seek a contract of more than \$2,000. [29 Del. C. § 5805\(c\)](#). The Commission found no violation.

07-54 Another Contract with State – A State employee filed a disclosure of a contract with a State agency (not his own). [29 Del. C. § 5806\(d\)](#). The facts were like a previous filing he made several years before, where the Commission found no conflict, e.g., not doing business with his own agency, [29 Del. C. § 5805\(b\)\(1\)](#); not writing, drafting, approving, etc., the other agency's contract. [29 Del. C. § 5805\(a\)\(1\)](#). Limited term contract. *Commission Op. No. 03-31*. The Commission again found no conflict..

07-07, 07-12; 07-16, 07-17, 07-21 thru 07-25, 07-31 - Foster Care Contracts with the State

Ten State Employees filed disclosure statements on their private contracts with the State as foster care providers, as a condition of commencing and continuing employment with the State. [29 Del. C. §5806\(d\)](#). State employees may not contract with their own agency, [29 Del. C. §5805\(b\)\(1\)](#); and may not seek State contracts of more than \$2,000 unless they were publicly noticed and bid. [29 Del. C. §5805\(c\)](#). Most of these disclosures showed that the contracts were with the State employees' own agency, the Department of Health and Social Services (DHSS). All of the disclosures showed that there was no public notice and bidding of the contracts and all were valued at more than \$2,000. DHSS was

notified of those problems in an opinion issued in 2003. *Commission Op. No. 03-37*. It still has not publicly noticed and bid the contracts to cure at least that violation. It also was offered the opportunity to seek waivers to these laws if there were an undue hardship. After the Commission's 2003 ruling, DHSS had a provision added to its epilogue language in the [budget](#) law, Section 188, to allow it to continue its contracts with its own employees, despite the Code of Conduct restrictions. This did not negate the requirement for the employees to file a disclosure, and the agency was so advised.

For the individual State employees who filed the disclosure, the Commission noted its concerns about the following:

(a) 07-07 - his foster care clients are clients from the State Hospital where he works. Contracting with own agency, and obtaining clients from his own section.

(b) 07-12 - Overlap between her State job and foster care position may require better separation.

(c) 07-21 and 07-24 - Are not contracting with their own agency, but still have problem in that DHSS did not publicly notice and bid the contracts. Also, the submissions were unclear on whether these two foster care providers are at the Sussex Consortium.

(d) 07-23 – No longer a State employee and post-employment law does not apply; filing of disclosure does not apply.

Pursuant to its authority to work with agencies in Code of Conduct compliance, [29 Del. C. § 5809\(10\) & \(13\)](#). where both the public notice and bidding and/or the dealing with own agency rules would apply, the matters were deferred until the next meeting because of the absence of a record on why the agency cannot comply with the public notice and bidding, or show a demonstrable hardship for not doing so and/or for contracting with its own employees. A letter will be sent to the Cabinet Secretary, Division Directors and other Senior level staff members who have been involved in this matter over the years. The letter will also go to all applicants.

07-31 – Another Foster Care Contract

The Commission noted that there has been a pattern of recent reviews dealing with State employees from the Department of Services for Children, Youth and their Families contracting with its own employees. The Code bars State employees from privately dealing with their own agencies. [29 Del. C. § 5805\(b\)\(1\)](#). This employee also works for the contracting Department. She will not be providing care to any of her State clients. She is not involved with the foster care contracts or administering foster care in her official capacity. A waiver is needed if she is to provide foster care because the contract would be with her own Department. However, at present, she has no current foster care client, so no violation was occurring. The Commission concluded she should not enter future contracts with her own agency.

07-03-State Contract as Nurse; Waiver Granted.

A waiver was granted so the opinion is not confidential. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 07-03 – Contracting with a State Agency

Hearing and Decision by: *Chairman Terry Massie, Vice Chairs; Barbara Green and Bernadette Winston, Commissioners; William Dailey, Dennis Schrader and Barbara Remus*

Dear Ms. Stanley:

The Public Integrity Commission granted a waiver for you to privately contract as an Advance Practice Nurse with your own Department's Division of Substance Abuse and Mental Health. Our decision was based on the following facts and law.

You work in the Long-Term Care Division, Department of Health and Social Services. You are an Advance Practice Nurse at the Delaware Hospital for the Chronically Ill. The contract as Psychiatric Advanced Practice Nurse is not with your Division. Your hospitalized clients would not be treated outside their facility.

The Code restricts State employees who seek to privately contract with the State:

(1) A full disclosure must be filed with this Commission. [\[29 Del. C. § 5806\(d\)\]](#). You have complied.

(2) In your State job, you may not review or dispose of matters related to this contract. [\[29 Del. C. § 5805\(a\)\(1\)\]](#). Your disclosure said you will not because a separate division handles the contract.

(3) In your private job, you may not represent or otherwise assist a private enterprise before your agency. [\[29 Del. C. § 5805\(b\)\(1\)\]](#). “Private enterprise” is “any activity by any person, whether for profit or non-profit.” [\[29 Del. C. § 5804\(9\)\]](#). [State] “Agency” includes Departments. [\[29 Del. C. § 5804\(11\)\]](#). As a vendor entering and fulfilling the contract, you would “represent and otherwise assist” your own enterprise before your Department. We had to waive this provision.

(4) Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. [\[29 Del. C. § 5807\(a\)\]](#). The purpose of the restriction we waived is to insure you do not unduly influence co-workers and colleagues in making their contract decisions. Based on your disclosure, that possibility is remote. You are in a separate division; your private job and State job do not overlap; the clients are different; and the job would be during non-State work hours.

Based on the above facts and law, we waive the one provision of non-compliance as the public purpose can still be served. This waiver applies only to the specific facts of this case.

Original signed by Chair Terry Massie

Local Officials and Private Employment

07-70 – Disclosure Not Mandated for Local Appointment

Lawrence Steele was being considered for appointment to the Town of Bethel’s Zoning Commission. He was told by local authorities that he was required to file a financial disclosure. He is not required by law to file, as local officials are exempt from subchapter II disclosures, and only need to file under subchapter I if they have a financial interest in a private enterprise that does business with, or is regulated by, their government. He authorized release of the opinion. [29 Del. C. § 5807\(d\)\(1\)](#). Thus, it is a public record.

07-70 - Appointment to Local Board and Outside Employment

Hearing and Decisionby: *Chairman Terry Massie, Vice Chairs Barbara Greenand Bernadette Winston; Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.*

Dear Mr. Steele:

The Public Integrity Commission (PIC) reviewed your disclosure on your appointment to the Town of Bethel’s Zoning Commission and your private

employment as an attorney. Based on the following law and facts, we find no conflict of interest.

First, PIC understands that you were advised that you must file a financial disclosure with PIC. PIC administers two disclosure provisions. We wish to clarify the two requirements.

(a) Annual requirement for “public officers” to disclose certain assets, creditors, etc. [29 Del. C. § 5811](#), *et. seq.* You are not required to file under that law as it specifically exempts local officials. [29 Del. C. § 5812\(n\)\(2\)](#).

