POST-EMPLOYMENT
1991-2015

NOTE: The Delaware Superior Court addressed the issue of post-employment in *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995). The Court determined that there was no violation of the post-employment restriction provision, 29 Del. C. § 5805 (d), where a former member of the Health Resources Management Council appeared on behalf of Nanticoke Memorial Hospital for a certificate of need. The Council reviewed applications for certificates of need and made recommendations to the Bureau of Health Planning and Resources Management. The Bureau approved the application for Nanticoke and denied an application submitted by Beebe Medical Center. The Medical Center appealed the decision to deny its application alleging, among other things, lack of an impartial hearing because of impermissible conflicts of interest. The Court found that the record showed that while on the Council, the member did review Certificate of Needs requests, but did not participate in reviewing the applications that were the subject matter of the proceeding, and therefore, the member had no direct or material responsibility for the matter. The Court held that the Council member did not violate the statute by appearing on behalf of Nanticoke.

15-24—Post Employment: Over the past year, [Employee] worked [for a Division of a State agency]. Prior to that assignment, [Employee] worked in a similar position in [a different Division of the same agency]. His job duties included: [various management and administrative tasks]. [Employee] changed job assignments after he returned from a leave of absence. Ongoing projects [Employee] worked on in his State capacity included [specifically listed projects] and he stated he would not work on those projects prior to the expiration of the two year post-employment restriction. He planned to retire from State service on October 31st.

[Employee] had been offered a job with a private consulting company to work on the construction oversight team for [a new project]. At the time of the meeting [Employee] had not had any involvement in the project while employed by the State. [Employee] asked the Commission to decide if he could work on the [new project] without violating the post-employment restriction in the Code of Conduct. He also asked the Commission to consider whether he could work on projects initiated by [the agency] after his retirement date.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico,* 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a

particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] had worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency's contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41.* The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

At the hearing [Employee] told the Commission he did not have any involvement whatsoever in the [new project]. Therefore, the project was not one he was materially responsible for while employed by the State. As a result, he could accept employment working on that project after he retired from the State without violating the post-employment restriction in the Code of Conduct. The same reasoning applied to [Agency] projects that began after he retired from State employment. The Commission wanted to clarify that the two year post-employment restriction began the day after he retired from State service and not the day he left his first [State] position [for a leave of absence]. [Employee] was also reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

15-16—Post Employment: [Employee] worked as a manager in [a State agency]. He managed [a particular system] and supervised a team of personnel. [Employee]'s unit collected data about [relevant] projects, generated project reports, reviewed project progress, and made recommendations about project scope. Each manager was assigned to assist specific state agencies. [Employee]'s customer agencies included [various agencies]. One member of [Employee]'s staff was assigned to assist [a specific state agency] and [Employee] served as a backup to that agency. In his written submission, [Employee] stated that he had not worked on any [of the customer-agency's] projects while employed by [his agency] except to provide [some equipment for an old project].

[Employee] wanted to leave State service and accept a position with [a vendor company]. [Vendor] contracts with [a specific State agency] and had an [employment opportunity that required Employee's job skills]. In that position [Employee] would document [various information collected by the agency].

[Employee] learned about the contractual position from his former supervisor [who worked at the agency that hired the Vendor]. [Employee] had reached out to his former supervisor to see if there were any open positions at [the agency]. According to [Employee], the contractual position had already been created prior to his conversation with his former supervisor. At the hearing, [Employee] stated that he would be interviewed for the position but he would not be interviewing with his former supervisor.

[Employee] asked the Commission to determine if acceptance of the position [with the Vendor working for a former customer-agency] would violate the post-employment restriction in the Code of Conduct.

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The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Like the employee in *Beebe*, [Employee] worked on the subject matter while employed by the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific

facts. [Employee] would be contracting with an agency for which he did not provide any direct management services while employed by the State. Therefore, the Commission found it difficult to foresee a circumstance in which [Employee] would be working on a project that he was previously responsible for while working for the State. While [Employee] heard about the position from his former supervisor, he was the one who initiated the contact rather than his former supervisor trying to 'poach' employees from other State agencies.

The Commission asked [Employee] if he anticipated having any contact with his colleagues at his former agency if he accepted the position with [Vendor]. [Employee] stated he estimated the probability that he would interact with anyone from his former agency at 5%. He opined that it may be possible he would be asked to pass along [information] to someone at [his former State agency] but he felt it was a very remote possibility. He further stated that if he was required to pass information to a [former colleague], it would not be related to anything he worked on while employed by [his former agency].

The Commission decided that other than the fact both jobs involved working in the same field there did not appear to be any overlap between the two positions. As a result, the post-employment position with [Vendor] would not violate the post-employment restriction in the Code of Conduct. [Employee] was reminded of the prohibition against revealing confidential information he learned during the course of his employment with the State. 29 Del. C. § 5805(e).

15-15—Post Employment: [Employee] worked for a [State agency]. [Employee] had been a State employee for over 9 years. In 2013, before returning to her current position, she worked in a pilot program at a middle school in New Castle County. In that position, she worked with middle school students who were referred to the program by school staff, parents, peers, or through self-referral. Students and families underwent consultations and screening assessments to identify underlying issues and needs. The students and families were then linked to community services when necessary.

[Employee] wanted to accept a contractual position with [her current State agency working in the same capacity she had previously served in the pilot program or in a supervisory position in the program. However, she would be assigned to a different school and would not be involved with the same students]. The position was created in response to the success of the pilot program in which she previously worked. If [Employee] was selected for either position she would resign her State position. She asked the Commission to consider if acceptance of either position would violate the Code of Conduct's post-employment restriction.

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To ascertain if there is substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. If selected for the [supervisory] position [Employee] would be working in a different position than the one she previously held. As a result, there was little likelihood she would encounter matters for which she was previously responsible. If selected for [the positon she previously worked] [Employee] would be performing the same job duties as those she performed while working in the pilot program as a State employee. However, she would be assigned to a different school. Under those circumstances it was highly unlikely she would encounter any of her former students, thus alleviating the post-employment concerns related to her reviewing matters for which she was previously responsible. In analogous situations the Commission had decided that former State employees were permitted to work as a contractor for their former State agency as long as they did not [interact with] their former clients. *Commission Ops. 13-52 and 14-07.* The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

After [Employee] left the hearing, Commissioner Mishoe stated she may know the applicant's sister but she wasn't sure. Assuming she did know applicant's sister, Commissioner Mishoe stated she could remain fair and impartial. No motion for recusal.

The Commission concluded acceptance of a contractual position would not violate the post-employment restriction in the Code of Conduct as long as [Employee] did not work with any of her former [students].

15-13—Post Employment: [Employee] worked for [a State agency in a statewide supervisory position]. Despite repeated emails from Commission Counsel asking him to describe his State job duties in greater detail, he did not provide any additional information until July 13th when he was informed that failure to provide more information would result in his removal from the meeting agenda. When he did respond, his description was limited to [a very short, generic description of his job duties]. (*Email dated July 13, 2015*). He did not include information about specific projects he was working on or even a general geographic area where he was assigned.

In fact, he provided more information about the tasks his job did *not* include such as bidding, contracts, or hiring.

According to his request, [Employee] was offered a job with a private consulting company that contracts [with the State]. Again, no additional information was provided in his request including the name of the company, the projects they worked on, what his job description would be, etc. When asked at the hearing, he indicated the job would be with [a private company] and he would be hired [in a field position]. During the course of the hearing the Commission asked additional questions which elicited the following facts: [Employee] heard about the job opportunity through "word of mouth"; in his State position he works in Kent County; his State job involves monitoring [a specific component of an agency project]; if hired by [the private company] he would be responsible for [keeping specific records]; he planned to retire from his State job on July 31, 2015, if the Commission approved his position with the private company. Upon learning that his State job required him to work on projects in Kent County, the Commission asked whether he would consider working for the private company in New Castle or Sussex counties so he could avoid projects he had worked on while employed by the State. [Employee] responded with an adamant "no" and stated he had conditioned his employment with [the private company] upon the fact that he be assigned to work in Kent County. When asked if he felt the two jobs were similar or different, [Employee] vacillated and said that they were similar and not similar. He did not seem to have any firm idea of what type of work he would be doing at [the private company].

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Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). *See also Beebe.*

To ascertain if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] had worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. Without knowing [Employee]'s exact job responsibilities, it was difficult to determine the exact amount of overlap, if any, between the two positions. In analogous situations the Commission had routinely approved post-employment positions for workers who leave State employment to work for one of the agency's contractors so long as they do not work on the same projects. *Commission Ops. 12-09 and 13-41.* The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

Without knowing the specific projects that [Employee] worked on in his State job, and the specific projects that he would work on [for the private company], the similarity between his State job and his prospective position was a concern to the Commission. The Commission was also concerned about [Employee]'s unwillingness to provide any geographic separation between the two jobs. Those two factors taken together led to the conclusion that [Employee] may end up working on projects for [the private company] that he was previously responsible for while employed by the State. As a result, [Employee]'s request to work for [the private company] after July 31, 2015 was denied. [Employee] did not present any facts that would indicate that his inability to accept the position with [the private company] would create a hardship and so the Commission did not consider a waiver.

The Commission decided it would violate the two year post-employment restriction for [Employee] to accept a position with [the private company].

15-13--Post Employment (Reconsideration): *Note: [Employee]'s Post Employment request was denied by the Commission on July 21, 2015. See Commission Op. 15-13. [Employee] was very unhappy and asked Commission Counsel what recourse was available. Commission Counsel explained to [Employee] he could ask the Commission for reconsideration if he was going to provide adequate information from which the Commission could render a decision. [A few days later], Employee asked Commission Counsel to place him on the agenda for the August meeting and provided more detailed information about both his State job and his post-retirement position.*

[Employee] worked for [a State agency]. To explain his job duties, [Employee] submitted his Performance Plan that detailed the tasks by which his job performance was measured. [*The various job duties are omitted to preserve his anonymity*].

[Employee] was offered a job [with Vendor], a private consulting company that contracted with [his State agency]. According to the job profile [Employee] submitted he would be responsible for: [duties in the same general field, but not in the same role, Employee worked in while employed by the State]. [Employee] would have no involvement in the contracting or bidding processes.

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To ascertain if there is substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] had worked on the subject matter, highway and road construction, while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission has routinely approved post-employment positions for [agency] workers who leave State employment to work for one of the agency's contractors, so long as they do not work on the same projects. *Commission Ops. 12-09 and 13-41.* The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

At the reconsideration hearing, [Employee] brought photographs, charts and diagrams to more clearly explain the specifics of his State job to the Commission. The additional information helped define the specifics of his State job, as well as those of the position [with Vendor]. Once the parameters were made clear, the Commission was able to engage in a meaningful analysis of whether there was any overlap between the two positions. In his State job [Employee]'s unit travelled to vendor's sites to examine and analyze [products]. At the work site his employees [performed a specific analysis]. As an employee of [Vendor], [Employee] would monitor job sites, verify that the work performed complied with project specifications, building codes, and contract terms. He would also keep records [to determine] vendor reimbursements.

Both jobs involved [a specific job field] and although the [tasks] related to those [duties] were different, there was a degree of overlap between the two. As a result, the Commission decided [Employee] should not work on a job site that he previously worked on in his State

capacity. He could work on [projects in a related, but different, field] because he had not previously worked on those projects. He was also reminded that any confidential information he learned through his State employment should remain confidential. 29 Del. C. § 5805(d).

15-12--Karryl McManus—Post Employment (Waiver Request): *B*ecause a waiver was granted, the opinion will be published in its entirety so the public will know why the waiver was granted. 29 Del. C. § 5807(b)(4).

Prior to the start of the hearing Commissioner Mishoe informed those present that she knows Ms. McManus but that she didn't immediately recognize the name because she knows Ms. McManus by her maiden name. Commissioner Mishoe stated she has known Ms. McManus' mother for many years. When asked if she could be fair and impartial

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July 28, 2015

Karryl McManus, Director
Division of Management Support Services
Department of Services for Children, Youth, and their Families
1825 Faulkland Road
Admin Bldg. Room 152a
Wilmington, DE 19805

15-12 Post Employment—WAIVER GRANTED

Hearing and Decision By*: William F. Tobin, Jr., Chair; Andrew Gonser, Esq., Vice Chair; Commissioners: Jeremy Anderson, Esq., Dr. Wilma Mishoe*

Dear Ms. McManus,

Thank you for attending the Commission meeting on July 21, 2015 to which you were accompanied by Matthew Payne. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow your agency to contract with Mr. Payne, a former employee of the Department of Technology and Information (DTI). Ordinarily, under your circumstances contracting with a former State employee before the expiration of the two year post-employment restriction is prohibited, but the Commission decided to grant a 90 day waiver based upon agency hardship.

FACTS

You work for the Department of Services for Children, Youth and their Families (DSCYF) as Director of the Division of Management Support Services (DMSS). DMSS provides administrative and technical support to the other four divisions of DSCYF. Your Division is responsible for human resources, information technology, facilities management, and fiscal management services. In carrying out those duties, DMSS is the principle contact with the State's central agencies and government offices.

DSCYF is in the process of re-vamping their case management system. The 20 year-old system manages, tracks, and coordinates services to children and families across the Department's four service divisions. The current system, Family and Child Tracking System ("FACTS"), relies on an aging platform and infrastructure that is no longer supported by DMSS's Management Information Unit. Additionally, FACTS does not facilitate information sharing across the divisions. The ability for interdivisional information sharing is important given the number of children who require coordinated services from multiple divisions.

In addition to providing day-to-day case management services, the database must meet federal Statewide Automated Child Welfare Information System (SACWIS) and other Federal reporting requirements, such as the Adoption and Foster Care Analysis and Reporting System (AFCARS), the National Youth in Transition Database (NYTD), the National Child Abuse and Data System (NCANDS) and the Child and Family Services Review (CFSR) process. Failure to comply with any of the above requirements could result in administrative and monetary penalties to be levied against the State. Additionally, the database provides a medium through which your agency pursues Medicaid and other service reimbursements which allows the State to recover federal funds for child welfare and mental health related services. If DMSS suffers a system failure the State would be unable to recover those federal funds. Between 2011 and 2014, the State recovered more than $22 million in that manner.

In 2011, the Department obtained funding for a project, titled "FACTS II," to replace the FACTS system. The goal of the project is to provide an integrated system that is updated, reliable, supportable, and that allows for information sharing across Divisions. Deloitte was selected as the vendor to develop the system. DTI Secretary Jim Sills was a co-executive sponsor of the FACTS II project, along with your Department's Cabinet Secretary, Jennifer Ranji. However, DTI did not play a central role in the project, opting to select a contractor to manage the project.

In late Winter and Spring 2014, when the State began testing the FACTS II system, it was discovered that there were significant issues with the system that had thus far been developed by Deloitte. Over 4,000 defects were discovered during testing, and the State had concerns regarding the Deloitte project leadership. In late Spring 2014, user acceptance testing was halted due to the high number of defects. Throughout the Summer of 2014, Deloitte and

the State worked to correct the problems by adding additional personnel to the project. The State contracted with Computer Aid Incorporated (CAI) to develop test scripts to facilitate testing of the system and Deloitte added a new project leader. In October, the State expanded its contract with CAI to hire a new project manager, replacing the individual contractor who had served as the FACTS II project manager since the project's inception.

In late Summer/early Fall 2014, Secretary Sills left DTI, and Secretary Ranji and newly confirmed DTI Secretary James Collins agreed to increase DTI's involvement in the project. As a result, Secretary Collins assigned Matthew Payne, a DTI employee to the project. Until then, Mr. Payne had not worked on FACTS II. Mr. Payne attended his first meeting related to the FACTS II project in November 2014. In June 2015, Mr. Payne left State service and accepted a position with CAI.

Prior to his retirement Mr. Payne's primary role in the FACTS II project was to help ensure that the Department's and the State's interests were being represented. Because of Mr. Payne's technical and project management experience, his assistance was invaluable to DSCYF for planning purposes and in negotiations with Deloitte. Since the Fall of 2014, the State team and CAI have made significant progress towards continued development of the FACTS II project. The State completed a technical analysis to identify the areas in which the system does not meet the Department's needs. Over the next 2-3 months, DMSS will be re-engaging in negotiations with Deloitte to remediate the deficiencies identified during the testing period and to develop a timeline and budget for completion of the project.

You believe that Mr. Payne's experience with FACTS II and his previous involvement during negotiations with Deloitte are critical to the success and completion of the project. This is especially true as you continue negotiations with Deloitte and plan for completion of the project. However, you also recognize that Mr. Payne would be violating the two year post-employment restriction in the Code of Conduct by working on the FACTS II project while employed in the private sector. As a result, you are requesting a hardship waiver on behalf of DMSS and DSCYF.

APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former

agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Mr. Payne would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Mr. Payne worked on the FACTS II project while he was employed by the State. At the hearing he stated that he served in an advisory role for the project rather than providing technical expertise. Nevertheless, there is no doubt that Mr. Payne's continued presence on the project after leaving State service is a violation of the two year post-employment restriction in the Code of Conduct. This job switch is exactly the type of situation the statute was designed to prevent.

The Commission then turned to a consideration of whether there are adequate facts and circumstances to justify a waiver based upon agency hardship.

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18* (*citing Merriam Webster's Collegiate Dictionary*, p. 1290 (10th ed. 1992).

Deloitte is an international consulting conglomerate with over 70,000 employees and $14.91 billion dollars in revenue in fiscal year 2014.[1] Since DSCYF suspended user testing of FACTS II, due to the high number of product defects, the relationship between Deloitte and your negotiating team has been contentious with each party blaming the other for the end result. Your agency has already invested over three years and a substantial amount of money into the development of the FACTS II project. You stated that Deloitte's representatives have an advantage during the on-going negotiations because of their familiarity with the highly technical issues involved. This is knowledge that neither you, nor your colleagues, possess. The knowledge gap is not pointed out in a disparaging manner but only to highlight the disadvantage your agency experiences while involved in this contentious contract dispute. It is those particular skills that you believe Mr. Payne can provide during the next few months while your agency and Deloitte attempt to come to an agreement regarding the completion of the FACTS II project.

At the hearing, Mr. Payne stated that prior leaving the State he had been employed by DTI for six years. Before he began working for the State, Mr. Payne worked in the private sector and acquired job experience which is relevant to your current situation. However, Mr.

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[1] Source: http://www2.deloitte.com/us/en/footerlinks/about-us-deloitte.html?icid=bottom_about-us-deloitte, July 27, 2015. These figures are for Deloitte's U.S. businesses.

Payne is now employed by CAI, the company that your agency retained to write test scripts and provide project management services for FACTS II. When asked, Mr. Payne stated he left State employment because he did not have confidence that he would be able to retain his position when the current administration changes with the 2016 election.

The Commission is concerned about the conflicts of interest that may arise if your agency accepts contractual advice from Mr. Payne as a representative of CAI, a company that is providing ancillary services on the FACTS II project. When asked if CAI could apply to replace Deloitte if the contract negotiations failed, you indicated that they would be welcome to bid on the project like any other interested vendor. Mr. Payne indicated he did not know how CAI would proceed under those circumstances. While it was clear to the Commission that the waiver request was made at the behest of your agency rather than at Mr. Payne's request, and although the scenario is not ideal, contracting with Mr. Payne as a private contractor places some degree of separation between the contract negotiations and CAI.

Taking into consideration all the relevant facts and circumstances, as well as the huge investment your agency has already put into the FACTS II project, the Commission decided to grant a waiver based upon agency hardship. However, there are two caveats. First, Mr. Payne must agree to contract with your agency as an independent contractor and not as a representative of CAI. At the hearing, neither you nor Mr. Payne knew if CAI would allow such an arrangement but wanted to resolve the ethics issue prior to approaching CAI. Second, the waiver is granted for only 90 days from the date of the hearing. Such a time constraint is designed to minimize the length of time Mr. Payne will be allowed to violate the Code of Conduct and to promote an expeditious end to the contract negotiations with Deloitte.

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

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

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

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise

directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

The public does have an interest in preventing the failure of DSCYF's technical infrastructure. First, a great deal of money is recovered from the Federal government for the State through use of the agency's computer system. Next, DSCYF has already expended significant resources towards the development of the project. All of those resources would be wasted if the contract negotiations between Deloitte and DSCYF were to proceed under circumstances in which you acknowledge your agency is operating at a disadvantage. Also weighing in favor of serving the public purpose is the fact that if the Commission grants a waiver the decision becomes a matter of public record. That ensures that the public knows why this former State employee was allowed to contract with a State agency in contravention of the Code.

CONCLUSION

DMSS, and by extension, DSCYF is granted a 90 day waiver of the post-employment restriction in the Code of Conduct based upon agency hardship. The waiver is to allow your agency to contract with Mr. Payne, as an individual, to assist you in contract negotiations with Deloitte. Because the Commission has granted a waiver, this opinion will be printed in its entirety on our website. If you have any questions, please feel free to contact us.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.
Chairman

15-14--Post Employment: [Employee] worked as a casual/seasonal employee for the [the State]. Her job duties included grant monitoring and serving as a staff member for [a State committee]. As a staff member for the [committee] she attended and scheduled meetings; organized the agenda; recorded minutes; and conducted research as requested. As a staff member she did not have any direct input on [a new program developed by the committee] and did not participate in writing the grant application to fund the program.

[Her State agency] recently approved a grant to [another agency] to fund the [new] program. [Employee] wanted to leave State service and accept a contractual position with [the agency that received the grant] as the program's Coordinator. Her duties would include contacting assigned community providers to monitor participant compliance; determining participant eligibility; collecting and analyzing program data; and building community support for the program. [Employee] indicated she had previous experience working [in this particular field] when she lived in [another state].

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Like the matter in *Beebe*, she worked on the subject matter, the [newly developed] program, while employed by the State. However, her involvement with [the program] was limited to providing administrative support to the [committee], rather than direct participation in the decision-making process. As a result, the overlap between her state job duties and those of the Coordinator position were not substantial enough to violate the two year post-employment restriction in the Code of Conduct. [Employee] was reminded of the prohibition against revealing confidential information she learned through her State position. 29 Del. C. § 5805(e).

After the applicant left the room Dr. Mishoe indicated she had been a former member of an umbrella body which would oversee the [committee]. Dr. Mishoe indicated that her prior experience with the [body responsible for oversight of the committee] would not affect her ability to render a fair and impartial decision.

15-09—Dr. Trimzi—Post Employment (Waiver Request): Because a waiver was granted, the opinion will be published in its entirety so the public will know why the waiver was granted. 29 Del. C. § 5807(b)(4).

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June 22, 2015

15-09 Post Employment—WAIVER GRANTED

***Hearing and Decision By**: William F. Tobin, Jr., Chair; Commissioners: Jeremy Anderson, Esq., Dr. Wilma Mishoe, Bonnie Smith;*

Dear Dr. Trimzi,

Thank you for attending the Commission meeting on June 16, 2015. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow you to contract with your former State agency once you leave State employment. However, the Commission is concerned that in the past two months two Delaware Psychiatric Center (DPC) employees have requested hardship waivers on behalf of their agency without any justification from the agency itself. Going forward, no other waivers will be granted based upon agency hardship unless the request is made, and substantiated, by DPC leadership. The burden of obtaining a waiver based upon agency hardship is the responsibility of the agency and not the employee. You should know that because a waiver was granted, this opinion will be published in its entirety on our website. 29 Del. C. § 5807(b)(4). Additionally, a copy of this opinion will be forwarded to Dr. Gallucci, Medical Director for the Department of Health and Social Services (DHSS).

FACTS

You are a psychiatrist currently working for DHSS as the Residency Training Director at DPC. The residency program trains physicians to specialize in psychiatry with a primary focus on community psychiatry and public service. You currently spend 26 to 30 hours per week working as the program's director. Originally, your position also entailed clinical duties at a facility that has since been closed. You want to leave State employment and contract with DPC for 25 hours per week to continue as the Residency Training Director. You requested that the Commission consider a waiver if it was determined your contract with DPC would violate the post-employment restriction in the Code of Conduct. You stated that if a waiver were denied DPC would suffer a hardship if they had to find a replacement for your position because no other psychiatrists at DPC perform the same administrative functions required by your position. You also asserted your request for a hardship waiver was supported by Dr. Gallucci, the Medical Director for DHSS.

APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are

matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if you would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. You made no effort, nor could you have, to distinguish your current State position from the contractual position. You would be leaving State employment to perform the exact same job with the same duties and responsibilities. As a result, the contractual position with your former agency would violate the two year post-employment restriction.

The Commission next turned to a consideration of whether the facts presented qualified as a hardship necessitating a waiver. In order to qualify for a waiver the law requires a showing of hardship to either the employee or the agency, or facts demonstrating that enforcement of the post-employment restriction is not necessary to effectuate the public purpose. 29 Del. C. § 5807(a) and (b).

B. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(1) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18* (*citing Merriam Webster's Collegiate Dictionary*, p. 1290 (10th ed. 1992).

At the hearing, you denied any demonstrable hardship to yourself if you were not permitted to accept the contractual position with DPC. Although it was a close call, the

Commission found you did present facts establishing a hardship on the agency. DPC would be placed in the position of having to find a psychiatrist qualified to manage the Residency Training Program. You stated that when the job was first posted you were the only applicant who applied for the position. When asked why there were so few applicants for the position, you indicated that large urban hospitals in close proximity to Delaware offer more opportunities to psychiatrists seeking employment. Further complicating the search for a suitable candidate is the fact the contract is for a part-time position. If the agency were fortunate enough to find a qualified psychiatrist in Delaware, the part-time, contractual nature of the position would likely create further difficulty in the recruitment process. In this instance, you are willing to work part-time for DPC and your switch from a full-time employee to a part-time contractor would leave a vacancy for a full-time budgeted position which is more likely to appeal to potential job applicants.

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

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

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

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

In considering the public purpose, the fact that you would be contracting with your former agency weighed against granting the waiver. It would be obvious to even the most casual observer that you obtained the contract because of your prior employment with the State. Another factor weighing against a waiver is the fact that your position is administrative. A vacancy in your position would not appear to have a significant or immediate impact on DPC's ability to provide services to their clients.

On the other hand, it is clear there would be a limited pool of applicants from which DPC could recruit to fill your position. As a result, the Commission determined that DPC's ability to

administer the Residency Training Program would be seriously hindered if you were unable to contract with your former agency. While you do not treat patients directly, you administer a program which brings psychiatrists to the State who, in turn, provide treatment to Delaware's citizens. Also weighing in favor of serving the public purpose is the fact that if the Commission granted the waiver the decision becomes a matter of public record. That ensures that the public knows why you were allowed to contract with your former agency in contravention of the Code.

CONCLUSION

After considering all the relevant facts and circumstances, the Commission decided to grant a hardship waiver to allow you to contract with your former agency as the Residency Training Director. No further waivers will be granted to DPC employees without a showing of agency hardship by DPC's leadership.

Sincerely,

William F. Tobin, Jr.

/s/ William F. Tobin, Jr.
Chair

Cc: Gerard Gallucci, M.D.

Motion—Dr. Trimzi's moved from a State employee to a contractual employee violates the post-employment restriction in the Code of Conduct. A waiver is granted on the basis of agency hardship. The Commission will no longer approve similar waiver requests without justification from the agency itself.

15-10—Post Employment: [Employee] worked for a Division within the Department of Services for Youth, Children and their Families (DSYCF). [Employee] was a casual/seasonal worker [providing a particular service to a specific segment of the population] in Dover. Her work required her to coordinate services with other State agencies and vendors. [Employee] reported directly to a supervisor who, in turn, reported to the Regional Manager. [Employee] had contact with the Regional Manager during trainings and meetings. The Regional Manager also evaluated [Employee]'s job performance.

[Employee] wanted to leave State service and accept a contractual position with her State agency [as Coordinator of a new program]. [Employee] stated she had worked on a similar program when she lived in [another state]. [Employee] would work with [the same segment of the population she worked with in her State position, but limitations on participation in the program made it unlikely she would encounter previous clients]. [Employee] would continue to [perform some of the same job duties] as well as collecting and analyzing data related to the success of the program and educating [other agencies] about the nature of the program. As the program's coordinator, [Employee] would report to the same Regional Manager who had oversight of her State position. However, she would be assigned to a work location in Wilmington. When asked about the benefits of leaving State employment to become a contractor, [Employee] indicated she would be paid at a higher rate which would enable her to purchase health insurance, a benefit she did not receive in her State job because she was a casual/seasonal worker.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee], had worked on the subject matter, managing [programs aimed at a specific segment of the population]. As a result, [Employee] would be required to work with some of the same State employees she worked with in her State position. However, it was unlikely [Employee] would have any oversight of clients she worked with in her State position because [of the participation requirements in the new program].

The Commission considered the fact that [Employee] would be contracting with her former agency. Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller,* Del. Ch., 280 A.2d 748, 752 (1971}. The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions.

The Commission compared [Employee]'s situation to others they have considered in the past. The Commission routinely approves post-employment positions for DelDOT workers who leave State employment to work for one of the agency's contractors so long as they do

not work on the same projects. *Commission Ops. 12-09 and 13-41.* In those matters, the new employer was contracting with the agency, not the former State employee.

In this instance, [Employee] would become a contractor and personally contract with her former agency. Her matter was similar to recent decisions made by the Commission which allowed former casual/seasonal workers to leave their counseling positions at various middle schools to contract to provide services in other middle schools so long as they did not treat the same clients. However, in those matters, the former State employees were not supervised by the same staff that supervised them while working for the State. *Commission Ops. 13-52 and 14-07*.

The Commission weighed and compared the issues from those previous opinions to determine if [Employee] should contract with her former agency. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5). After consideration of all the relevant facts and circumstances, the Commission determined [Employee]'s situation was more analogous to that of the DelDOT employees. The contractual position offered her ample opportunity to work on [the new program] without encountering matters for which she had previously been responsible when employed by the State. Additionally, there was no evidence [Employee] was leveraging her State position to gain an opportunity as a contractor. She was merely trying to improve her economic circumstance which was understandable given the fact she was not receiving State benefits.

15-06—Andrew Donohue, M.D.—Post Employment (Waiver Granted): As a waiver was granted, the Commission's opinion becomes a matter of public record so the public will know why the waiver occurred. 29 Del. C. § 5807(a).