(b) Immediate requirement if employees, officers or officials have a financial interest in a private enterprise that does business with, or is regulated by, their agency. [29 Del. C. § 5806\(d\)](#). This does apply to local officials *if* the elements are met. [29 Del. C. § 5802\(4\)](#). Based on your filing, your private law firm is not doing business with, nor is it regulated by, the Zoning Commission or any other Town entity.

As you had no affirmative duty to file with PIC, you have more than complied with the above.

Second, without any link between your private activities and your Town position, we find no conflict and can only give you general guidance unless the facts should change.

(1) In your Town capacity: You may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. [29 Del. C. § 5805\(a\)](#). If, for example, your firm and/or clients come before your Commission, i.e., variance, as a general rule, you should recuse yourself. PIC understands that your firm and your private clients, including those who may be Town officials, have no matters before your Commission. However, if circumstances change you may seek advice on any “particular facts.” [29 Del. C. § 5807\(c\)](#).

(2) In your private capacity: You may not represent or otherwise assist your private enterprise and/or its clients before your Commission in your private capacity. [29 Del. C. § 5805\(b\)\(1\)](#). As your firm, nor your clients, have matters before your Commission, it does not appear you would have a reason to represent or assist them in your private capacity. Again, should particular facts arise, you may seek advice.

(3) Confidentiality: You may not misuse confidential information gained from your public position. [29 Del. C. § 5806\(f\) and \(g\)](#). At this time, you are not aware of any confidential information you would obtain in your official capacity. As you know, you also are bound by the Delaware Lawyers’ Rules of Professional Responsibility from improper use of confidential government information. *Rule 11.1*.

Based on the above law and facts, we find no conflict, and if the facts should change and you need specific advice, please feel free to contact PIC.

Original signed by Chair Terry Massie

UPDATE: Mr. Steele withdrew his nomination for other reasons.

[06-39 - Contracts with Local Government](#)

Two local government officials filed their annual disclosure on contracts with their local government. [29 Del. C. § 5806\(d\)](#). Enclosed with the disclosures was a letter from the local government's finance officer, explaining the process by which these individuals contracted with local government departments. They did not contract with their own agency. [29 Del. C. § 5805\(b\)\(1\)](#) All contracts were less than \$2,000 and so not required to be publicly noticed and bid. [29 Del. C. § 5805\(c\)](#). Neither official drafted, wrote or approved the contracts, nor selected the contractors. [29 Del. C. § 5805\(a\)\(1\)](#). The Commission found no conflict and that the written record reflected full disclosure.

[07-32 Local Government Officials' Disclosure](#)

Two local officials filed their annual disclosures on contracts with their local government. [29 Del. C. § 5806\(d\)](#). One official's contracts were: one for \$151.00 and one for \$155.00--totaling \$306. Thus, public notice and bidding was not required. [29 Del. C. § 5805\(c\)](#). He did not contract with his own agency, review, or dispose of the contract in his official capacity. [29 Del. C. § 5805\(a\)\(1\)](#). The other official had eight contracts totaling \$1,932 with individual contracts ranging from \$10 to \$638. Again, public notice and bidding was not required. [29 Del. C. § 5805\(c\)](#). He did not contract with his own agency, review, or dispose of the contract in his official capacity. [29 Del. C. § 5805\(a\)\(1\)](#) Neither represented or assisted their private enterprise before the agency with which they were associated by employment. [29 Del. C. § 5805\(b\)\(1\)](#) The Commission found no violation for the reasons stated in a prior opinion to them. *Commission Op. No. 06-29*,. The only difference: these contracts were for a lesser amount. The Commission is to strive for consistency in its opinion. [29 Del. C. § 5809\(5\)](#).

08-04, 08-05, and 08-06 **Local Officials' Employment Disclosures**

The local officials waived their right to confidentiality pursuant to [29 Del. C. § 5807\(b\)\(1\)](#).

08-04, 08-05, and 08-06 – Disclosure of Interest in Private Enterprise Hearing and Decision by: Chair Terry Massie; Vice Chairs Barbara Green and Bernadette Winston, Commissioners William Dailey and Wayne Stultz

Dear Mr. [Scott] Chambers [attorney for the local officials]:

As you know, the Public Integrity Commission (PIC) reviewed disclosures of outside employment by Middletown officials: Mayor Kenneth Branner and Councilmen Jason Faulkner and James Reynolds. Based on the following, PIC finds no violation.

I. Law and Facts:

(1) Disclosure Filing: [29 Del. C. § 5806\(d\)](#). If employees, officers and officials have a financial interest in a private enterprise that does business with their government, they must disclose it to PIC. *Id.* “Financial interest” includes private employment. [29 Del. C. § 5804\(5\)\(b\)](#). Disclosure is a condition of commencing and continuing government “employment” or “appointed status.” *Id.* It is confidential [unless waived] *Id.*

(a) Financial Interest: All three are employed by private firms.

(b) Who must file: “Employees,” “officers” and “officials.” *Id.* All three elected officials filed.

(c) Conditions: Disclosure is “a condition of commencing and continuing “employment” or “appointment.” [29 Del. C. § 5806\(d\)](#). Elected officials are “employees” or “appointees.” This condition cannot apply to elected officials as PIC cannot impose conditions for office on elected officials; nor remove them. The public decides whom to elect and whom to remove. This does not mean they are exempt from the rest of the Code. For example, [financial] conflicts can require recusal. [29 Del. C. § 5805\(a\)\(2\)\(a\)](#)..

(c) Timing of Filing: The law gives no deadline. We address this issue further at the end of this opinion.

(d) Purpose of filing: Disclosure gives PIC the chance to provide advice to filers on their conduct as it relates to their financial interests. Disclosure does not necessarily mean there is a conflict, nor that recusal has not occurred if there is one.

(e) Confidentiality: Disclosure is confidential. *Id.* Confidentiality rights belong to filers, who may waive it. [29 Del. C. § 5807\(d\)\(1\)](#). All three waived that right.

(2) Town Policy: The Town has had a conflict policy since June 22, 2001. Recusal is required for conflicts. Those recusing must give a reason.

Policies can be more stringent, but not less stringent, than the law. *Nardini v. Willin*, 245 A.2d 164 (Del., 1968). State law does not require a reason for recusal. [29 Del. C. § 5805\(a\)\(1\) and \(2\)](#). To that extent, the officials followed a more stringent Town policy.

(3) Acting in a Government Capacity: The law bars reviewing or disposing of matters if a personal or private interest exists in the matter. [29 Del. C. § 5805\(a\)\(1\)](#). It is an automatic “personal or private interest” if participation would result in a financial benefit or detriment to the official, close relatives or a private enterprise, to a lesser or greater degree than others similarly situated. [29 Del. C. § 5805\(a\)\(2\)\(a\) and \(b\)](#).

(a) Councilman Reynolds: Employer--Contractors Material. It has no Town contracts. Contractors Material supplies private contractors, e.g., hot mix, etc. The private contractors may do business with the Town. The firm had the private contractors for clients prior to Mr. Reynolds’ June 1, 2003 employment. The Town does not select suppliers for private firms. The contractors decide which suppliers to use.