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April 21, 2015

Andrew Donohue, M.D.
DHSS
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Canby Park—Room 137
Wilmington, DE 19805

15-06 Post Employment—WAIVER GRANTED

Hearing and Decision By: *William F. Tobin, Jr., Chair, Mark Dunkle, Esq., Vice Chair; Andrew Gonser, Esq, Vice Chair.; Commissioners: Lisa Lessner, Jeremy Anderson, Esq., Dr. Wilma Mishoe, Bonnie Smith*

Dear Dr. Donohue,

Thank you for attending the Commission meeting on April 21, 2015. Based upon your written submissions and your comments at the hearing, the Commission decided to grant a waiver to allow you to contract with your former State agency once you leave State employment.

A. FACTS

You are a forensic psychiatrist employed by the Division of Health and Social Services (DHSS). Your duties are split between the Wilmington Community Mental Health (WCMHC) Center and the Delaware Psychiatric Center (DPC). Approximately 80% of your time is spent treating patients at WCMHC and 20% is spent conducting court-ordered psychiatric evaluations at DPC. The demand for court-ordered psychiatric evaluations has doubled in the past four years[2] while DHSS's need for community treatment providers has changed due to increased outsourcing to private providers. You want to leave State service and contract with DPC as a forensic evaluator working approximately one day per week performing court-ordered evaluations. DHSS plans to find a replacement for you once you resign and they will hire a full-time psychiatrist to work at WCMHC treating patients. You would then fill DPC's need for a part-time forensic evaluator as a contract employee. When not working for the State, you plan to work in private practice.

You asked the Commission to decide if a contract with your former agency would violate the post-employment restriction in the Code of Conduct. Should the Commission determine that a contractual position with DHSS would constitute a violation, you requested a waiver on the grounds the agency would suffer a hardship if they lost your services. In your comments to the Commission you stated that Delaware has a shortage of psychiatrists and less than one percent of all psychiatrists are board certified in forensic psychiatry. As a result, you anticipate DPC would have a difficult time recruiting a psychiatrist with the proper credentials which would be further complicated by the fact the position is part-time with no benefits. Dr. Gallucci, Medical Director for DHSS agreed with your assessment of the agency's needs. In an email to our office Dr. Gallucci stated:

> Dr. Donohue would most likely also be involved in some of the training activities associated with the University of Pennsylvania forensics Fellows who rotate at the Mitchell Building of DPC. Dr. Donohue is a valuable employee with expert skills in

[2] According to your comments at the hearing, the number of court-ordered psycho-forensic evaluations in 2010 was 14. In 2014 the number rose to 24.

forensics psychiatry. We would have difficulty replacing him and the functions he performs should he not be allowed to continue his work with us.

B. APPLICATION OF THE FACTS TO THE LAW

1. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if you would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during employment to the proposed post-employment activities. In your case, the overlap is substantial. You would work for the same agency, with the same director, performing the same tasks you performed while employed by the State. When asked if there would be occasion for you to evaluate the same patients you treated while employed by the State or to evaluate patients you treat in private practice you stated:

> Delaware is a small state, so some of the same individuals I have seen at the clinic as their treatment provider may require an evaluation from time to time as the years go by. We make every effort not to have such individuals evaluated by someone who has treated that person in the past, mainly to avoid creating any confusion with regard to the sometimes competing goals of treater (sic) (i.e. trying to help the patient) and evaluator (i.e. trying to objectively answer the judge's question).

You indicated you would recuse yourself where possible but DPC may not have the staff necessary to recuse yourself in every instance and if you did so, an individual may be forced to wait an extended period of time for an evaluation, to their detriment.

The Commission also considered the fact you would be contracting with your former agency. Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller,* Del. Ch., 280 A.2d 748, 752 (1971}. The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions. In this case, it appears you were offered the contract because of your former association with the agency as well as the fact you possess a very specific set of skills required to perform the job.

Considering all those factors, the Commission decided it would violate the post-employment restriction in the Code of Conduct for you to accept the contractual position with DPC. However, for the reasons below, the Commission decided to grant a waiver based on agency hardship.

2. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

(a) "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18* (*citing Merriam Webster's Collegiate Dictionary*, p. 1290 (10th ed. 1992).

In granting a waiver, the Commission may consider a hardship to either the employee or to the State agency. If you were prohibited from contracting with DHSS, the agency would be placed in the position of having to recruit a psychiatrist qualified to perform court-ordered evaluations from a shallow pool of resources. Further complicating the search for a suitable candidate would be the fact the contract is for a part-time position. If the agency were fortunate enough to find a qualified psychiatrist in Delaware the part-time, contractual nature of the position may create further difficulty (i.e. lack of benefits, etc). Failure to locate a suitable candidate would create a backlog of individuals waiting for psycho-forensic evaluations.

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

Having decided you qualified for a waiver based on agency hardship, the Commission need not consider the public purpose served by the law. However, those considerations are an equally important reason for the Commission to grant the waiver.

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

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

Id.

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

Court-ordered psycho-forensic evaluations are most often ordered for people accused of crimes. Here, the public has an interest in swift and just resolutions to criminal cases. The need for a court-ordered psycho-forensic evaluation, which provides the court direction on which programs or treatments would most benefit the defendant, often prevents inmates from litigating their cases and being released from custody. If you were prevented from accepting the contractual position with DHSS, it is likely the wait time for an evaluation would rise dramatically and ultimately delay the release of defendants who are presumed innocent until proven guilty. Also weighing in favor of serving the public purpose is the fact that this waiver will be published in its entirety. That ensures that the public knows why you were allowed to contract with the State in contravention of the Code.

C. CONCLUSION

Based upon the agency's hardship and in considering the public purpose of your application, the Commission grants a waiver to allow you to contract with your former State agency.

Sincerely,

/s/ William F. Tobin, Jr. /s/

William F. Tobin, Jr.
Chair

15-02 – Post Employment: [Employee] retired from [his State position] on September 1, 2014. Before his retirement [Employee] was the Director of [a specific Division]. The Division provided (or contracted to provide) [services to a specific segment of the population]. The Division was made up of [numerous employees with various job descriptions] who reported to [the head of each county]. The [head of each county] reported directly to [Employee]. [Employee] was generally responsible for the division's policies, personnel, and budget.

[Employee] wanted to accept a contract with his former agency to review reimbursement [rates related to a specific service]. Originally, the reimbursement amounts were determined by an independent agency contracted by [the State agency]. Over time, additional monies were requested for specific [clients] and those requests were reviewed by [Employee] while he still worked for the State. [The State agency] was seeking to hire a contractor to [review the previously approved reimbursement rates]. The contract offered to [Employee] was for approximately $5000. The agency's procurement rules did not require the contract to be publicly noticed and bid because it fell below the threshold dollar amount. The Code of Conduct only requires public notice and bidding for contracts awarded to current State employees. 29 Del. C. § 5805(c). According to [Employee], he was asked to do the contract work because of his "historical knowledge and familiarity with the system."

[Employee] asked the Commission to determine if his acceptance of the contract would violate the post-employment restrictions in the Code of Conduct. [Employee] could not attend the meeting. However, he was available by telephone if the Commission had additional questions.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] previously worked on the subject matter while working for the State. However,

unlike *Beebe*, it appeared there was substantial overlap between [Employee]'s State duties and the contract work. As a contractor, [Employee] would be identifying [reimbursement levels] he had personally approved as a State employee. That is exactly the type of job switch the statute was designed to prevent. To permit him to engage in such activities would distort the purpose of the post-employment provision by allowing [Employee], as a contractor, to get a "leg up" on other private enterprises that deal with the State. *Commission Op. No. 95-11.* As to the specific issue of contracting with his former agency, Delaware Courts have noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp* & *Son v. Heller,* Del. Ch., 280 A.2d 748, 752 (1971}. The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions. In this case, [Employee] was offered the contract specifically because of his former association with the agency.

The Commission decided it would violate the post-employment restriction in the Code of Conduct for [Employee] to contract with his former agency.

14-49 -- Post Employment: [Employee] worked for the Delaware Department of Transportation (DelDOT) on large construction projects. He recently retired from State service. [Employee] was generally responsible for the oversight of [specific employees] to ensure that work was completed pursuant to specifications and to ensure it was completed in a timely manner. [Employee] would [coordinate with other entities involved in the project]; he oversaw and recorded daily activities; and he kept records of work completed and material used for invoicing purposes.

[Employee] wanted to accept a position with one of DelDOT's contractors. He asked the Commission to consider allowing him to work for [the contractor] doing the exact same job he performed for the State. [Employee] was accompanied to the meeting by [one of the contractor's employees].

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher;* p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there was substantial overlap, the Commission compared the duties and responsibilities during State employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter and made no attempt to hide the fact that he would be performing the same job duties while working for [the contractor] that he was primarily responsible for while he worked for the State.

The Commission asked [the contractor's employee] if it would be possible for [Employee] to work on projects that he was not involved with while he was employed by the State. Generally, the Commission has been of the opinion that former DelDOT employees could work on DelDOT-related projects in the private sector as long as they did not work on the same projects they were involved with while employed by the State. *See Commission Ops. 13-41, 12-09, 11-58*. [The contractor's employee] indicated there were no other opportunities at that time. He also indicated he had been trying to actively recruit [Employee] since before his retirement.

B. Waivers may be granted if there is an "undue hardship" on the State Employee or the State agency. 29 Del. C. § 5807(a). They also may be granted if the literal application of the law is not necessary to serve the public purpose. *Id.*

[Employee] claimed the post-employment restriction was creating a personal hardship because his pension did not pay him enough money. He also argued that a waiver would benefit the State because the agency was suffering from a lack of experienced manpower.

(1) "Undue Hardship"

The statute permits the Commission to grant a waiver if there is a hardship on either the agency or the employee. 29 Del. C. § 5807(a). The common and ordinary meaning of "undue hardship" is "more than is required" or is "excessive." *Commission Op. No. 97-18* (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992). The mere fact that a former employee cannot work on the same matters for which they were responsible, is not, by itself, an "undue hardship." *Commission Op. No. 97-18*. Rather, it is the very hardship imposed by the statute. *Id*.

[Employee] did not provide any information about his inability to secure other employment. Nor did he provide any information which would suggest he had even attempted to seek other employment. As a result, the Commission decided he had not offered any facts which would justify a hardship waiver. The agency itself did not request a waiver.

(2) Literal Application Is Not Necessary to Serve the Public Purpose

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in

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

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

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

[Employee] did not present any information that would lead the Commission to believe that application of the law was not necessary to serve the public purpose. As a result, the Commission decided application of the two year post-employment restriction to [Employee]'s situation struck an appropriate balance between the public's interests and the State's interests. Therefore, a waiver was inappropriate.

The Commission decided that [Employee]'s proposed post-retirement employment would violate the two year post-employment restriction and he did not qualify for a waiver.

14-42 - Post Employment: [Employee] was retiring from State employment. He was [a manager for a specific Division of a State agency]. [Employee] was generally responsible for overall operations [related to his Division]. His specific job duties included: setting priorities; measuring workloads; estimating and shifting manpower as needed; estimating equipment and materials needed; developing budgets. He also assisted his supervisor with planning and scheduling regular and special operations on a daily, weekly and monthly basis. Projects which required special skills were referred to outside contractors. [Employee] was responsible for identifying those projects which required outsourcing but he was not involved in the contract process.

[Employee] wanted to accept a position working with [a private company]. [The private company] contracted with [his Division] to provide [certain] services for long-term projects. His job responsibilities would include: conducting field observations and writing observation reports; monitoring compliance with [specific] requirements; reviewing payment requests and change orders, reviewing and responding to contractor requests for information; traveling to various

sites. He asked the Commission to determine whether his proposed employment with [the private company] would be a violation of the post-employment restriction.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. In addition, [Employee]'s contact with [the private company] must be substantial enough to support a finding that [Employee] would be 'assisting' [the private company] by accepting the post-retirement position. A practical definition of "assist" must be limited to substantial activity on behalf of the private enterprise which has a direct influence on the State. Peripheral help that does not directly interact with the state or take advantage of the prior state employment, is not enough to constitute a violation of 29 Del. C. § 5805(d). To do so would be too strict an interpretation of the public policy reasons for the post-employment restrictions and would unfairly hinder job opportunities and negatively impact the desire of individuals to work for the state.

Like the matter in *Beebe*, [Employee] had worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In his State position, [Employee] was responsible for the orchestration of resources, manpower, and scheduling of [specific] projects. He was also responsible for identifying those projects which required outside contractors. The projects undertaken by outside contractors were [reviewed] by [Employee]'s prospective employer, [the

private company]. However, other than identifying the projects that needed to be outsourced, [Employee] did not interact with [the private company's employees] nor was he responsible for overseeing the State's contract with [the private company]. As a result, there was no overlap in job duties between [Employee]'s State position and the post-retirement position. As a result, [Employee] did not have contact with [the private company]'s employees substantial enough to support a finding that [Employee] would be assisting [the private company] when he began working in his post-retirement position.

The Commission decided [Employee] would not violate the post-employment restriction in the Code of Conduct by accepting the post-retirement position with [the private company] and he was reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

14-38 - Post Employment: [Employee] retired from State employment on February 1, 2014. He was employed as the Director of [a State agency] for over 28 years. [Employee]'s responsibilities included: operational and policy decisions; strategic planning; supervision of senior managers; hiring and promotion decisions; drafting legislation; working with the Governor's office, private businesses, and the federal government regarding policy matters; interpreting various rules and case law and its application to his Division.

As a retiree, [Employee] wanted to consult with private entities about [his area of expertise]. Prior to the meeting he presented three specific consulting scenarios in which he asked the Commission to consider the applicability of the two year post-employment restriction. If the Commission found a conflict with any of the three opportunities, he requested a waiver. [Employee] told the Commission he felt the post-employment restriction prevented him from being employed. He said [the work he did for the State] was his area of expertise and the only reason an employer would want to hire him. The Commission explained the statute is necessary to prevent State workers from making official decisions based upon their post-retirement opportunities.

Scenario 1: A national organization that advocated for employers on [a specific topic and related areas] contacted [Employee] on behalf of [a Delaware organization] to discuss a recent change to [one of his former Division's policies]. The previous policy was established based upon [Employee]'s interpretation of several Delaware Superior Court decisions. The national organization suggested the [Delaware organization] hire [Employee] to explain his interpretation of those cases and the Division's policy while [Employee] was Director. In addition, the [Delaware organization] wanted [Employee] to advise them during meetings between representatives of the [organization] and representatives of his former Division regarding the same issue.

Scenario 2. A national company that provided businesses with [certain services] may want to hire [Employee] as the Agency Liaison Director for [a particular division related to his past State employment]. In that position, his primary duty would be to serve as a liaison between the company and state officials [with oversight of a particular area] across the country to gather information and cultivate relationships. In addition, he would be responsible for analyzing "emerging trends/forces shaping agency/legislative/regulatory change and identify potential product opportunities." If [Employee] was offered the position he asked the Commission to determine if he may interact with Delaware officials or if he would be required to recuse himself.

Scenario 3: As an employee of, or as a consultant to, a private entity, [Employee] wanted to advise companies about matters related [to his previous State employer]. Those activities would include: [general management duties related to the employer's business which was directly related to the Employee's former State job].

Scenario 4: At the meeting [Employee] made the Commission aware of a fourth employment option. He asked about the possibility of working [as a liaison between the federal government and the citizens of Delaware]. He described the position as a federal job paid with federal dollars. In that position he would contact citizens to gather information and provide advice when necessary.