As his private employer does not do business with the Town, he did not have to file a disclosure under [29 Del. C. § 5806\(d\)](#). He did so. That exceeds the law. If matters on his employer arise, he will recuse.

(b) Councilman Faulkner: Employer--Austin & Bednash Construction. The firm has bid on Town contracts, with one success—a street maintenance contract. The multi-year contract was publicly noticed and bid in 2007. The Town minutes show he publicly recused from participating in who would get the contract, and gave the reason. *Council Minutes ¶ 7, June 4, 2007*. State law does not require a reason. [29 Del. C. § 5805\(a\)](#). By announcing the reason, his conduct exceeded the law. By recusing, he complied with the bar against reviewing or disposing of the matter. *Id.*

(c) Mayor Branner: Employer--Artisan. Artisan contracts with the Town on wastewater. It has had the contract for more than 7 years. The Mayor accepted a job approximately 7 months ago when Artisan already had the contract. It has not come up for renewal or rebidding since he went to work at Artisan. He can avoid participating in Artisan matters because the Town Manager, or the Council member responsible for the Water and Sewer Department, can work with Artisan. Mayor Branner does not expect any upcoming contracts in the future. When the contract comes up for renewal or rebidding, or any other matter, he will recuse. The Mayor said he only votes if there is a tie. If he finds he has to break a tie on Artisan matters, the law requires disclosure to PIC on why the decision cannot be delegated. [29 Del. C. § 5805\(3\)](#).

(4) Acting in a Private Capacity: State law bars representing or otherwise assisting a private enterprise before one's agency. [29 Del. C. § 5805\(b\)\(1\)](#).

(a) Councilman Reynolds: No facts suggest he has represented or assisted Contractors Material on Town matters. He said if any Town matters came to his firm, he would not work on them.

(b) Councilman Faulkner: No facts suggest he has represented or assisted Austin & Bednash on Town matters. A different Project Manager handles Middletown. Mr. Faulkner is specifically excluded from his firm's discussions or meetings on Town projects. He does not make bidding decisions for the firm or its private clients.

(c) Mayor Branner: No facts suggest he has represented or assisted Artisan on Town matters. When Artisan deals with Town matters, he does not represent or assist the firm. His job covers other municipalities. He and Artesian worked that out before he accepted the job.

(5) Timing of Disclosure

Other Code of Conduct provisions give a set time for filing documents with PIC. [29 Del. C. § 5813\(c\)](#); [29 Del. C. § 5832\(a\) and \(c\)](#), [29 Del. C. § 5833](#) and [§ 5835\(a\)](#). This provision does not. [29 Del. C. § 5806\(d\)](#).

(a) As Councilman Reynolds' employer does not do business with the Town, the filing date is a moot issue for him.

The statute does not give a specific time frame for this Subchapter I disclosure. It does for Subchapter II public officer financial disclosure⁴³ and Subchapter IV lobbying expense disclosures. 29 Del. C. § 5813(c); 29 Del. C. § 5835(a). Had the General Assembly wanted to give a specific time frame for this disclosure, it could have done so.

As no time frame is set, the Commission considers the particular facts of this case as they relate to the public purposes of the law. [29 Del. C. § 5807\(a\) and \(c\)](#). Here, (1) they immediately responded once notified of the filing requirement; (2) nothing suggests they were "hiding" a financial interest that may

⁴³Local officials are excluded from Subchapter I1 financial disclosure. [29 Del. C. §5812\(n\)\(2\)](#). It requires filing within 14 days of becoming a public officer, and by February 15 each year thereafter. [29 Del. C. §5813\(c\)](#). (NOTE: Now by March 15 <http://delcode.delaware.gov/sessionlaws/ga145/chp353.shtml>) Subchapter IV requires lobbyists to file expense disclosures by the 20th of the month after the end of a quarter. [29 Del. C. § 5835\(a\)](#). Specific penalties can be imposed solely on the basis of failing to file by the time frames in Subchapters II and IV. [29 Del. C. §5815\(a\)](#) and [§5837\(c\)](#). This Subchapter I disclosure has no specific penalty based only on a failure to file. Rather, the requirement is to consider all the facts. [29 Del. C. §5807\(c\)](#).

be a potential conflict; (3) where appropriate, recusal occurred; (4) in some instances they more than complied with the Code; (5) they have not represented or assisted their private enterprise on Middletown matters; (6) their conduct is consistent with the purpose of the statute--to avoid conduct that would create a justifiable impression among the public that the public trust is being violated. [29 Del. C. § 5802\(1\)](#); (7) they are entitled to a “strong 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 (January 29, 1996); and (7) to encourage citizens to assume public office and employment, the law “should not be unduly circumscribed.” [29 Del. C. § 5802\(3\)](#).

The question of an exact date of when they should have filed must encompass all the facts showing compliance with the letter and purposes of all other provisions. Even Courts, and the attorneys representing local governments, are not always aware that the Code of Conduct applies to local governments. [Harvey v. Zoning Board of Adjustment of Odessa](#), Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001) *aff’d.*, 781 A.2d 697 (Del., 2001). When there is more than substantial compliance, it would seem to be “unduly circumscribing the law,” and would not be considering the “particular facts” of this case, if the filing date were the lone basis of a violation.

Original Signed by Chair Terry Massie

[08-23, 24, 25: Local Officials Contracting with Local Government](#)

Three local officials filed disclosures of their private business dealings with their local government. [29 Del. C. § 5806\(d\)](#). Two of the filings were for contracts of less than \$2,000 so they did not have to be publicly noticed and bid. [29 Del. C. § 5805\(c\)](#). The contracts were not with the agency for which they worked. [29 Del. C. § 5805\(b\)\(1\)](#). The officials did not participate in any official decisions about the contracts. [29 Del. C. § 5805\(a\)](#). The officials provide services at costs, not labor. The Commission found no conflict for those officials.

The other official entered a contract for more than \$2,500 so public notice and bidding was required. [29 Del. C. § 5805\(c\)](#), unless there was an undue hardship for the agency. [29 Del. C. § 5807\(a\)](#). The Commission found it needed more facts from the agency his contract. That information was subsequently provided and a waiver was granted. Commission Op. No. 08-35. That opinion follows.

08-35 – Local Official Contract with Local Government; Waiver Granted
Waiver Granted so opinion is public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 08-35 - Local Official's Contract with County
Hearing and Decision by: Vice Chair Barbara Green; Commissioners: Barbara
Remus, William Dailey and Wayne Stultz

Dear Ms. [Susan] Webb: (Sussex County Finance Officer)

The Public Integrity Commission (PIC) completed its review of Register of Wills David Wilson's disclosure, and Sussex County's waiver request for contracting with him for more than \$2,000 (\$500 over), without public notice and bidding as required. [29Del. C. §5805\(c\)](#). The County decided Mr. Wilson's auction house was the sole source in Sussex County.

APPLICABLE LAW: Waivers may be granted if the official or agency have an undue hardship or literally applying the law is not necessary to serve the public purpose. [29Del. C. §5807\(a\)](#). Waivers are based on each case's particular facts. *Id.*

AGENCY HARDSHIP: The County said: (1) it followed procurement laws by contacting other vendors for the job without success; (2) it specifically contacted O'Neal's Auction and Watson's Auction, but O'Neal's does not sell autos at its Laurel location, and Watson's stopped selling autos at auction; **(3)** no other car auction houses are in Sussex County except Wilson's; (4) if held outside the County, the County would incur additional trailer or tow truck costs to transport many of the vehicles; and (5) the County has tried to sell on its own premises in the past with sealed bids "but did not do well at all."

PUBLIC PURPOSE: Here, facts show compliance with all other provisions and efforts to insure the public purpose, insuring contracts are not given based on favoritism or unwarranted privileges. [29 Del. C. § 5806\(e\)](#); [W. Paynter Sharp & Son v. Heller, 280 A.2d 748 \(Del. Ch., 1971\)](#).

(1) In his official capacity, Mr. Wilson did not review or dispose of the contract. The County's Executive offices--agencies with vehicles for auction (mainly Paramedics); Procurement Office, and the Finance Department--made the decision. As he made no official decision, he did not engage in self-dealings nor have impaired judgment which the Code prohibits. [29 Del. C. §5805\(a\)\(I\)](#) and [§ 5806\(b\)\(1\)](#).

(2) In his private capacity, Mr. Wilson did not represent or assist his auction house before his own agency. [29 Del. C. § 5805\(b\)\(I\)](#). Before this provision was enacted, Delaware Courts upheld a Cabinet Secretary's decision not to contract with an appointee to one of his agency's Board. [Heller, supra., 280 A.2d 748](#). The basis was a conflict of interest, and the Court specifically noted the public's suspicion of intra-agency dealings. *Id.* The purpose of not

dealing with one's own agency is to reduce the possibility of undue influence on colleagues and co-workers. By avoiding such conduct, he complied with the literal terms of the law, and the public purpose of the law.

(3) Mr. Wilson filed a disclosure with PIC of his financial interests in a private entity that does business with the County, complying with [29 Del. C. § 5806\(d\)\(1\)](#). This insures the public that PIC, an independent body, reviews financial connections between an official and their government.

(4) While the County did not publicly notice and bid the contract as needed by [29 Del. C. § 5805\(c\)](#), it did follow its procurement rules. Like the Code, procurement laws are meant to build the public's confidence in fair and equitable treatment in awarding of contracts. See, e.g., [29 Del. C. § 6901](#). It also has the purpose of insuring quality goods, materials and services. *Id.* Before he was elected, Wilson's Auction successfully handled the vehicle auctions, so the work quality was known.

(5) Taxpayer costs were reduced by using Wilson's Auction House as compared to the costs involved if the County had to transport the vehicles to locations outside the County. Part of building the public's confidence, is "maximizing the purchasing value of public monies." *Id.*

(6) Waiver decisions are "open to public inspection," so they understand what occurred and why a waiver was granted. [29 Del. C. § 5807\(b\)\(1\)](#).

CONCLUSION: Balancing all the facts, we grant a waiver in this particular case which has already occurred. This is not a blanket authority to assume future waivers if Mr. Wilson continues as a County official. We recommend seeking auctioneers who can come to the County, reducing transportation costs. If they are not available, that information should be in any filing. Also, as stated in our prior opinion to the County, if there is Code compliance, officials contracting with the County need only to file annual disclosures. "However, if either the individual or the agency cannot comply with the Code, then the Commission must be notified immediately." *Commission Op. No. 98-23*.

Original Signed by Vice Chair Barbara Green

[08-63 – Contracting with State to teach Federally Required Program](#)

The Federal government passed a law that a State Branch develop a training program for business owners and operators which it regulates. State agencies that develop the program will get Federal dollars. The Federal Government must approve the program under its law and rules. The Branch collaborated with an institution of higher learning on the courses. The institution will hire; registration fees will go to it; the teachers will develop and present the course. It is a one-time course for owners/operators, unless violations occur. Then, they can be

sent back for training. The agency asked if staff or regulators that work in the branch could apply to teach.

Under a federal law, the agency was required to develop the training. That law also set a specific deadline by which the regulated operators must complete this new course. The agency was working in conjunction with an institute or higher learning in developing the course. The agency would create the standard curriculum, and the institute of higher learning would hire the trainers. Thus, the agency would not have its employees evaluating other employees in the agency for the job. A further reason for the use of such employees is that the agency expects its course will be the sole source provider for the next five years. The agency will not benefit from the registration of the regulated operators, as the registration fees for the course will go to the institute of higher learning. The Commission found no conflict in the State employees applying for the job. However, it recognized that it was possible that if selected, they may encounter a conflict, and should seek advice as needed. NOTE: The Commission must base its opinions on the particular facts, not hypotheticals, or speculative facts. [29 Del. C. § 5807\(c\)](#).

06-47 Was There a Contract with State?

In e-mail correspondence with an agency representative, Commission Counsel learned that it might be possible that a State employee was privately contracting with their own agency. [29 Del. C. § 5805\(b\)\(1\)](#). The agency representative did not think it necessary at this time to seek advice from the Commission. Counsel's duties include the responsibility of bringing suspected violations to the attention of the Commission. [29 Del. C. § 5808\(A\)\(3\)and \(4\)](#). The Commission directed Counsel to contact a Senior Level officer in the agency about the issue of whether the employee was, in fact, contracting with their own agency.

06-48 General Guidance on State Contracts

A State employee sought guidance on restrictions on State employees contracting with their own agency. He did not plan to do so, but wanted guidance if the issue arose for now and the future. He did not ask for any waiver if there was a bar to such contracts. The law is clear that a State employee cannot

contract with their own agency, [29 Del. C. § 5805\(b\)\(1\)](#), unless a waiver is granted. [29 Del. C. § 5807\(a\)](#).

Concurrent Government Positions

06-19DualGovernment Positions – Waiver Granted; Agency Hardship
Opinion is public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 06-19 - Waiver Request - Dual Government Jobs
Hearing and Decision by: Chairman, P. David Brumbaugh, Commissioners
Barbara Green, William Dailey, Barbara Remus, Dennis Schrader, and
Bernadette Winston

Dear Mr. Kernan:

The Public Integrity Commission reviewed your letter requesting a waiver to hire Mr. Robert Ricker, Fire Commissioner, as a casual/seasonal Fire School Instructor employee. As you may know, based on Mr. Ricker's submission, we concluded that it would violate the Code for him to be a casual/seasonal Instructor when, as a Fire Commissioner, he would have authority over the persons who would be evaluating his performance as an instructor. This would be contrary to the restriction against reviewing or disposing of matters where there is a personal or private interest that tends to impair judgment in performing official duties. [29 Del. C. 5805\(a\)](#). We know that as a Fire Commissioner he would recuse himself from matters related to persons with oversight of him as an Instructor. However, the public may well suspect that the distinction is form over substance because to fulfill his duties in the dual roles means he would be in the best position to evaluate the performance of those persons from which he must recuse from evaluating as a Commissioner. It also places the Fire School employees in the uncomfortable situation of "ordering their boss around."

Where there is a conflict, the Commission may 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 the State agency. [29 Del. C. § 5807\(a\)](#).