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

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The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

To ascertain if there is a substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while employed by the State. In fact, for the past 28 years he was the policy-maker for the entire Division. [Citation omitted]. As Division Director and policy-maker, [Employee] was materially responsible for most, if not all, of the agency's procedures. His job as a State employee, and its impact on his ability to work as a consultant in any of the four scenarios was discussed by the Commission.

Scenario One: The [Delaware organization] wanted to hire [Employee] to consult on matters for which he had previously given an opinion and for which he was materially responsible while he was Division Director. As Director, the agency's policies were applied based on [Employee]'s interpretation of the case law affecting his agency. It was for that exact reason the [organization] wished to hire him as a consultant. The [organization] wanted [Employee] to attend meetings with his former agency to discuss why his interpretation of the case law was justified and cast doubt on the current Director's interpretation and application of the law. Because of the overlap in duties between this job and [Employee]'s state job, the Commission determined this position would violate the post-employment restriction in the Code of Conduct.

Scenario Two: Working with the other 49 states on matters concerning [a specific topic] did not involve matters for which [Employee] was previously responsible. However, if [Employee] works as a liaison between the private company and Delaware, he would put other companies at a disadvantage by leveraging his relationship with officials who were previously his colleagues and subordinates. That would contravene one of the goals of the post-employment law which is to allay the public's concern that government employees may exercise undue influence over their previous government co-workers. *Commission Op. No. 96-75* (*citing United States v. Medico*, 7th Cir., 784 F.2d 840, 843 (1986)).

[Employee]'s request indicated he would be able to accept the position as an agency liaison with the understanding he would need to recuse himself from any matters involving Delaware officials. Recusal would allow him to work in his area of expertise while still honoring the boundaries of the post-employment provision in the Code of Conduct. The Commission decided the position did not violate the post-employment restriction as long as [Employee] recused himself appropriately.

Scenario Three: The job description provided by [Employee] indicated he would be hired to advise a private company about the inner workings of his prior Division. All of the responsibilities included in the job description required [Employee] to use his knowledge about the inner workings of the agency to the advantage of a private company. To permit him to engage in such activities would distort the purpose of the post-employment provision by allowing his private employer to get a "leg up" on other private enterprises that deal with the State. *Commission Op. No. 95-11.* Furthermore, his specialized knowledge was a direct consequence of his prior employment with the Division where he was directly and materially responsible for all policy matters. The Commission decided the position would violate the post-employment restriction because it would require [Employee] to review policy matters for which he was materially responsible while employed by the State.

Scenario Four: Delaware's post-employment statute is silent as to whether it applies to post-retirement employment with other governmental entities. 29 Del. C. § 5805(d). The statute specifically addresses former employees representing "private enterprises". *Id*. The definition of 'private enterprise'[3] is broad and only excludes "any activity of the State or of any political subdivision or of any agency, authority or instrumentality thereof". 29 Del. C. § 5804(9). Delaware Courts have held that where the legislature is silent, additional language will not be grafted onto the statute. *Goldstein v. Municipal Court,* 1991 WL 53830 (Del. Super.) (citing *State v. Rose*, 132 A. 864, 876 (Del. Super., 1926); *Commission Op. 07-63.* Existing statutory language must be interpreted consistent with the General Assembly's manifest intent. 1 Del. §

[3] 'Private enterprise' is referenced throughout the Code of Conduct, not only in the post-employment restriction. *See* 29 Del. C. §§ 5805(a)(2)(b); 5805(b)(1)(2)(3); 5805(c); 5806(b); 5806(c); 5806(d).

301. 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); *Comm Op 07-63*. In deciding legislative intent, Courts look first to the statutory language. *Goldstein, supra*. 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)); *Commission Op. 07-47.*

The plain language of the statutes comprising the Code of Conduct indicated the legislature did consider those entities to which the Code would not apply. 29 Del. C. § 5804(9). The federal government was not excluded. For the Commission to decide the post-employment restriction did not apply to subsequent employment with the federal government would be to graft additional language onto the statute. Similarly, the Commission did not conclude that the Legislature's failure to provide for the exclusion would lead to an absurd and undesirable result. It was entirely possible there were circumstances under which subsequent federal employment could be detrimental to the State's interests. Based on the foregoing, the Commission found that, generally speaking, Delaware's post-employment restriction *does* apply to federal employment. As a result, the Commission considered the facts of [Employee]'s proposed employment to determine the restriction's applicability.

The Commission decided [Employee] would be able to accept the [federal liaison] position without violating the post-employment restriction. As a liaison he would be contacting citizens to gather, and provide, information about [issues unrelated to his former State job]. Acting as a liaison for issues unrelated to [his previous Division] was not problematic. As Director [of his Division], he was not materially responsible for the regulations and laws promulgated by the other Divisions. Therefore, the post-employment restriction did not apply to those matters. As to citizen inquiries about [his area of expertise], the Commission decided he could answer questions and provide information as long as he is careful to avoid handling citizen inquiries related to general policy matters he was previously responsible for while employed by the State. Because [Employee] was not involved in the day-to-day [tasks of his Division], assisting individual citizens with procedural questions or relaying information to [his employer] would be permissible as long as he limited himself as described above.

The Commission reminded [Employee] of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

B. Waivers may be granted if there is an "undue hardship" on the State Employee or the State agency. 29 Del. C. § 5807(a). They also may be granted if the literal application of the law is not necessary to serve the public purpose. *Id.*

[Employee] claimed the post-employment restriction created a hardship because he was having a difficult time finding employment in his area of expertise that did not run afoul of the Code. He further stated "my area of subject matter expertise with its depth, breadth, and years of experience in [his area of expertise] is so specialized, this expertise, knowledge and experience is the primary reason a prospective employer would be interested in hiring me as an employee or consultant. Without a waiver, future employment is unlikely unless I change my field of endeavor." The Commission then considered his request for a waiver.

(a) "Undue Hardship"

The statute permits the Commission to grant a waiver if there is a hardship on either the agency or the employee. 29 Del. C. § 5807(a). Because [Employee] was no longer employed by the State, the issue was whether the two year post-employment restriction imposed an undue hardship on him personally. The common and ordinary meaning of "undue hardship" is "more than is required" or is "excessive." *Commission Op. No. 97-18* (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992). The mere fact that a former employee cannot work on the same matters for which they were responsible, is not, by itself, an "undue hardship." *Commission Op. No. 97-18*. Rather, it is the very hardship imposed by the statute. *Id*.

[Employee] identified two employment opportunities which would allow him to capitalize on his expertise while also complying with the post-employment restriction. He also told the Commission about a job opportunity he had been offered working in New Jersey. He did not accept the position because he did not want to move away from Delaware. The Commission determined [Employee] opportunities were limited by his own unwillingness to work outside [his preferred subject area] or outside the geographic boundaries of Delaware and denied his request for a waiver based on undue hardship.

(b) Literal Application Is Not Necessary to Serve the Public Purpose

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). In discussing the federal post-employment law, which is similar to Delaware's, the United States Congress noted that public confidence in government has been weakened by a widespread conviction that government officials use their public office for personal gain, particularly after leaving the government. *"Ethics in Government Act," Senate Report No. 95-1770, p. 32.* In extending its post-employment law from one year to two years on matters within the official's former responsibility, Congress said the two-year requirement was justified because:

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

On the other hand, the Code also seeks to encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely placed a restriction on post-employment activity involving matters for which the former employee (1) gave an opinion; (2) conducted an investigation, or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) . *Commission Op. 01-07*.

In this case, the Commission decided the post-employment restriction was serving its intended purpose. Former State employees cannot leverage their previous State employment in order to secure post-retirement employment. The Commission denied [Employee]'s request for a waiver because enforcement of the restriction was necessary to serve the public purpose.

C. Decision

[Employee] could not accept the employment opportunities in Scenario One or Three. His request for a waiver was denied. [Employee] could accept employment under Scenario Two as long as he recused himself from matters related to the State of Delaware. Employment under Scenario Four was permissible as long as [Employee] did not involve himself in matters related to policy and procedures for which he was previously responsible.

14-36 - Post Employment: [Employee] worked for the State as a casual/seasonal employee from June 2013 to October 2013. During that time she was employed by [a State agency] [involved in a seasonal program]. [The agency] received funds for the program from the [federal government] and awarded those funds to sub-grantees responsible for implementation of the program. At the time, the only sub-grantee of the program was [a private company].

During her employment with the State, [Employee] reviewed invoices submitted by the sub-grantees; performed statistical analysis; interpreted data related to policies, procedures, organization, managerial and operational practices; defined and made recommendations for correcting problems. In 2013 the sub-grantees for [the program were not the same as the current sub-grantee]. [Employee] was supervised by the program administrator.

[Employee] accepted employment with [the private company] as a Billing Coordinator for [the program]. Her responsibilities included: oversight of operational practices; statistical analysis, interpretation of collected data, creating and maintaining documents; performance tracking; submitting invoices. She had limited contact with her former supervisor. [The private company] instructed [Employee] to seek the advice of the Commission as to whether her new position violated the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of

those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the program had different sub-grantees during the time [Employee] was employed by the State. At the meeting, [Employee] indicated she had no involvement in developing [the agency's] policies and procedures that she was required to comply with as an employee of [the private company]. She also stated her contact with her previous supervisor was through another employee. He was merely responsible for approving the invoices submitted to [the State agency], she did not have direct contact with him.

The Commission decided that [Employee]'s position at [the private company] did not involve matters for which she had previously given an opinion or was materially responsible for while employed by the State and was not a violation of the post-employment restriction. She was reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

14-34 - Post Employment: [Employee] retired from State employment. While employed by the State she worked [at a particular State agency]. She was primarily responsible for two federal grant programs. [The private company] was an agency which received grant money from [her former State agency]. With the grant money, [the private company] provides assistance to their clients based upon various income calculation standards set by the State. As part of her duties, [Employee] would visit [the private company's] sites to [review information relevant to her State job]. Her contacts for [those visits] were the managers of each county. [Employee] would verity the income calculations were done appropriately. If she felt the income calculation was not done correctly, she would write to [the private company] and ask them to research their calculation methodology.

[Employee] wanted to accept a position with [the private company] as an intake worker. She would be working one-on-one with clients to complete applications for assistance. [Employee] would collect the needed documentation and determine the appropriate income calculation for each client's application. She would then enter the information into a computer which would determine if the client was "income eligible." The applications processed by [Employee] would be reviewed by another staff member. [Employee] would not have any contact with her former State agency. If one of [Employee]'s applications was selected for a [review], the State worker completing [the review] would deal with the site manager, not [Employee]. [Employee] asked the Commission to decide whether acceptance of the new position would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In her State position, [Employee] conducted random [reviews] to determine if the receiving agency was correctly applying State income eligibility standards. She did not interact with [the private company's] clients. In her post-retirement position with [the private company], [Employee] would be working with the same federal program but she would not be interacting with her former co-workers. Any questions about the applications she processed would be handled by the [the private company's] site manager obviating the need for her to interact with her former co-workers. It was possible that one of the applications [Employee] worked on would be selected for [a review]. When the Commission asked if her former co-workers would be able to identify her from the application she acknowledged that her name would be on the application. However, the review would be limited to the method of income calculation used on the application which would be handled by the site manager.

In the unlikely event [Employee] was confronted with a matter for which she was previously responsible while employed by the State, she should recuse herself. Under the law, recusal has been broadly interpreted. The Commission advised her to leave the room and not participate in any discussions concerning the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del., January 29, 1996). This is to insure her colleagues are not influenced by nonverbal cues such as gestures, etc.

The Commission found acceptance of the position with [the private company] would not violate the Code of Conduct's post-employment restriction as long as she recused as necessary. Additionally, [Employee] was reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

14-31 - Post Employment: [Employee] worked for [a State agency] as a Program Evaluator. Her primary duties included reviewing: [various program providers]. Reviews were based on compliance with regulations. She reported her findings to each provider and the provider then submitted a Plan of Improvement to [her agency]. Once the Plan of Improvement was verified, she would then recommend/not recommended continued licensing of the [provider to the person responsible for issuing their licenses].

[Employee] planned to retire from State employment in the near future. She wanted to accept a position with a provider currently contracting with her Division. At [the private company] [Employee] would be responsible for internal quality assurance. As part of her duties, she would oversee managers and supervisors as well as collect and report data to [the private company's] corporate office. She would not be working on any Plans of Improvement for two years. Nor would she be involved in the contract negotiation process. [Employee] asked the Commission to decide whether acceptance of the new position would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] had worked on the subject matter while employed by the State. However, the court in *Beebe* drew a specific line between the subject matter and

its application to specific facts. [Employee]'s work with the State involved certification and improvement plans. She stated she would not work on any improvement plans for [the private company] during the next two years. [Employee] further stated her new position would involve overseeing managers/supervisors and collecting data to report to [the private company's] corporate office. Those types of tasks appeared to be completely distinct from the work she performed while with the State.

The Commission decided that as long as [Employee] confined her work at [the private company] to internal quality control she would be unlikely to encounter a matter for which she previously gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for while employed by the State. If such a circumstance should occur, she was instructed to recuse herself. Under the law, recusal has been broadly interpreted. The Commission advised her to leave the room and not participate in any discussions concerning the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del., January 29, 1996). That is to insure that her colleagues are not influenced by nonverbal cues such as gestures, etc. [Employee] was also reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

14-29 - Post Employment--[Employee] worked for [a State agency as an administrator]. One of his responsibilities was to work with [a private entity]. [The private entity] was a registered non-profit organization and was not a State agency. [The private entity] was comprised of three [subdivisions]. Each [of the subdivisions] was created by statute as a "governmental subdivision of the State." [citation omitted]. Although entirely comprised of 'governmental subdivisions of the State', [the private entity] itself was not a statutory entity. The mission of the [three subdivisions] was to further [a goal serving a public purpose]. *Id*. [Each of the subdivisions] had an independent Board which was both elected and appointed. *Id*. [Employee]'s job was to assist the three [subdivisions] in carrying out their mission and serve as the liaison between [Employee's agency] and the [subdivisions]. He attended meetings [of the private entity] in an "advisory role."

[A staff member of the private entity (X)], retired in March. At the meeting [Employee] stated that [X] was actually an employee of [one of the subdivisions] but was "working on behalf of [the private entity]". [X] reported to [Employee] for daily supervision which included signing her time sheets and vacation slips. When the Commission asked [Employee] why [X] reported to him, his response was "because of the relationship between [his agency] and the [private entity]." [X] also reported to the [the private entity's] president "for policy and general guidance." She was physically located at the [Employee's agency]. Due to [X's] retirement, [Employee] had been helping [the private entity] with some of their routine business and the [leaders of each subdivision] had been asked to make staffing recommendations to the [private entity's] Board. The Board had been discussing expanding the duties and responsibilities of [X's vacant position] into a newly created position. During those discussions [Employee] voluntarily excused himself from the meetings so he would not be part of the decision-making process.

PIC received an anonymous letter alleging [Employee] was contemplating applying for the newly created position [with the private entity]. The letter alleged his acceptance of the position would violate the post-employment provision of the Code of Conduct. A copy of the job description was attached to the letter. Commission Counsel contacted [Employee] to see if he was, in fact, contemplating applying for the position. He acknowledged he was considering retirement and wanted to apply for the job but had not yet seen a job description. Commission

Counsel provided [Employee] with a copy of the job description. According to the job description [Employee] would be responsible for the day-to-day operations of [the private entity], manage the budget, compile financial reports, develop fundraising activities, apply for grants, and act as a liaison to the General Assembly and other State agencies, including [Employee's agency]. The position had since been posted and [Employee] had submitted an application.

[Employee] agreed to seek the advice of the Commission as to whether his acceptance of the position would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] has worked on the subject matter while employed by the State. While [Employee] represented the State's interests when working as [his agency's] liaison to [the private entity], he was also heavily involved in [the private entity's] day-to-day work. [The private entity's employee, X,] reported to [Employee] on a daily basis and since the employee's retirement, he had been assisting [the private entity] with those duties. In addition to his advisory role with the [individual subdivisions] and [the private entity], [Employee] had also been involved in overarching policy matters which affected both [his agency] and [the private entity]. [As the private entity's new employee] he would be working with leadership [of his current agency] to facilitate achievement of mutual goals. At the meeting he also indicated he would likely be required to work with his former co-workers. [Employee] emphasized the fact his duties related to [the private entity] were only part of his job responsibilities.

The Commission decided [Employee]'s work with [his current agency] and the proposed position with [the private entity] involved the same basic facts, the same parties and the same issues. His argument that his current duties related to [the private entity] and the [individual subdivisions] were only a portion of his total responsibilities was unavailing. First, the [private entity's newly created position] was posted as a part-time position. Second, the law's application is not limited to post-retirement positions which are entirely identical to an employee's government job. The law is applied to matters for which an employee previously gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). The Commission decided [Employee] would be changing jobs but the facts and the matters under his purview would remain the same. This type of job exchange was exactly the type of issue the two year prohibition was designed to prevent.

14-29—Consideration for Referral to the AG's Office--*[Former Employee] appeared before the Commission on September 16, 2014. Commission Op. 14-29. [Former Employee] requested an opinion as to whether a post-retirement position would violate the two year post-employment restriction in the Code of Conduct. 29 Del. C. § 5805(d). The Commission decided that accepting the position would be a violation of the post-employment prohibition and a letter to that effect was sent to [the former Employee] shortly after the meeting. Commission Counsel checked to see if [Employee] had complied with the Commission's ruling.*

While researching [Employee's compliance], Commission Counsel located a reference about [Employee working in the position he was told would violate the post-employment prohibition in the Code of Conduct]. After finding the reference, Commission Counsel emailed [the former Employee] to see if the information on the website was correct and that he had accepted the position against the Commission's advice. He responded that he was not employed by [the entity in question]. Commission Counsel then located a copy of a recent press release which referred to [the former Employee] as [a management employee of the entity in question]. Commission Counsel then contacted [the party responsible for the press release] to see if they had any pictures of [the former Employee] at the event, but they did not.

The Code of Conduct provides criminal sanctions for violation of the post-employment restriction of up to one year in jail and/or a $10,000 fine. 29 Del. C. § 5805(f)(1). The Commission is required to report to State authorities "substantial evidence" of a criminal violation. 29 Del. C. § 5807(d)(3). Substantial evidence is defined as "less than a preponderance of the evidence, but more than a mere scintilla of evidence. It does not mean "a large or significant amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood,* 487 U.S. 552, 555 (1988). The Court of Appeals for the Third Circuit has further clarified, "a single piece of evidence will not satisfy the substantiality test" if it fails to resolve a conflict by created by countervailing evidence, if it is overwhelmed by other evidence, or if it is merely a conclusion." *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983).

At the time, the information gathered led toward the conclusion that [the former Employee] did, in fact, accept the [prohibited] position against the advice of the Commission and contrary to 29 Del. C. § 5805(d). Nonetheless, it was not likely the information gathered met the 'substantial evidence' requirement. As a result, referral of the matter pursuant to 29 Del. C. § 5807(d)(3) would likely fail to meet the statutory evidentiary requirement. However, that did not end the inquiry.

Not required, but permitted, under 29 Del. C. § 5808A(4) Commission Counsel may recommend to the Commission that "possible violations" of the Code of Conduct "be referred…to the Attorney General…for investigation and prosecution. Matters may be so referred to the Attorney General…only upon a determination by at least a majority of the Commission that there are reasonable grounds to believe that a violation may have occurred. *Id.* The Commission considered whether there were reasonable grounds to believe [the former Employee] accepted the [prohibited position]. After a brief discussion the Commission decided there were reasonable grounds to believe [the former Employee] accepted the post-retirement position in violation of the Code. The matter was referred to the AG's office for further investigation and possible prosecution. *(The matter is still pending with the AG's office).*

14-28 - Post Employment: [Employee] worked for [a State agency] and was planning to retire in the near future. [Employee] worked in Kent and Sussex counties. His duties included: [certification of facilities providing services to his agency]; reviewing improvement plans submitted by providers in response to reviews; recommending provider's certifications. He also served on several committees and boards related to [his agency's] mission. While [Employee] was involved in the provider certification process, he did not have any responsibilities related to the terms of the contract between the provider and [his agency].

Post-retirement, [Employee] wanted to work [for] a provider contracting with [his agency]. [Employee] would be [doing other tasks unrelated to his State job]. [Employee] would primarily work with [one of his State agency's employees]. [Employee] claimed his duties at [the agency] did not involve contact with [those employees]. [The provider] was subject to random audits by [his State agency]. As a result, there was a possibility one of [Employee]'s cases could be selected for audit by his former agency. According to [Employee], [the] audit process involved a determination as to whether specific services were provided to the client rather than a subjective critique of the service itself. As a result, his former colleagues would not be evaluating his work. Nor would [Employee] be required to interact with his former co-workers. Any audit inquiries would be handled by administrators [at the provider's office].

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former

agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] worked on the subject matter, services [for particular clients], while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In his State position, [Employee] regulated and certified service providers. He was seeking post-retirement employment with one of those same providers. In his post-retirement position [Employee]'s responsibilities would be client-oriented and focused on treatment rather than licensing and certification. He would not be involved in the certification process he was responsible for in his position with the State.

The Commission discussed the remote possibility that [Employee] would be confronted with a matter he was previously responsible for while employed by the State. The Commission instructed [Employee] that if such a circumstance were to occur he should recuse himself. Under the law, recusal has been broadly interpreted. Should such a situation occur, the Commission advised him to leave the room and not participate in any discussions concerning the matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del., January 29, 1996). This is to insure that his colleagues are not influenced by nonverbal cues such as gestures, etc.

The Commission decided it would not violate the post-employment restriction in the Code of Conduct for [Employee] to accept a position with [the provider] as long as he recused as necessary. He was also reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. §5805(d).

14-16 - Post Employment Waiver Request—William Love: GRANTED

Waivers granted by the Commission are published in their entirety and confidentiality is waived. 29 Del. C. § 5807(b)(4).

Hearing and Decision By: *Dr. Wilma Mishoe (Chair); William Tobin, Vice Chair); Andrew Gonser, Esq., Vice Chair; Commissioners: Mark Dunkle, Esq., Bonnie Smith*

Dear Mr. Love,

Thank you for attending the Commission meeting on May 20, 2014. Based upon your written submissions, your comments at the hearing, as well as the comments of Mr. Robert Martine and Mr. Michael Price, the Commission decided to grant the Office of the Chief Medical Examiner a waiver of the post-employment restriction applicable to

Mr. Robert Martine for 90 days effective June 1, 2014. Because a waiver was granted, this entire opinion will be published to assure the public that the appropriate interests were considered. 29 Del. C. § 5807(b)(4).

FACTS

You are the Director of the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) within the Department of Health and Social Services. You are temporarily working with the Office of the Chief Medical Examiner (OCME) due to the absence of the OCME's Director. The OCME is comprised of multiple departments, some of which are currently the subject of a criminal investigation. You assured the Commission your request was not related to the Chemical Testing Laboratory which has been closed while the pending investigation is completed.

The OCME is faced with an urgent staffing situation in their Death Investigation Unit serving New Castle County. If fully staffed, the unit has one manager, Michael Price, and four forensic death investigators. Currently, three of the four forensic death investigators are not available: one investigator is on FMLA and expected to return to work in June; a second position is filled but the incumbent is suspended with pay due to an ongoing criminal investigation, return date is unknown; a third position is vacant and a candidate has been offered, but not yet accepted, the position and if accepted, his training will take several weeks; the fourth position is filled and the incumbent is working. The manager and the one staff member on duty are working excessive hours given the lack of normal staffing and the number of deaths requiring investigation. As an example, Mr. Price stated during a one week period earlier this month, there were eight automobile fatalities which required the services of a Forensic Investigator on the scene.

Forensic investigators assist in determining circumstances surrounding certain deaths listed in State statue which include accidents, suicides, suspicious deaths, and industrial and aircraft disasters. Investigations include conducting interviews, photographing the scene and body, gathering and preserving evidence, and transporting the body. Investigations must comply with forensic investigation laws, rules, regulations, standards, and policies. The responsibilities require competencies in medical terminology, anatomy, as well as investigative skills. Once an applicant is hired, a process that takes up to 60 days, the incumbent undergoes 300 hours of field training before being able to work independently. Typically, the agency has hired from a limited pool of retired law enforcement personnel. Mr. Price stated that was because of the investigative skills required for the position. The medical expertise needed for the position is gained through on-the-job training and self-study.

You and your staff are working on a short term solution to the vacancies which would help with some of the staffing issues through the end of May 2014. The OCME is planning to hire Robert Martine, currently a State employee with Capitol Police, who is scheduled to retire on June 1st. Mr. Martine is now on leave (vacation/compensatory time) through the end of May. The Capitol Police have authorized him to work with the OCME while on leave in May. He will be hired as a State seasonal/casual employee through the end of May. However, the OCME would like to contract with Mr. Martine beginning on June 1st for a period of six months. Mr. Martine previously worked for the OCME as a Forensic Death Investigator as a Casual/Seasonal employee from 2007 to 2013. He would be able to step into the job and provide the skilled services the agency needs without delay. You are asking the Commission, on behalf of the OCME, to

consider a waiver of the two year post-employment restriction to allow Mr. Martine to contract with the OCME.

APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Mr. Martine would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

There is no question that contracting with Mr. Martine would be a violation of the post-employment restriction. He last worked at the agency one year ago, performing the exact same job. Therefore, as a Forensic Investigator, he was directly and materially responsible for matters in the OCME, a position which is now being offered to him as a contractual worker. A waiver would be necessary to allow Mr. Martine to contract with the OCME within the two year time frame of the post-employment restriction.

B. Waivers may be granted if there is an "undue hardship" on the State Employee or the State agency. 29 Del. C. § 5807(a). They also may be granted if the literal application of the law is not necessary to serve the public purpose. *Id.*

(b) "Undue Hardship"

The common and ordinary meaning of "undue hardship" is "more than is required" or is "excessive." *Commission Op. No. 97-18* (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992). The Forensic Investigators positions are only 25% staffed. The result is the remaining employees are required to work excessive hours. At this point, Mr. Price indicated that both he and the only other investigator are working 24 hour shifts. Complicating the staffing issue is the fact the job requires special skills and 300 hours of field training, a standard recommended by the American Board of Medicolegal Death Investigators (ABMDI) of which the OCME is a member. To cope with the staffing shortage, Mr. Price indicated he had checked with numerous past employees to see if anyone would be interested in returning on an interim basis but was not successful. He also stated that the position is not one which could be outsourced to a private contractor because the nature of the job requires an immediate ability to respond anywhere in the State 24 hours a day, seven days a week.

When determining the existence of a hardship, the Commission considers the cause and the agency's role in creating the hardship. As stated earlier, the Forensic Investigator position requires a blend of investigative and medical skills. When the Commission asked about the recruitment process for the vacant positions, Mr. Price stated the OCME has almost exclusively hired retired law enforcement personnel because of their investigative skills. The retired officers obtain the necessary medical training by observing and assisting with autopsies and through independent study. By limiting the applicant pool to such a narrow segment of the population, the Commission believes that much of the agency's hardship was created by the agency itself. When asked why the agency does not consider hiring trained medical professionals, Mr. Price dismissed them as unqualified because they typically don't have the investigative skills required for the position. In contrasting the two pools of potential applicants it appears the OCME is willing to hire personnel with investigative experience and teach them the medical aspects of the job, but they are not willing to hire an applicant with medical experience and teach them the investigative side of the job. Interestingly, ABMDI's website states there are no formal requirements for a position as a death investigator other than those set by each medical examiner's offices. www.abmdi.org. The ABMDI goes on to say that degrees in "Forensic Science, Natural Science, *Nursing, or any other medically related field would be useful*." *Id*. (*emphasis added*). The OCME's short-sighted view of qualified applicants has contributed greatly to the current situation in which they now find themselves.

While it appears the OCME has an inherently flawed hiring process, there are other contributing factors to the staffing shortage which could not have been anticipated. One is the loss of an employee on medical leave and the other is the loss of the suspended employee. The combination of the hiring practices, the employee on medical leave, and the suspended employee have caused an emergency staffing situation in a critically important area. With his previous experience, Mr. Martine would be able to step into the position and begin work immediately. There would be no need for training or orientation. Therefore, the Commission decided to grant a 90 day waiver of the post-employment restriction as it applies to Mr. Martine effective June 1, 2014. During the next 90 day period, at least one employee should be returning from medical leave. Additionally, at the hearing Mr. Price indicated it may be possible to fill one of the other vacancies from a pool of applicants who have already been through the interview process. Therefore, the waiver will help the OCME through the worst part of the staffing shortage. However, the OCME is cautioned that the waiver is a short-term solution to a long-range problem. If the OCME continues its current hiring practices, the Commission

expects they will face similar issues in the future. The Commission strongly urges the OCME to explore other hiring options, including partnerships with previously untapped resources such as nursing schools, colleges, and even law students. While we do not have oversight of personnel matters outside the realm of the Code of Conduct, failure to make significant progress in the remedial process will weigh heavily on the Commission's decision-making process if the OCME should again ask for a waiver of the Code of Conduct.

(b) Literal Application Is Not Necessary to Serve the Public Purpose

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). It is difficult to imagine anything that could be more detrimental to the public's confidence in their government than the OCME's inability to respond to crime scenes, car accidents, and suspicious deaths in order to conduct their investigations in a timely and professional manner, and to provide information on cause and circumstances of a suspicious death. To the contrary, it would appear that the OCME's inability to fulfill this important mission would be more detrimental to the public's confidence in their government than the perception created by contracting with an employee in violation of the two year post-employment restriction. However, the request for a six month waiver seems excessive. A 90 day waiver balances the hardship of the OCME with the public's interest in prohibiting former employees from contracting with their State agency after they leave State service.

CONCLUSION

The Commission grants a 90 waiver, effective June 1, 2014, to the OCME for the purpose of contracting with Robert Martine, a former employee. The purpose of the waiver is to allow the OCME to continue to perform critical services during the immediate staffing shortage.

Sincerely,

/s/ Wilma Mishoe

Dr. Wilma Mishoe
Chair

The Commission granted a 90 day waiver but cautioned the agency not to apply for another waiver unless they had taken remedial steps to address their hiring practices. The Commission found that part of the agency's hardship was caused by institutional and cultural problems. The 90 day waiver will allow for the return of the employee out on medical leave and give the agency time to hire another investigator.