No waiver is granted on the basis that the “literal application of the law is not necessary to serve the public purpose.” That is because the facts substantiate conflicts not only for the Fire Commissioner, but the employees who would evaluate him as an Instructor. Mr. Ricker said he will recuse himself appropriately and there is a strong legal presumption that he will act with honesty, integrity and impartiality. [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)*.

Usually, recusal resolves a conflict and the public purpose is served. No actual violation is required; only that the conduct create an appearance of impropriety. *Commission Op. No. 92-11*. The test 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)*.

As noted above, the distinction is so blurred the public may reasonably believe, or suspect, he could not avoid being at least indirectly involved.

While the public perception is not cured by recusal, it will help diminish the perception of impropriety, as long as he recuses himself on matters related to the dual employment.

That fact, combined with the agency’s statements on its difficulties in finding

instructors, leads us to grant a waiver on the basis of an “undue hardship.”

Your correspondence and the comments of your Deputy, Steve Martin, who appeared before the Commission, showed the Fire School suffers from a lack of qualified and certified instructors. It is especially limited in the area where Mr. Ricker would instruct firemen—Vehicle Rescue. Also, the courses require several instructors per session, which further limits the number of instructors available when up to six instructors could already be committed to giving training. Further, the training normally occurs over several weekends. Because of their work schedules in the private sector; their obligations as volunteers for independent fire companies; unavailability due to health reasons or being out of state, etc. , those certified in Vehicle Rescue training, are even further reduced. Commissioner Ricker has been involved in this training in the past; is currently still certified to teach; has years of experience not only in training Vehicle Rescue, but in performing Vehicle Rescue. His knowledge and experiences can be imparted to attendees, and may result in encouraging other firemen to become certified.

II. Conclusion

Accordingly, we grant a waiver on the basis of an “undue hardship” for the agency. When a waiver is granted, the proceedings become a matter of public record. This aids the entire public in understanding the factual basis for granting a waiver. That, like recusal, will serve to diminish any public perception that Commissioner Ricker is circumventing the law.

Original Signed by Chair Paul Brumbaugh

Post Employment

06-35 – Private Contract with Former State Agency

A former State employee asked the Commission if it would violate the Code if he privately contracted with a State agency where he worked many years ago. The post-employment law bars former State employees from representing or otherwise assisting a private enterprise on State matters, if they are matters where the State employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matters as a State employee. [29 Del. C. § 5805\(d\)](#) The contract would not be in an area that he was in any manner involved with while with the agency years ago. Further, his subsequent position with a different agency did not entail any such work, or any decision by him on the particulars of this contract. No violation was found.

06-62 – Contract with Non-employing Agency

For 2 years after terminating State employment, State employees may not represent or otherwise assist a private enterprise on State matters if they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for the matter while employed by the State. . [29](#)

[Del. C. § 5805\(d\)](#). A State employee asked if it would violate the post-employment law if she contracted with an agency other than her former agency to work on plans that were not part of her duties while employed by the State. While her former agency and the contracting agency jointly coordinated some of the plans, she was in no manner involved in developing any of the contracting agency's plan. The Commission found no violations as she was not in any way directly and materially responsible for the matter as a State employee.

06-67 – Knowledge of a Process does not Make Employee Directly and Materially Responsible

For 2 years after terminating State employment, State employees may not represent or otherwise assist a private enterprise on State matters if they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for the matter while employed by the State. . [29](#)

[Del. C. § 5805\(d\)](#). A local government employee, through his attorney, asked if it

would violate the post-employment law if, after retiring, he accepted a job with a private enterprise that does business with his local government. He provided a list of government duties, and a list of the duties he will perform for the private enterprise. He had served as a liaison with consultants and contractors in his government job, but did not deal with the contracts with this particular private company. When asked if his private duties would involve any contact with his former agency, he said the work would include pre-bid and progress meetings, but it would not be on contracts he worked on with the government. As his attorney noted, the law does not say that knowing a contract process, by itself, would preclude work on matters related to the former agency's contracts. *Commission Op. No. 96-75 (discussing "process" knowledge)*. If that were true, the former employee, most likely, could not have *any* dealings with the former agency. The restriction does not bar dealing with the former agency except in the three areas listed. *Id.* The Commission found no violations as his post-employment work would not be on matters where he was in anyway directly and materially responsible. [NOTE: See, [Beebe v. Certificate of Needs Appeals Board](#), C.A. No. 94A-01-004, *J. Terry (Del. Super. June 30, 1995), aff'd No. 304 (Del. January 29, 1996)*(State official who served on State Board, appeared before the Board after leaving. He represented applicant on matters that the Board decided. Court held that as to the particular application, he was not involved with it as a Board member so he was not directly and materially responsible for that matter.) .

07-53 Post Employment as a Trainer on Matter Arising after Leaving State Employment

A former State employee asked if he could give a one-day seminar for certain State employees on their annual training day on certain matters. For 2 years after leaving State employment, former employees may not represent or otherwise assist a private enterprise on State matters where they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for the matter as a State employee. [29 Del. C. § 5805\(d\)](#) . The law

allows former employees to work on new matters arising after they terminate State employment. This was new for him. The Commission found no violation.

07-38 “Matters” that do not Involve the State; “Matters” of other Agencies; New Project with Former Agency

After leaving his State job, a former employee contacted Commission Counsel about the post-employment law. He was given a general overview of the law, but he intended to leave the private firm shortly, so did not seek a formal opinion. He later returned to work for the firm. A question was raised at his agency about compliance with the post-employment law because the former employee was dealing with his former agency. The post-employment law bars State employees from representing or otherwise assisting a private enterprise on matters involving the State matters if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State for 2 years after leaving. [29 Del. C. § 5805\(d\)](#) . The statute does not bar dealing with one’s own agency except in those three areas. *Commission Op. No. 96-76*. The agency and the employee want to resolve this so it was clear what he could work on. In his private job, he is involved in a number of things: (1) working with private clients for potential sales, which did not “involve the State”; (2) providing customer services to clients, which did not “involve the State”; (3) working on matters involving a different agency, on matters that he did not work on for the State; (4) dealing with his former agency on a new project for the firm, in which he was not involved in his State job; (5) working on new sites acquired by the firm which may be regulated by his former agency, but as they were new, he could not have worked on them as a State employee. The Commission found no violation as he was not working on matters for which he was responsible as a State employee.

08-20 Contracting with Prior Employee for Same Job; Waiver Granted
Opinion is a public record. [29 Del. C. § 5807\(b\)\(4\)](#).

Advisory Op. No. 08-20 - Post Employment

Hearing and Decision by: Chair Terry Massie; Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey and Wayne Stultz

Dear Mr. [Patrick] Carter:

As you know, the Public Integrity Commission granted your office a waiver of the post-employment law until the end of this calendar year.

The post-employment law prohibits former State employees from representing or assisting a private enterprise (which includes a private contractor) on matters for which they were directly and materially responsible. [29 Del. C. § 5805\(d\)](#). Your office wants to contract with a former employee, Phyllis Baker, to perform her prior duties, absent a waiver, that is contrary to the law. Waivers are based on an “undue hardship,” or if a literal application of the law is not necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). We consider both your expression of an agency hardship, and facts related to serving the public purpose.