14-10 - Post Employment: [Employee] worked for the Delaware Department of Transportation (DelDOT) as [a manager of a specific department]. His job duties were split between [two different areas]. [Employee] acquired [a resource for his department]. The [resources] for all of the projects were acquired through donations and the entire process generally took 3 or 4 months. He also helped [outside businesses acquire the same resource]. [Employee] did not work for [a different department which handled larger projects which take years to complete].

Next year, [Employee] planned to retire from his State position. He anticipated the projects he will have worked on at DelDOT would be completed within 30 days of his retirement. After retirement, he planned to work for himself as a contracted consultant to DelDOT, developers, and utility companies. He described his new venture as [helping various private industries acquire resources related to long-term projects]. He was seeking the guidance of the Commission to determine if his proposed consulting business would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

[Employee] would continue to work in the [same acquisition of a particular resource] field. However, he indicated that within 30 days of his retirement, any projects in which he gave an opinion, conducted an investigation, or was materially responsible for, would be complete. Therefore, it was very unlikely he would have any involvement in those projects after he transitioned to the private sector. The Commission has previously decided other matters related to post-employment restrictions on DelDOT employees. Generally, the Commission has been of the opinion that a former DelDOT employee could work on DelDOT-related projects in the private sector as long as they did not work on the same projects they were involved with while employed by the State. *See Commission Ops. 13-41, 12-09, 11-58*.

The Commission decided [Employee]'s planned business would not violate the post-employment restriction. However he was reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d). Additionally, [Employee] should recuse himself in the event he is asked to contract on a project he was involved with while employed by DelDOT.

14-07 - Post Employment: [Employee] had worked for the State of Delaware as a Seasonal/Casual employee since August, 2012. In her seasonal position, she was a [consultant] at [a school]. She was employed in a pilot program to assist middle school students with behavioral, social, emotional, and academic issues they may be dealing with at home, school, or in the community. Students were referred to the program by school staff, parents, peers, or through self-referral. Students and families underwent consultations and screening assessments to identify underlying issues and needs. The students and families were then linked to community services when necessary.

[Employee] wanted to accept a contractual position as a [consultant] which was the subject of a Request for Proposal (RFP) by DSCYF. The position was created in response to the success of the pilot program in which she previously worked. She wanted to continue to work at [her school] with students and their families in the school environment assessing needs, assisting with the development of interventions (within the school), and make referrals for additional services. She did not want to transfer to a different school and her duties and responsibilities under the contract would remain the same as when she was employed by the State.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same

confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). *See also Beebe.*

Like the matter in *Beebe*, [Employee] had worked on the subject matter, the pilot program, while working for the State. However, the public interests that gave rise to the post-employment prohibitions were not implicated in this instance. [Employee] went into the pilot program knowing that it would become a contractual position if the program was successful. She was not trying to leverage her State position to gain a benefit as a contract employee. Additionally, the purposes of the pilot program served the State's [interests] by demonstrating whether the program was likely to be successful before it was fully implemented. It would defeat the purposes of a pilot program if those who worked to make it successful were later denied employment. In fact, it would discourage employees from working in pilot programs if there were a blanket application of the post-employment restriction which would disqualify them from subsequent employment.

The Commission had previously held that leaving State employment to continue the same position for a higher rate of pay would be a violation of the post-employment restriction. *See Commission Op. 13-05*. In that matter, a full-time State employee wanted to leave her permanent position in a school district to work as a contract employee in the same school district performing the same job duties. As a contractual employee she would have been earning three times her regular salary. Therefore, it appeared her sole reason for wanting to become a contractual employee was to earn more money for doing the same job. The Commission did not approve the request, nor did it issue a waiver of the post-employment restriction. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5). That matter can be distinguished from [Employee]'s situation because she was working in a temporary position where the stated purpose of the position was to determine the feasibility of implementing the pilot program as a permanent program. If she did not apply for the contractual position, her employment would be terminated.

The Commission decided under the circumstances that it would not be appropriate to apply the post-employment restriction to [Employee]'s situation. Her position was for a limited term and served the public purpose by determining the viability of the program before it was fully implemented.

14-05 - Post Employment: [Employee] worked [at a] High School Wellness Center from July 2013, to February 2014. While the job was with a school district, she was not a State employee, she was a contract employee. In that position she provided counseling to students and coordinated programs for the school. [Employee]'s most recent State employment was in [a division] under the Department of Health and Social Services from June 2012, to June 2013. In that position, she worked with the families of children with [certain] disabilities. [Employee] also owned a part-time counseling business.

[Employee] wanted to accept a contractual position as a [consultant] which was the subject of a Request for Proposal (RFP) by DSCYF. She would work with middle school students and their families in the school environment focusing on behavioral, social, emotional, and academic issues they may be dealing with at home, school, or in the community. Students were referred to the program by school staff, parents, peers, or through self-referral. Students

and families underwent consultations and screening assessments to identify underlying issues and needs. The students and families were then linked to community services when necessary.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

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The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials,* American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

In [employee]'s most recent State [position] she worked with very young children in the field of disabilities. The contractual position would require her to work with middle school students in the behavioral health context. The facts that [employee] would be working with a different population of clients, in a different area of treatment, greatly reduced the chance she would be required to review matters in which she had previously given an opinion, conducted an investigation, or for which she had been directly and materially responsible. However, because the contractual position required the [consultant] to work with the entire family unit, she could find herself in a position where she would be required to work with a family she had previously been involved with while working for [her State agency]. In that unlikely event, she would need to recuse herself from that client.

The Commission explained the scope of "recusal" has been broadly interpreted. When there is a personal or private interest, an employee is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del., January 29, 1996). This is to insure that her co-workers are not influenced by nonverbal cues such as

gestures, etc. She was also reminded that there is a prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

The Commission decided it would not be a violation of the post-employment restriction in the Code of Conduct for [employee] to accept a contractual position as a [consultant].

14-02 - Post Employment: [Employee] [worked for a Division] within the Delaware Department of Health and Social Services (DHSS). His duties included managing grants received by the [Division]. That included oversight of the completion of the grant applications, oversight of the hiring of the contractors under the grants, managing the budgets, reporting, and financial reports for the grants. He was also responsible for ensuring that all purchases made under the grants were allowable, verifying processes were in place to expend the funds received, and all project reviews conducted by the granting agencies. He was the chairperson for [one of the Department's committees], and was on [another committee]. He coordinated the development of plans by each Division, and directed the development of planning for [his Division].

[Employee] intended to retire from his State position in Oct. 2014. He submitted a proposal for a contract [position] under an RFP issued by the Department of Children, Youth and Families (DCYF). The [successful candidate] would be responsible for all aspects of statewide grant project implementation and management. His responsibilities would include: coordinating, supervising, and managing, the work of the grant project team to ensure compliance with negotiated agreements; monitoring the grant to ensure compliance with federal requirements; serve as a representative to the grant governing body and provide information/reports requested; overall responsibility for the training and oversight of mental health services to children and their families which are funded through the grant. [Employee] would also prepare an annual grant continuation application to [a federal agency] to be approved by DSCYF, and foster collaborative relationships between agencies and organizations to support the mental health treatment of children in Delaware.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] had worked on the subject matter, administering grants, while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. [Employee] would be administering a grant program for mental health services, much like he did in his State position. However, there were important distinctions between the two positions. The grants administered in the post-employment position were related to treatment for juveniles while the grants he administered in his State position were related to adult treatment. Additionally, in the post-employment position, he would not be required to work with his current division. The Commission discussed the fact that some of the grants in the post-employment position were passed to DSCYF through [his Division]. However, those grants were historically subcontracted to outside agencies. The Commission compared the situation to one in which DelDOT employees are given permission to work with vendors after their State employment ends as long as they do not work on the same projects.

The Commission found that there would not be a violation of the post-employment restriction if [Employee] accepted the contract position with DSCYF.

13-52 - Post Employment: [Employee] had worked for the State of Delaware as a Seasonal/Casual employee since October 22, 2012. In her seasonal position, she was a consultant at [a school]. She was employed in a pilot program to assist middle school students with behavioral, social, emotional, and academic issues they may be dealing with at home, school, or in the community. Students were referred to the program by school staff, parents, peers, or through self-referral. Students and families underwent consultations and screening assessments to identify underlying issues and needs. The students and families were then linked to community services when necessary.

In December 2013, [Employee] applied for a contractual position as a consultant which was the subject of a Request for Proposal (RFP) by DSCYF. The position was created in response to the success of the pilot program in which she previously worked. [Employee] would continue to work with middle school students and their families in the school environment assessing needs, assisting with the development of interventions (within the school), and make referrals for additional services. However, she was transferred to a different school and will work with a new population of students. The contract cannot be finalized until the Commission decides whether acceptance of the contract position would be a violation of the post-employment restrictions. Until then, she has moved into the new position but is still paid by the State.

[Employee] also asked the Commission to consider whether she would have a conflict If she accepted a [management] position. The [manager] oversaw the work of the consultants

and was not directly involved in client therapy. Therefore, she would not have contact with any students she worked with during the pilot program.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not "directly and materially responsible" for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official's responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not "directly and materially responsible" for that particular matter.

The Federal Courts have stated that "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same "matter," Courts have held that it is the same "matter" if it involves the same basic facts, the same parties, related issues and the same confidential information. Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico* at 842). See also *Beebe.*

Like the matter in *Beebe*, [Employee] had worked on the subject matter, the pilot program, while working for the State. However, the Commission noted that [Employee] would be working in a new school with a new set of students. Therefore, any counseling she provided to those students would not be matters over which she had previously given an opinion, conducted an investigation, or was materially responsible for handling. [Employee] was not involved in the funding of the program and she did not supervise any employees while employed in the pilot program. The Commission also discussed the fact that it would be contrary to the public purpose to exclude employees in pilot programs from applying for employment once the program was funded on a full-time basis.

As to the [management] position, [Employee] did not appear to have any conflict as the job duties of that position were not similar to the duties she performed in the pilot program.

The Commission decided that [Employee] would not violate the post-employment restriction in the Code of Conduct if she accepted the contractual position. However she was reminded of the prohibition against revealing confidential information gained during her employment with the State. 29 Del. C. § 5805(d).

13-40 - Post-Employment—State Employee: [Employee] worked for the Division of Substance Abuse and Mental Health (DSAMH). As part of her job duties she was responsible for the review of all licensed treatment programs throughout the state to evaluate their compliance with DSAMH licensure standards. [Employee] also reviewed the contracts of each program to evaluate their compliance with the contract requirements. After a review had been conducted, she reported her findings to the program providers and suggested corrective actions as needed. [Employee] was planning to retire from State service and wanted to accept a position working for [a private company].

[Private company] was a provider of treatment services and was licensed by DSAMH. They were hiring a Quality Assurance Coordinator. The employee would be responsible for the development and implementation of a Continuous Quality Improvement (CQI) Plan for community mental health, substance abuse, employment, and intellectual disability programs. As part of the CQI, the coordinator would assure compliance with all DHSS, DOL, DSCYF, CARF, [the private company] and any accrediting bodies' policies, procedures and standards of care; develop audit tools for community programs; monitor licensure and accreditation; review and analyze monthly program audits, draft reports and performance improvement plans based on audit results.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

In comparing the two job descriptions, it appeared [employee] would be working in the private sector doing essentially the same job she performed for the State. At the hearing, she stated she conducted contract and licensure reviews of [the private company's] treatment programs. Those reviews, and [employee]'s subsequent recommendations, would qualify as matters in which she had previously given an opinion and conducted investigations. As a result, [employee] was directly and materially responsible for [the private company's] licensure and contractual compliance as they related to their [treatment programs] while working for the State. [Employee] stated it could be possible for her to accept the position under the condition she not have any involvement with matters related to DSAMH. Recusal is often used to correct conflicts of interest. [Employee] asked for guidance in selecting possible employment opportunities if the Commission found a conflict of interest.

The Commission decided [employee] could accept the position with [the private company] without violating the Code of Conduct's post-employment restriction if she was able to recuse herself from all matters related to her current agency.

13-36 - Post-Employment—State Employee: [Employee] worked for the Department of Services for Children, Youth, and Their Families (DSCYF) within the Division of Prevention and Behavioral Health Services (PBH). Her duties were to provide support to agencies offering treatment to State clients. She supported them through contract management and oversight, along with providing liaison services between the clinical teams, billing departments and leadership. [Employee] also worked to foster relationships between the division and the agencies with whom they contracted. Her contacts were CEO's, CFO's, and others in

management positions. She did not interact with therapists. [Employee] did not manage contracts or provide supervision to the individual providers at the contracting agencies.

[Employee] applied for a contractual position with DSCYF as a Behavioral Health Services Contract Manager. The Contract Manager would develop and negotiate contracts with the Behavioral Health Consultants who would provide services to middle school students and their families. The Behavioral Health Consultants were also under the same DSCYF contract. She sought advice from the Commission as to whether accepting the position would violate the Code of Conduct's post-employment restrictions.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

At the hearing, [employee] stated the only similarity between her position and the contractual position would be her work on contracts. In the contractual position, she would be negotiating contracts with individual providers. In her State position, she negotiated with members of upper level management representing various agencies. It was possible she would negotiate contracts with individuals currently contracting with State agencies but they were not workers she was directly and materially responsible for in her State position.

The Commission decided the contractual position did not violate the post-employment restrictions in the Code of Conduct. [Employee] was cautioned against revealing confidential information she learned during her employment with the State.

13-34 - Post-Employment & Conflict of Interest—State Employee: [Employee] was employed at [a school] as a mental health counselor. She had accepted a position to work as a family counselor in a separate program which would be in the same school and was funded by a grant from the State. The position was contractual and would report to the Division of Prevention and Behavioral Health Services (PBH) and [the school]. The goal of the program was to promote children's mental health and to engage families in their children's education with the expectation that children would have less behavioral issues and perform better in school. The program offered assessment, therapeutic support and case management. A list of potential students was created at the beginning of the school year. The students were selected based on absenteeism, behavior, academics and information gathered from staff. Families of the students were asked if they would like to participate in the program. The families stay in the program the entire school year. The program was not open to students who were receiving other mental health services through the State. [Employee] asked the advice of the Commission as to whether her acceptance of the [contractual] position (and pending resignation with [the school]) would violate the post-employment restrictions in the Code of Conduct.

[Employee] also volunteered as Chair of a Board. The Board was a Governor's advisory board which had oversight of [a specific child-related issue] for the State of Delaware. In addition to reviewing issues regarding [the child-related issue], the Board reviewed difficult cases that were not moving forward. In the eight months she had been on the Board there had been five cases reviewed. Since the [contractual] program did not accept students who were receiving other services, a [child connected to the advisory board] would not be offered a

position in the program. [Employee] asked the Commission to determine if maintaining her position on the Board would create a conflict of interest with her contractual position.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

At the hearing, [employee] said she was the person responsible for the creation of the [contractual] program and she wrote the grant which funded the program. She interviewed for the position with the supervisor of her State job. [Employee] would work in the same building, at the same desk, with the same school population she currently served. The only discernible difference between her current job and the contractual position was that she would provide services in the client's homes, in addition to the school setting.

The Commission found [employee]'s acceptance of the contractual [position] would violate the post-employment restriction in the Code of Conduct. As program creator and grant-writer, she would be assisting [the program] when, in her State position, she had given opinions related to the program and was directly and materially responsible for the program's existence. Because of the finding of a conflict of interest, the Commission did not address the issue of a conflict between [the contractual] position and her position on the [advisory Board].