The “undue hardship” expressed by your agency is:

- (1) on February 11, 2008, Ms. Baker advised you she was retiring in March;
- (2) two days later, the State implemented a hiring review process to reduce costs, and your agency could not get approval for a full-time employee to replace Ms. Baker;
- (3) the agency also was barred from re-hiring her as a part-time employee;
- (4) she worked in a two-person office, leaving that office 50% short of staff;
- (5) it is the peak of the tax season (personal and corporate) and her help is needed because of accounting responsibilities for over \$1.5 billion of State revenue;
- (6) the special knowledge required of the State’s accounting system and lack of ability to train another contractor, impacts on timely and accurate deposits and accounting, especially considering the State’s current financial forecast;
- (7) Ms. Baker’s assistance also will serve the public because revenue transfers to them must be timely, and accurate, so their taxpayer accounts can be timely credited;
- (8) you identified other duties to be performed in your letter requesting a waiver.

The public purpose of the law is to insure, among other things, that a former employee does not obtain a financial windfall by exiting as a State employee one day, and immediately contracting for the same work. Here, a “windfall” is avoided by reducing her State pay (\$20 per hour plus benefits) to

\$18 per hour as a contractor. She will receive no benefits, e.g., health insurance.

By law, waivers become public records. [\[29 Del. C. § 5807\(b\)\(4\)\]](#). It allows the public to know why there is a deviation from the law. Like other public records, the release helps instill the public's confidence by giving them a window to the government's actions. Also, we limit the waiver to the rest of this calendar year, to help reduce the public's concern that a waiver will be used long after the reason no longer exists.

Based on your letter, Mr. Ed Salinski's comments, and factoring in all of the above, a waiver is granted through December 31, 2007.

Original Signed by Chair Terry Massie

08-61 – Proofreading for Typos is not “Directly and Materially Responsible”

An employee asked if she could privately contract with her own agency if she left State employment. For 2 years after leaving State employment, former employees may not represent or assist a private enterprise on State matters if they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for the matter. [29 Del. C. § 5807\(a\)](#). The position will be publicly noticed and bid. Her only involvement was to proofread and correct typos in the grant submission.⁴⁴ If she is selected after public notice and bidding, her duties would not be the same as in her State job. The Commission found she did not: give an opinion, conduct an investigation and was not “otherwise directly and responsible” for the grant.

08-62 – Contract for New Population of State Clients

An employee was offered a contract with her agency to work on its grant if she leaves State employment. The grant establishes a new population of clients for the agency. She was not involved with the grant request at all. Her State job is very dissimilar to the contract position. The contract was publicly noticed and bid. The Commission found no violation as she was not in any manner directly and materially responsible for the matter. [29 Del. C. § 5805 \(d\)](#)

⁴⁴Generally, such work would constitute ministerial matters. A “matter” is considered “ministerial” when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc., Del. Supr., 336 A.2d 209, 211(1975)*. In other words, no opinion would need to be formed, or given.

08-17 - Private Firm Requires Post Employment Opinion: A former State employee accepted a job with a private firm. It requires all former State employees to get advisory opinions so that neither the former employee, nor the firm, would engage in acts that would not be permitted under the post-employment law. The 2-year restriction bars former employees from representing or assisting a private enterprise on State matters where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter. [29 Del. C. § 5805\(d\)](#). The former employee worked for the State for less than a year. He was not involved in any projects that his private employer had contracted on with his agency. He did not work in the same section of the agency which awarded contracts to the firm. One was awarded to the firm several years ago, before the employee worked for the State. The firm has completed that work, and does not expect any further activity on the matter. The former employee said the firm would support him if he had to recuse, and he would seek further guidance if needed. The Commission found no post-employment violation.

[09-31 Agency Interpretation of Post Employment Law](#)

A State employee withdrew his request for a post-employment advisory opinion since he decided not to try to contract with his former agency. However, because his agency had issued an interpretation of the post-employment law, the Commission decided to send his former agency a letter reminding them that PIC is the only agency authorized by law to decide conflict issues, and to offer its services for future issues. [See, Ethics Bulletin 009, ¶¶ 6, 7, 8](#). The statute authorizes PIC to provide assistance to State agencies in administering the law. [29 Del. C. § 5809\(10\)](#). Courts have held that if a State employee does not obtain advice from the statutory body which is authorized to issue advisory opinions, then the employee is not protected against disciplinary actions or complaint, as they would be with an opinion from the proper source. [Ethics Bulletin 009, ¶¶ 6,7 & 8](#).

06-53 Local Official Post Employment

For 2 years after terminating government employment, a former employee may not represent or otherwise assist a private enterprise on matters where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible. [29 Del. C. § 5805\(d\)](#). The requestor

works for a local government. He plans to retire and accept a job with a private company. The requestor, and his future employer, appeared before the Commission. The requestor explained that some matters related to his private job involved matters related to some parts of his government job. The official said that in addition to working for the private employer, his former government agency has indicated it may seek to contract with him. The potential contracts appeared to be matters in which he was involved as an employee. Thus, the contract with his former government agency would be on a matter for which he had been directly and materially, absent a waiver. He said there was a problem finding replacements. However, he then said there were almost 20 applicants.

He also would like to contract with other local governments for services he did not perform in his government job. Aside from involvement with Delaware government, he could be involved with governments in nearby States, and Associations related to local governments. The law only bars him from working on matters that involved his local Delaware government. [29 Del. C. § 5805\(d\)](#). Persons from his former government agency are involved in the Associations. There would be direct contracts between him and the local government entities, but also he would work on contracts of the private firm related to governments. He said if matters arose before any of these entities related to his government employer, he would recuse.

The prospective employer said the firm's principal place of business is in Maryland. The requestor would work in External Affairs, e.g., marketing, presentations, Project Manager, representing clients and consulting with government entities such as towns, etc. The firm has contracted with the local government where he worked, but presently has no contracts. The company may seek contracts with other local governments on large projects. The

prospective employer gave an example. The requestor said he was not in any way involved in that matter. The Commission found that he could not contract as a consultant with his government employer on matters for which he was responsible. [29 Del. C. § 5805\(d\)](#). Regarding contracts with other local governments in Delaware, he is to look at the contracts to determine what, if any connection, he had with those contracts while in his government job. He should review each contract and if necessary seek further advice from the Commission, as there are no particulars at this time on those contracts.. The Commission must base its opinions on the particular facts. [29 Del. C. § 5807\(c\)](#).

06-32 – To Be the Same “Matter” there must be a substantial overlap
Limited Waiver Granted.

For 2 years after leaving the State, former employees may not represent or otherwise assist a private enterprise on matters involving the State if they fall are matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. [29 Del. C. § 5805\(d\)](#)]. When waivers are granted, the proceedings become a matter of public record. [29 Del. C. § 5807\(a\)](#). The opinion is printed in its entirety.

Advisory Op. No. 06-32 - Post Employment

Hearing and Decision by: *Chairman P. David Brumbaugh and Commissioners: Barbara A. Remus, Bernadette Winston and William W. Dailey*

Dear Mr. [Charles] Jones:

The State Public Integrity Commission reviewed your request for an opinion on whether your proposed conduct would violate the post-employment law. Based on the following law and facts, we find that some of the proposed conduct as it relates to the SR 26 projects, may appear to violate the Code. However, we also find that a literal interpretation of the Code is not necessary to serve the public purpose. On the Corridor project, any final decision is premature as Century Engineering is not presently involved in acquisitions for contract.

I. Applicable Law

State employees, for 2 years after terminating, may not represent or otherwise assist a private enterprise on matters involving the State if they are matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. [29 Del. C. §5805\(d\)](#). They also may not improperly use or disclose confidential information. *Id.*

II. Application of Law to Facts

You work in DeIDOT's real estate section. It acquires properties for such things as right of ways. You: (1) conduct preliminary property ownership research; (2) negotiate with owners to buy the property; (3) prepare administrative offers of compensation; (4) explain appraisals, highway construction, and right of way plans to owners. More detailed activities are to investigate by going to the property, taking pictures, pulling deeds, etc. If DeIDOT's offer is rejected, you find out why. You look at parcels as part of on-going projects and ones needed in the future. After investigating, you send the findings to Mr. Russo to decide if DeIDOT will buy the property or if its offer will be reconsidered. You go back to owners who reject offers with any changes to compensation to continue negotiations.

You want to do similar work for Century Engineering on the following DeIDOT projects. In no instance did you draft or write the contracts or participate in selecting Century as the contractor.

(A) Corridor Capacity Preservation: At present, Century's contract to provide final engineering design services has expired. Occasionally, it may be asked to complete a study or conceptual design. It has no contract for acquisitions for the Mainline part of the program, but has a contract for the local roads. At present, no work on acquisitions is occurring, thus, we cannot rule on the matter as we have no particular facts. [29 Del. C. § 5807\(c\)](#). However, if it should become involved with acquisitions and wants to use you on that matter, it is recommended that you return to the Commission for additional guidance.

(B) SR26 Atlantic Avenue from Clarksville to Assawoman Canal: Century is preparing construction and right of ways plans. Two parcels in this corridor were leased by DeIDOT. You obtained the leases last month. You would do no further work on those properties, but wish to work on new properties to acquire the right of way.

(C) SR26 Local Roadway Improvements: Century began preparing construction and right of way plans in 2002. The work was shelved until February 2005, when Century was told to proceed. In June 2005, Century was given a stop work order. In February 2006, funds were identified and Century was told to continue. Your only involvement was in early 2003, when you and others were assigned to the project as points of contact for property owners in the area. Your involvement was to attend a public workshop in March 2003, where you, and others, met with property owners at an initial briefing on the corridor work. At that time, all persons in the zip code of the area were invited. You answered calls from some prospective sellers of a right of way. Your involvement with the project ended late in 2003. You did not negotiate with any owners to acquire property; did not inspect properties, etc. Subsequently,

DelDOT decided it would start using private companies for the right of way acquisitions. Contracts were issued and Century was selected.

We consider the two SR 26 projects together. Former employees may not be involved State matters if they: (1) gave an opinion; (2) conducted an investigation; or were (3) otherwise directly and materially responsible. We recognize that in each situation, you did not provide the “full services” of your State job on these projects. In other words, your participation was limited. On the mainline project, you obtained two leases for DelDOT and had no other involvement. Regarding the local roads, you participated in one workshop as part of a team of DelDOT employees who presented the conceptual plans of a design by a different company, which later handed over the package to Century. After the workshop, you fielded some phone calls from possible sellers and had no other involvement. Later, the project was cancelled. When it was taken off the shelf, Century was selected for the contract, including acquisition rights and has now finalized the plans.

We have held that for the post-employment work to be the same “matter” there must be a substantial overlap between the work for the State and for the private enterprise. Commission Op. No. 96-75. In this instance, it is clear that the SR 26 projects were State matters in which you were involved. While that involvement may be limited, it could well be seen by the public as a situation where it “raises suspicion” that a violation may have occurred. [29 Del. C. § 5806\(a\)](#).

To avoid such suspicion, we look at whether the literal application of the law is necessary to serve the public purpose. [29 Del. C. § 5807\(a\)](#). A literal application of the law would mean you could not work on the SR 26 projects. However, the public purpose of the Code is to not only insure that the public trust is not being violated, but also to not unduly circumscribe the activities of officers and employees of the State. [29 Del. C. § 5802\(1\) and \(3\)](#). Here, no facts suggest that the public trust would be violated. Century has worked with DelDOT, which had decided that it will pursue right of way acquisitions through private contractors, and has no objection to you working for Century on acquisitions. Further, as noted above, your work on the projects was limited, and no facts suggest that your particular work on the projects would give Century any unfair advantage over other competitors. Independent of any action by you, it was awarded the contracts, and no facts indicate you used your public office to assist them in acquiring those contracts. Moreover, as waivers become a matter of public record, the public will know the reasons you are allowed to work on those projects.

Original Signed by Chair Paul Brumbaugh

06-50 No Details; No Ruling A former State employee wrote saying he had taken a job with a private enterprise. He described his former State job and said he would not work on matters related to that former job, and if a specific question arose he would come to the Commission for advice. State employees may not represent or otherwise assist a private enterprise on matters involving the State for 2 years after terminating, on matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter. [29 Del. C. § 5805\(d\)](#). He did not provide any details of any specific dealings between the private enterprise and the State. The Commission responded to his correspondence, stating that it would need the “particular facts” in order to provide an advisory opinion. [29 Del. C. § 5807\(c\)](#).

07-23 – Post-Employment Foster Care

A State employee filed a disclosure stating that they had left State employment and were providing foster care. The statute does not mandate disclosures from former employees who are dealing with a State agency. It only mandates disclosures from current employees in that situation. [29 Del. C. § 5806\(d\)](#). However, it treated the disclosure form as a request for an advisory opinion, as advisory opinions can be based on written statements. [29 Del. C. § 5807\(c\)](#). According to the disclosure she was not involved in reviewing or disposing of any matters related to the State contract establishing her as a foster care provider, in her official capacity while with the State. [29 Del. C. § 5805\(a\)\(1\)](#). There is a strong presumption of honesty and integrity in public officials. [Beebe Medical Center, Inc. v. Certificate of Need Appeals Board](#), Del. Super., C.A. No. 94A-01-004, *J. Terry* (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996). In fact, her contract was not effective until January 1, 2006, which was after she left State employment. Thus, no facts suggested she was directly and materially responsible for that contract as a State employee. [29 Del. C. § 5805\(d\)](#).

08-56 “Opinion” Does Not Have to Be Final Decision

A State employee asked if he could accept a private contract with his agency on a grant position if he terminated State employment. For 2 years after leaving

State employment, State employees may not represent or otherwise assist a private enterprise on State matters if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. [29 Del. C. § 5805\(d\)](#). His involvement with the grant was to meet with a group and discuss obtaining a grant. Although initially opposed, he subsequently you told the Group changed his mind, and his division obtained the grant. He then wanted to seek a job under the grant.