13-32 - Post-Employment—State Employee: State Employee was a supervisor working for the Department of Services for Children, Youth, and Their Families (DSCYF) within the Division of Prevention and Behavioral Health Services (PBH). If a family was denied care by PBH, [the employee] guided them through the process. Her role was to serve as a liaison to the process and she set time frames for completion. [The employee] also monitored providers for contract compliance and completed reports of her findings. The job was an administrative position.

[The employee] responded to a Request for Proposal (RFP) by DSCYF for the position of Behavioral Health County Coordinator or Behavioral Health Consultant. The Behavioral Health Consultant (BHC) would work with middle school students and their families in the school environment assessing needs, assisting with the development of interventions (within the school), and make referrals for additional services. [The employee] stated the position would require her to assist families make contact with provider agencies, some of whom contract with the State. The Behavioral Health County Coordinator, will train the BHCs and review their work, collect data, and create reports regarding the success of the program. [The employee] did not know if this position would have any interaction with providers who contract with the state, but she did not think it would. In the event she was selected for either contractual position, she would resign her current State position. [The employee] appeared at the hearing to ask the Commission's advice as to whether acceptance of either position would violate the Code of Conduct's post-employment restrictions.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

There were some similarities between [employee]'s State job and the consultant position. In the contract position, she would be making referrals to providers contracting with her current State agency. Some would likely be agencies she monitored for contract compliance while with the State. However, it would appear the consultant position was more clinically-oriented than her State position. As a consultant she would work directly with clients to evaluate their needs and recommend appropriate treatment. If she were to make referrals to outside providers, the client would choose the provider. When referring clients to providers for outside services, she stated her direct point of contact would be the therapists, not the administrative staff she worked with while employed with the State. As to the coordinator position, it required training and monitoring of the Behavioral Health Consultants. If the position shared any common duties with her State job, they were not readily apparent.

The Commission decided it did not appear either position would require [employee] to review matters in which she gave an opinion; conducted an investigation, or was otherwise directly and materially responsible for while employed by the State. [The employee] did not have a conflict of interest as long as she did not reveal confidential information she learned while working with the State and she did not recommend specific providers to the clients.

13-30 - Post Employment: [A State employee] worked within a division of the Department of Labor. Among other things, she oversaw [a program for special needs citizens]. [The job] required her to collaborate with [another State agency] within the Department of Health and Social Service (DHSS), and other agencies to ensure [compliance with the programs she administered]. [The State employee] ensured the program adhered to Federal rules and regulations as well as assisted with program implementation. Locally, [her agency] had contracts with [private companies] to provide services to eligible clients. [The State employee] was primarily responsible for the oversight and administration of the program.

[The employee's agency and another State agency] jointly administered [a program] which, initially, was very successful. However, over the past 2 years [the other agency] had seen a decrease in the number of individuals [served]. [Employee] stated the program's success had declined because [the other agency] did not have an employee dedicated to the program. As a result, [the other agency] decided to create a position dedicated to the success of the program. [The other agency] advertised for contract submissions (a Request for Proposal (RFP)) to seek interested candidates for the position. The successful applicant would be a contract employee. [The State employee] applied for the job and if she was offered the position she would resign from her current job. When asked how the position at [the other agency] would interact with her current position, [employee] stated that they would work "hand in hand." She did not know how many applicants applied for the [RFP] position.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

In [employee]'s State position she worked jointly with [the other agency] to administer the [specific] program. She was a resource for other agencies and employees. Therefore, she had given opinions on the administration of the program. In her role as joint administrator, [the State employee] was directly and materially responsible for the program while employed by the State. Essentially, [the employee] wanted to enter into a private contract with [the other agency]

to administer the same program that she administered in her State job. The Commission decided it would be a violation of the Code's post-employment restrictions to allow [the State employee] to accept the contractual position. Having found a conflict of interest, the Commission then turned to the issue of a waiver. Waivers may be granted if there is an undue hardship on a State employee or State agency. 29 Del. C. § 5807(a). They also may be granted if a literal application of the law is not necessary to serve the public purpose. Id. When asked what the consequences would be if she was not allowed to accept the position, [the State employee] indicated she would be "disappointed." Without minimizing [the employee]'s disappointment, It does not appear it would present a hardship to [the employee] if she was prohibited from accepting the position. Next, the Commission considered whether imposing the post-employment prohibition would be necessary to serve the public purpose. Appearance of impropriety is a theme that recurs throughout the Code of Conduct. 29 Del. C. §5802(1); 29 Del. C. § 5806(a) and (b)(4). At the center of those concerns is how the public, without any additional facts, would view the situation. Allowing [the employee] to leave a State position to perform almost identical job duties as a contract employee would tend to create an impression of impropriety among the public.

The Commission decided acceptance of the contract position to perform the same job duties [the employee] performed in her State job would be contrary to the Code's post-employment restrictions. [The State employee] did not qualify for either waiver exceptions.

13-27 - Post-employment: [A retired State official's] responsibilities included supervising and reviewing the work of all of the State's contracts [related to his field], including that of [a private company]. [The private company's] contract of employment with the State was negotiated by [other State officials] in 2001. [The private company] was working on multiple [projects] that [the State official] supervised in his official capacity. [The official] retired from the State and accepted a position with [the private organization]. While at the hearing, he indicated his job with [the organization] would be centered on practice development. He planned to secure contracts for [the organization] with other States. That job description was significantly different from the information he provided to the Commission in his written disclosure. In the written disclosure [the State official] indicated he wanted to continue to work on the [projects] at [the organization] that he had supervised in his position with the State. At the hearing [the State official] additionally requested the Commission consider whether it would be permissible for him to consult with his State replacement on generic policy issues. [The State official] indicated he would like to serve as a resource for the staff at [his previous] office as he was primarily responsible for setting up and administering the current procedures. [The organization] would not increase his pay for his services [back to the State]. According to [the State official], if any issues arose about [a specific] side of the business, the State would contact [the organization's other employees] and would not contact him.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

[The State official's] description of the position at [the organization] changed significantly between the time the written disclosure was filed and his appearance at the hearing. For purposes of the decision, the Commission stressed that their opinion was only applicable to employment in practice development. Any new employment involving [a specific area] [the

State official] supervised [in his State position] were matters for which he was directly and materially responsible. If [the State official] was allowed to continue [to work in] the same [specific area], it would be contrary to the purpose of the post-employment law. He must not work [in the specified work area] while employed at [the organization] for the next two years

As to [the State official] working in practice development, the Commission did not find a conflict of interest based upon his oral presentation at the hearing. (Again, any work for [the organization] involving [the specific work area] would be prohibited by the Code). [The retired State official] was reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d). Regarding the request to serve as a resource for the State, the Commission withheld their decision to obtain additional facts. The Commission needed to determine what consulting services the State would seek to determine if a conflict of interest existed. [The State official] could return to the Commission on Sept. 17, 2013, to more fully explore the issue. He was instructed to bring someone from [his previous place of employment] to provide additional facts.

13-27 Post-Employment Reconsideration—Former State Official: [Former State official]'s responsibilities included supervising and reviewing the work of all of the State's contract auditors, including that of [a private company]. Last month he appeared before the Commission to seek advice on post-employment restrictions related to his new employment with [a private company]. The Commission decided he could work for [the private company] in the practice development area without violating the Code of Conduct post-employment restrictions. However, [former State official] was advised he could not work on any [specific] matter. In addition, he requested an opinion on whether he could consult with State of Delaware officials while working for [a private company]. He indicated [the private company] did not base his salary on the consulting aspect of the job. Therefore, his salary would not go up or down depending on the amount of consulting work. [The former State official]'s reason for wanting to serve as a consultant to the State is so he can act as a resource for staff at [his previous office]. Since he was primarily responsible for creating and administering many of the procedures used by the office, he believed he would be the best resource to provide information. When asked if he would be providing [specific] advice, [the former State official] indicated the State would direct [those types of] questions to [the private company]'s department. The Commission did not decide the consulting issue after the last meeting. [The former State official] was asked to return this month with a representative of the State so the Commission could obtain further details about the type of information that would be exchanged during the consultations.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

[The former State official] was accompanied by [a State Officer and a current State official]. When asked to explain the nature of the consultations with the State, [the former State official] indicated the information would not be related to [work] or investigations conducted by [the private company]. That explanation was supported by [the former State official]'s replacement and [the State Officer]. [The State Officer] confirmed the information [the former State official] would provide to the State would be related to "administrative and recordkeeping matters." As an example, [the State Officer] stated a question from the State might concern the

location of a file or confirmation of an oral conversation [the former State official] previously had with someone. Because of the length of time he was in office, both [the current State official] and [the State Officer] indicated [the former State official] possessed most of the institutional memory for the office. They also said the office would not be as efficient or well informed if the State was prevented from consulting with [the former State official].

While administrative and recordkeeping matters are matters over which [the former State official] was "directly and materially responsible", the Commission found that in this context, he would not be "assisting a private enterprise." "Assist" is not defined in the Code of Conduct. The legal definition is: [t]o contribute effort in the complete accomplishment of an ultimate purpose intended to be effected by those engaged; to help; aid; succor; lend countenance or encouragement to. *Black's Law Dictionary* 712 (6th ed. 1990). [The former State official] would be acting as a former employee providing information to the office he recently left. The private enterprise would not be a party to, or benefit from, his help to the State during [the current State official]'s transition phase.

Based upon [the former State official]'s oral comments, and the representations of [the current State official and [the State Officer] the Commission decided it would not violate the post-employment restrictions in the Code of Conduct for [the former State official] to consult with the State regarding administrative and recordkeeping issues. He could not discuss with his employer the content of his conversations with the State

13-14 – Post Employment – [Applicant]/Indian River (footnotes have been removed for ease of publication)

13-14 – Post Employment

Hearing and Decision by*: *Wilma Mishoe, Chair; Andrew Gonser and William Tobin, Vice Chairs; Commissioners Lisa Lessner and Jeremy Anderson, Esq.

Dear [Applicant]:

The Public Integrity Commission reviewed the request for a waiver so that Indian River School District and [an employee] could privately contract on services to the District [in her current position] if she leaves her State position. PIC concluded it would grant a waiver, but advises the School District to restrict her contract to the amount she would make if she continued as a State employee (including value of her State benefits) for the reasons expressed below.

I. Applicable Law and Facts:

(A) **Post-Employment:** For 2 years after terminating State employment, the post-employment law bars State employees from representing or otherwise assisting a private enterprise on matters involving the State for which they were directly and materially responsible for as a State employee. 29 Del. C. § 5805(d).

Here, if [the employee] quits her State job [in her current position] at Indian River she would be contracting to perform the very same work, with the very same clients, in the very same district. Thus, it would violate the post-employment law for her to privately contract with Indian River.

(B) **Waiver:** Waivers may be granted if there is an undue hardship for any 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).

(1) Is there an Undue Hardship for [the employee]?

In the letter from [a director within in the school district], and in your statements at the Commission meeting, a waiver was requested. The letter stated it was written "on behalf of [the employee]," and "we are asking the commission to grant a waiver on her behalf due to the district hardship…" and "[the employee] is seeking to contract with the district on a year to year basis due to financial difficulties."

At the Commission meeting, you also spoke in some detail of [the employee's] financial difficulties. This Commission addressed that issue with her prior to your request. Commission Op. No. 13-05. It concluded that while she may have a financial hardship, it would not grant her a waiver to contract with Indian River because her financial hardship could be cured by contracting with other School Districts, or long-term care facilities, etc., without violating the post-employment law. Id. The fact that [the employee] has other means of curing her financial hardship without violating the law is significant because in granting a waiver to the post-employment law, we are permitting a State employee to violate a provision that carries criminal penalties of up to a year in prison and/or up to $10,000 in fines. 29 Del. C. § 5805(f). Therefore, to the extent the request is being made "on her behalf," and that "[the employee] is seeking to contract with the District…due to financial difficulties," we did not, and will not, grant a waiver based on her financial situation.

(2) Is the literal application of the law to [the employee's] situation necessary to serve the public purpose?

In discussing the federal post-employment law--similar to Delaware's--the United States Congress noted: like other conflict of interest statutes, post-employment laws are meant to insure public confidence in the integrity of the government. *"Ethics in Government Act," Senate Report No. 95-170,* p. 32. It said public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id.* There is a sense that a "revolving door" exists ...[which] leads to suspicion that personal profit was the motivation. *Id.* There also is public concern that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post-employment laws set a "cooling off period" in areas which the ex-employee dealt with while working at the agency. *Id.* Additionally, it is to avoid the risk that after they switch to the private side they may exercise undue influence on those they leave behind. *Commission Op. No. 96-75 (citing United States v. Medico,* 7th Cir., 784 F.2d 840, 843 (1986).

At the meeting, you said you and [the employee] are colleagues, as you also [share a similar position]. That is one reason you were asked if you were there to speak on her behalf or on behalf of the School District. You said you were speaking for the School District, and are entitled to a strong legal presumption of honesty, integrity, and

impartiality. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996).

Thus, assuming you were speaking for the District with authority to commit funds to pay her, public confidence could be weakened because [the employee] could resolve her financial problems by contracting with another School District or a long-term care facility, etc., without violating the law. Moreover, she has been directly involved in trying to get Indian River to seek a waiver, by such things as expressing her financial problems. No facts suggest she told the District that in meeting with PIC, she said contracting with other School Districts, or long-term care facilities, etc., could solve her financial situation, or that PIC denied her waiver request to work for Indian River, for that reason. Now, she is contacting Indian River wanting to know the status of its request and telling the requestors she has a financial problem. Further, the letter from the [a director within the school district] states that **"[the employee] is seeking to contract with the District** …due to financial difficulties"—not that the District is seeking to contract with her. The public could well suspect she is driving the request by trying to influence her former colleagues.

Aside from the concern about undue influence, the public could suspect a personal motivation. If she contracts with Indian River, she does not even have to look for work elsewhere. She would just return to her same desk, with the same clients, only getting paid more under the contract. Further, she said she wanted to continue work at Indian River because her children are in school and she wants the same hours, etc. Presumptively, Indian River is more convenient for her than perhaps Cape Henlopen or another District. Thus, the contract with Indian River would better serve her personal desires, even beyond the financial aspect.

Further, the public may suspect she is obtaining an unfair advantage because by deciding to leave State employment, she created the opening in the District, and now wants to negotiate for a higher salary, again, when she could contract elsewhere. This was all done in the face of knowing that the District has not, for many years, filled [similar positions], and knowing that some currently employed [in that position] are considering retiring. Further, no facts suggest the District is announcing a full-time contract position opportunity to others, as there is nothing on its website, or other websites with Indian River jobs, about the opportunity.

Clearly, a waiver cannot be granted to [the employee] on the basis that the literal application of the law is not necessary to serve the public purpose when the very essence of the public purpose is severely undermined by the above facts. Thus, we will not grant a waiver on that basis.

(3) The School District's Hardship

[A director's] letter says that for the past 10 years the District has sought ways to fill [similar] positions. It says the District has advertised in local and national papers, attended job fairs in and out of State, and tried using recruiting firms. It further says there is a national shortage, and schools lose candidates to more glamorous and higher paying jobs at hospitals and rehabilitation centers. You added at the meeting that other School Districts in Delaware pay their [specialized personnel] more than Indian River. However, no facts suggested Indian River has tried to get the salary raised for those specialized positions, even in the face of having only 3 of 6 [similar] positions filled

before [the employee] came to the Commission. As noted above, despite the stated shortage, the web sites with job announcements in Indian River, do not include a single position for [similar positions] either as a State employee or private contractor. The public may suspect there is no sense of urgency by Indian River to fill the already existing open positions, if they have not even announced them. Yet, it immediately responded to [the employee's] request to seek a waiver which could pay her substantially more, without ever announcing any openings, and/or without any facts suggesting it had sought higher pay levels for the positions, or a different contractor who would not be violating the law. That tends to diminish the District's asserted hardship.