As the Code does not define "opinion," it must have its plain and ordinary meaning, and reflect legislative intent. [1 Del. C. § 301&§303](#). "Opinion" means: "a view, judgment or appraisal formed in the mind about a particular matter." *Webster 's 10th New Collegiate Dictionary, p. 81 5 (10 ed., 1994)*. "It implies a conclusion thought out, yet open to dispute." *Id.*

Here, he gave the group his "view, judgment or appraisal." Logically, it considers members' opinions on how the agency operates. He was "directly" responsible for his opinion on the grant. The opinion was "material." It was based on the impact on his shop. Such input, whether a recommendation to a superior, or a final opinion, is "material." See, [Beebe Medical Center v. Certificate of Need Appeals Board](#), *Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995)*(Code applied to officials who only made recommendations to a Division Director). The Commission found that he had given an opinion and/or was otherwise directly and materially responsible for the matter as a State employee, so the conduct would be contrary to the post-employment law.

[08-59 Contract to Work on Very Same Matters; Fewer Hours; Better Pay](#)

A State official sought a waiver for another official in his section to allow the official, who was leaving State employment, to privately contract with the same office and perform the same work as in his State job. In other words, he would be working on matters for which he was directly and materially responsible for as a State employee. That would violate the post-employment law. [29 Del. C. § 5805 \(d\)](#). A waiver was the only way such conduct could be approved. Waivers may be granted if there is an undue hardship on the State agency or State employee, or a literal application of the law is not necessary to serve the public

purpose. [29 Del. C. § 5807 \(a\)](#). Aside from doing the same work, he would work fewer hours and receive more than a 14% raise. The agency had not tried to find someone else who would not have a post-employment problem. While the supervising official had offered the other official the contract, the Division Director sent an e-mail saying the Division had no plans to issue a contract. The Commission did not grant a waiver as no facts substantiated an “undue hardship” if the official could not contract with his own section at a better pay rate and fewer hours. Similarly, it found that the literal application of the law must apply.

09-23- Lobbying after Leaving

A State employee left State employment to work for a company which wanted her to lobby on certain matters. Both she and her organization were aware that the post-employment law would bar her from working on certain specific matters. Their concern was that in the process on lobbying on other matters which would not violate the Code, she might be asked by officials at Legislative Hall if the organization had taken a position on a matter for which she had been responsible as a State employee, and she did not want to violate that 2 year restriction. [29 Del. C. § 5805\(d\)](#). The organization asked if she make very limited remarks: (1) she cannot work on the matter; (2) the organization’s “bottom line” of favorable or unfavorable; and (3) refer them to the organization’s proper person. The Commission said those limits would be permitted

Local Codes of Conduct

06-58 Smyrna Code of Conduct

The Town of Smyrna submitted a draft Code of Conduct to the Commission to decide if its Code is as stringent as the State Code. [29 Del. C. § 5802\(4\)](#). It was basically identical to the State Code, and was approved as being as stringent

07-55 Code of Conduct Dewey Beach

The Town of Dewey Beach submitted a Code for the Commission’s review asking if it were as stringent as State law. [29 Del. C. § 5802\(4\)](#). Its Code lacked some provisions, e.g., post-employment. It also had a provision that read as if

Dewey's Ethics Commission would make some decisions interpreting its Code, but leave other decisions to this Commission to interpret under State law, which could not be done.. The Commission found it was not as stringent as State law.

08-29 Lewes Code of Conduct Amendment

The Town submitted an amendment so PIC could decide if it were as stringent as the State Code. [29 Del. C. § 5802\(4\)](#). Three areas were less stringent:

(1) Would give the Mayor and Council approval of Commission decisions. State law: Ethics Commissions are to be independent, and if they must have approval from other officials, it does not insure that independence.

(2) Page 1, definitions: "Personal or private interests" should be substantive law.

(3) Page 3 – Parties to have a right to legal counsel or be assisted by a layperson. Not in State law. Concern: practicing law without a license (occurred when a layperson came before another State Board). As they were not as stringent as State law, they these areas of the amendment were not approved.

08-31 – New Castle County Code of Conduct Amendment

Less stringent areas:

(1) Union representative at hearings. Not in State Code. Same comments as above on laypersons.

(2) Commissioner to act as investigator, fact finder, and give a recommendation to the other Commissioners. State law: Those are Legal Counsel's duty. Aside from usurping Counsel's statutory duties, separating the duties instills public confidence because co-Commissioners are not reviewing their colleague's work. The same applies when all members participate, because it means another "public eye" is deciding on the critical issue of conflicts. It also can give an odd number for the vote to reduce possible split decisions, etc.

08-19 Dewey Beach Code of Conduct:

Local governments are subject to the State Code of Conduct unless they adopt their own Code which must be approved by this Commission as being as

stringent as State law. [29 Del. C. §5802\(4\)](#). Dewey Beach rewrote its Code with some changes after the Commission identified areas that were less stringent than State law. See, 07-55. This was a review of the rewrite. Areas identified last time as not making it as stringent were still not included, e.g., post-employment. Again, the Commission found it was still less stringent than the State Code of Conduct.

[08-67-Code of Conduct Georgetown](#)

Submitted Code identical to Smyrna's PIC approved Code. It was found to be at least as stringent as the State Code. [29 Del. C. § 5802\(4\)](#).

[08-96 - Code of Conduct Lewes Amendment](#)

Amendment to include that persons appointed to Boards and Commissions are subject to the Code to bring it into compliance with State law. [29 Del. C. § 5802\(4\)](#). The Commission approved the amendment contingent on a change to reflect all such appointees; not just those paid more than \$5,000. **UPDATE:** Town Attorney advised that no limit was intended; the wording will be changed to reflect all Board and Commission members are subject to the law.

[06-38 – Local Government Amendments](#)

A local government submitted two ordinances for the Commission to review to decide if the amendments were at least as stringent as State law. [29 Del. C. § 5802\(4\)](#). The Commission concluded that one ordinance had confusing language on preliminary hearings and confidentiality, making it appear that the local government would open complaint proceedings after the preliminary hearing. State law requires the proceedings be closed throughout, absent approval by the person charged. [29 Del. C. § 5810\(h\)](#). If the ordinance is meant to open the proceedings after a preliminary hearing, the ordinance is not as stringent as State law. The other ordinance was to change the local government's gift law, financial disclosure reporting law, and add solicitation as authorized under the ordinance. The Commission found that: (1) as previously ruled, it had no jurisdiction over the financial disclosure law of local Governments; (2) delegation of authority to persons other than the Commission

to approve gift acceptance was less stringent than the State law and would leave the local government employees without the statutory protection to which they are entitled; and (3) the authority for local government employees and officers to solicit gifts was found to be not as stringent as the State code, as State law has a rule regarding only acceptance. [29 Del. C. § 5806\(b\)](#). Moreover, there are criminal provisions against public servants soliciting. See, e.g., [11 Del. C. § 1206](#) & [§ 1209\(4\)](#). The Commission also determined that the local government's Ethics Commission should be advised that its process, which results in ordinances being passed by the local government (with hearings, etc.,) before the ordinance is reviewed for stringency by this Commission can confuse employees and official as to which law is in place at the time, and that a letter to that effect should be sent to the local government officials.