What we see as the real "undue hardship" is that innocent 3rd parties—those children who [are served by this position]--and may not receive the care and attention the District programs have been providing, and may not have the resources to go elsewhere. Therefore, we are granting a waiver, with the restrictions discussed below. 29 Del. C. § 5807(a).

(4) Is the literal application of the law to the School District necessary to serve the public purpose?

We have noted above the purposes of the post-employment law, which includes the public concern of former State employees experiencing a financial windfall because of their past connection to the agency; possible influence of former colleagues; obtaining advantage over other competitors, etc. Here, [the employee] said she makes about $42 an hour as a State employee, for a total of $61,000, not including benefits, for the 188 school days she works. She said if she contracted at $70 per hour for 188 days, it would be almost $100,000. She said that "even if you take out $12,000 a year for health care insurance and put some away for retirement, you would still come out ahead" of the State salary. She said she believes with all the State benefits, the salary of $61,000 a year as a State employee would probably be worth $72,000.

In the past, PIC granted a waiver where the agency worked to reduce these public concerns when a former State employee sought to contract with their former agency for the very same work, by offering the former employee a contract salary that was not a financial windfall, but consistent with her State hourly rate. See, e.g., *Commission Op. No. 98-15* (agency said it would offer former employee her current hourly State salary rate, plus Other Employment Costs (OECs). OEC's are the costs the State pays for a full-time employee to cover: health insurance, workers' compensation, pension, Medicare, FICA and unemployment insurance.)

In a separate opinion, PIC addressed the reasons why the connection to the State salary was relevant to the public purpose. *Commission Op. No. 99-15*. In that opinion, the agency had never announced the job, but offered the former employee substantially more than what she received as a State employee, and told PIC comparing her State salary was not justified. PIC's response was:

> "(1) That is the job she is doing and that is the pay rate she would have received if she stayed full-time with the State.
> (2) The General Assembly acknowledged a relationship between the State salary and the salary to be paid when a State retiree turns around after retirement and is re-hired to perform the same State job because it provided specific laws for such persons and connected the salary to existing State positions, and directed that they have a pension

offset. 29 Del. C. § 5502(a). We have noted that the effect of those laws is to prevent State employees from experiencing a windfall as a result of their public position. *Ethics Bulletin 007.*
(3) Using the State salary as the pay base is, in our experience, a common method used by agencies in negotiations. In every situation where an agency has sought and been granted a waiver of the post-employment law, they have used the former employee's State salary to establish the pay rate. *Commission Op. Nos. 91-18; 95-11; 96-60; 97-41*; *98-15*. Basing the salary on the State pay serves to diminish the perception that former employees are using their former State job to financially capitalize and obtain an unfair advantage." *Commission Op. No. 99-15.*

While [the employee] is not retiring under the pension plan, she, like those retirees, is terminating State employment, and then wants to return to Indian River to perform the very same job.

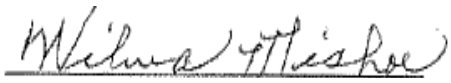
In that advisory opinion, the AG said the State agency was subject to remediation because its actions defeated the public purpose of the statute, even though the statute did not specifically address the types of remediation imposed. Here, to avoid defeating the public purpose of the Code of Conduct, we identify a reduced salary to consider so that a financial windfall does not occur.

In the event Indian River finds that salary condition that PIC has imposed is untenable, it should so advise PIC, explaining why, and offer a proposed salary and submit documentation explaining why the proposed salary would serve the public purpose. If Indian River chooses to go that route, such explanation and proposal should be submitted and presented to PIC by a School Administrator with authority to address funding, who is not a colleague or co-worker.

Conclusion

We grant a conditional waiver. The District can contract with [the employee] as long as the public purpose is served by avoiding a financial windfall to her by contracting for the amount of her State salary and OECs.

FOR THE PUBLIC INTEGRITY COMMISSION



Wilma Mishoe, Chair

13-11 - Post Employment: In March 2013, the matter was submitted to PIC by [a citizen] as a complaint against [a] City council member. After discussion with [both parties], it was determined the matter would proceed as a request for an advisory opinion. [City council members] are subject to the State Code of Conduct because the City had not adopted its own Code. 29 Del. C. § 5802(4). [The council member] requested an advisory opinion related to the "personal and private interest" section of the Code. Later, it was learned [the council member] would not be running for re-election. [His/her] term expired [in the near future]. After [his/her]

term had expired, [he/she] intended to continue involvement with two organizations [he/she] worked with while serving on the City Council. Counsel called [the council member] and asked if [he/she] would like to change the request for an advisory opinion to one focused on post-employment issues. After Counsel explained the two year post-employment provision, [the council member] agreed to seek post-employment advice. Counsel then contacted [the original complainant] to explain the change of focus and to inform [him/her] that the contents of the advisory opinion would be confidential.

The Code of Conduct imposes a two year restriction on former City employees to prohibit them from representing or assisting any private enterprise on any matter involving the City if the employee "gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties" as a City employee. Additionally, the former employee may not reveal confidential information that the employee gained through their employment with the City. 29 Del. C. § 5805(d).

[The council member] is President of [a local] non-profit organization. In the past, [the council member] advocated for [the organization] directly to the City Council. Specifically, [he/she] was the point person that convinced the City to agree to [a project for the organization]. [The council member] presented ideas to the Council and proposed a Memorandum of Understanding (MOU) between the City and [the organization]. The City contributed money towards the establishment of the [project]. At the hearing, [the council member] stated the project was largely complete. The only matters [he/she] anticipated developing during the two years of her post-employment restriction were [two separate projects]. The City would not be involved in the two [projects].

[The council member] was also President of [another organization]. Their mission was [related to economic interests of the City]. As a member of the organization, [the council member] solicited the City to fund a [project to the benefit of both the City and the organization] [He/she] also advocated a contractual relationship between the City and [the organization] so [the organization] would be eligible to apply for grants. [The council member] was successful in getting the City to contribute monies towards the project. [The council member] stated the project continued to be a work-in- progress.

After considering the facts and circumstances related to [the council member's] involvement with [the first organization], the Commission determined [the council member] would not violate the post-employment restrictions of the Code as long as [he/she] did not involve [themselves] in any matter the organization brought before the City.

[The council member's] continued involvement with [the second organization] was more problematic. The project was still active. Of specific concern to the Commission was [the organization's] need to have the City sign off on funding grants. When [the council member] was asked about the possibility of recusal, [he/she] indicated that the board had 11 other members. [The council member] said another board member could handle matters for [the organization] involving communication with, or soliciting from, the City. It was explained to [the council member] that the recusal requirement was not limited to funding issues. Recusal is required for any issue involving the City, such as permits, licenses, etc. The Commission further explained recusal meant [he/she] may not even be present in the room when any topic involving the City was discussed. [The council member] was also cautioned [he/she] may not reveal confidential information to [the organization] [he/she] learned from [his/her] position as a City council member.

The Commission decided it would not be a conflict of interest for [the soon-to-be retired council member] to continue [his/her] work with [the organization] as long as [he/she] recused [themselves] from any matter that involved the City and [he/she] did not divulge confidential information [he/she] learned as a council member.

13-06 – Post Employment: A State employee planned to leave State employment and wanted to take a position with a national company that contracted with her Division. That company also did business in other States. The position she would fill would be to work on a contract that the company had with the State of Pennsylvania. She would have no occasion to deal with her own Division, or even the State of Delaware. For 2 years after leaving State employment, a former employee may not represent or otherwise assist a private enterprise on matters involving the State if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter. 29 Del. C. § 5805(d). They also may not improperly use or disclose confidential information gained from their public position. *Id.* The post-employment law barred her from working on matters "involving the State." 29 Del. C. § 5805(d). "State" means "the State of Delaware and includes any state agency." 29 Del. C. § 5804(10). The Commission found that her proposed work would not involve the State of Delaware. Therefore, it would not violate the post-employment law.

13-05 – Post-Employment - Waiver Requested; Denied: A State employee planned to leave State employment and wanted to privately contract with State agencies, including her own, to perform the same work she did for her State agency. She sought a waiver so that she could contract with her own agency. The post-employment law states that for 2 years after terminating State employment, a State employee may not represent or otherwise assist their private enterprise 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). She said she could contract with State agencies other than her own. If she did that she would not be working on the same matters for which she was responsible because it would be a different agency, different clients, and different issues for those particular clients.

Waivers may be granted if there is an undue hardship on the State employee. 29 Del. C. § 5807(a). She stated that she and her family had financial difficulties and that if she privately contracted it would help overcome those difficulties. However, she also stated that if she privately contracted with other State agencies and worked on their matters, it would help overcome that hardship. The Commission decided a waiver not be granted because she could contract with agencies other than her own, to resolve her financial problems without violating the Code.

13-03 - Post Employment: The applicant was a Department Manager of a state agency. He wanted to retire and work for a private enterprise that contracted with his Department. For 2 years after leaving State service, State employees may not represent or otherwise assist a private enterprise on matters involving the State if they are matters where the employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the job.

As the Department Manager, the applicant supervised the Contract Manager for the four private companies that provided the Department with services. He wanted to obtain

employment with the private enterprise as a Social Worker, supervise the social work staff, conduct job-related training and assist in preparing and negotiating a contract with his Department. His role with the State in terms of such contracts was that "specific to the program I would offer information and objectives what I see as what should be in the contract." He agreed that he provided input on the substance of the contract, and also on the amount of moneys to be spent on the programs under the contract. Aside from contract oversight, he provided training and had other administrative duties. There was a completely separate department that oversaw the services provided by the private enterprise. He had nothing to do with that. He also said he had considered working for another company that did not contract with his agency, but did not give the details. He asked if the Commission's decision could be appealed. He was informed it could not be appealed to the Court. *Post v. PIC*. However, it also was explained that he could ask the Commission for reconsideration, but he should wait until he gets the written opinion before taking action. The Commission decided that it would be a conflict for him to work on the contract because he was responsible for that matter, and the oversight of information presented to the Committee, but he could work on other things not involving those matters.

13-01 – Post Employment: A State employee wanted to accept a job with a company that contracted with his State agency, after he left State employment. For 2 years after leaving State employment, State employees cannot represent or otherwise assist a private enterprise on State matters on which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for as a State employee. 29 Del. C. § 5805(d). They also may not improperly use or disclose confidential information gained from their State job. *Id*.

In his State job, and in his post-employment job, the State employee would deal with clients, however, the State job involved direct dealing with clients, and in the post-employment job, he would be dealing with organizations that provide services to clients. Aside from being involved more at the administrative end than directly with clients, there was no overlap in the type of clients, or the types of services they needed. The Commission decided there was no conflict because the scope of his employment with the private enterprise was vastly different from his State job, with different clients and a different range of ages and issues.

12-33 Post Employment: Contracting with Different State Agency: A State Executive Branch employee asked if she left State employment could she privately contract with a completely different State Branch. The 2-year law precludes State employees from representing or assisting a private enterprise on matters involving the State if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly or materially responsible. 29 Del. C. § 5805(d). They are also barred from improperly using or disclosing confidential information gained from State employment. *Id*. She learned about the contracting opportunity from the newspaper. Thus, it was not privileged or confidential information. She did not know the details about the project that the contractor would work on except that it would manage the program. As she has managed such programs, she applied. In her State job, she was not involved with the separate State Branch's decision to seek a contractor, nor did she review or decide what that contract would be. The Commission decided that based upon the written information provided, she did not have a conflict.

12-27 – Post Employment – Contract Overseen by Own Agency: A State employee asked if it would violate the post-employment law if she sought a State contract that her agency would

manage. She said if selected as the contractor, she would leave State employment. Former 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 with the State. 29 Del. C. § 5805(d).

The contract resulted from a different Department within her agency seeking a federal grant for a program not previously offered in Delaware. When the federal funding was approved to pay a contractor to provide the service, it required her Department to oversee the program. She was not involved in the grant request; did not work with clients that the program would cover; and never worked as a State employee in the same type of program, as it did not previously exist. The Commission decided there was no post-employment issue as she did not give an opinion; conduct an investigation; nor was she otherwise directly and materially responsible for that matter in her State job.

12-19 Post Employment: A State employee wanted to retire and accept employment with a company that contracted with her agency. For 2 years after leaving the State, former employees may not represent or otherwise assist a private enterprise on matters before 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).

In her State job she had oversight of performance of contractors. Her private job was coordinating/completing certain types of investigations that were never part of her State work; overseeing emergency operations, which again was not part of her State work; looking at innovative trends and activities across the United States, which would not involve the State of Delaware; keeping up on regulatory standards and interfacing with the internal operating units (not the State) on systems improvement. It was possible that people from her State office would come to the facility to inspect, but she would not be part of that activity, either during the inspection or during any follow-up discrepancies to be handled. That would be handled by the head of the company and other people in the company who were responsible for those particular activities where discrepancies were noted. The Commission advised she could accept the employment as long as she did not become involved with any inspection conducted by her former agency. Further, until such time as she left State employment, she was to recuse from any matters pertaining to that company. 29 Del. C. § 5805(a)(1).

12-11 – Post Employment: A former State employee started his own lobbying and consulting firm. For 2 years after leaving State employment, he may not represent or otherwise assist a private enterprise on State matters where he: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. 29 Del. C. § 5805(d). At the time he had one client, and that client was not connected to his State work, either in its lobbying interest or in regulatory matters. Thus, he was not responsible for those matters. He registered as a lobbyist as required. 29 Del. C., Subchapter IV. He asked if he could accept clients that were interested in hiring a lobbyist or consultant on matters related to his regulatory agency. In his State job, he had drafted legislation that was pending in the General Assembly. He said he would not work on that matter, as either a consultant or lobbyist. However, as far as lobbying/consulting on other matters handled by his former agency, he identified specific regulatory areas where he had no involvement since his primary duties did not relate to the regulatory aspect of the agency, but pertained more to communications activities. The Commission advised that he could not work on the legislation which he drafted, but could work in regulatory areas because he said he was never involved in that area as part of his duties, and

he is entitled to a strong presumption of honesty in that statement. *Beebe Medical Center v Certificate of Need Appeals Board,* C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd.,* No. 304 (Del. January 29, 1996)*.* As far as procedural areas, he could work on any procedural issues that arose after he left State employment as they would be new issues and he could not have been responsible for them, and he could work on issues that arose while he was employed by the State as long as he was not involved in the matters.

12-09 Post-Employment: A former employee identified a number of contracts with his former agency, and his involvement in those particular matters. For 2 years after leaving the State, former employees may not represent or otherwise assist a private enterprise on matters before 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). Three of the contracts were not awarded to his private employer. Thus, he would not be representing or assisting them on those particular matters. *Id*. The company did have three contracts that he initially said he had no involvement in, but later said that he did have some involvement with one, and described that involvement. Another specific contract might be awarded to his private employer, and, if so, he wanted to work on it as he was not, in any manner, involved. He said there would likely be other contracts awarded to his private employer, but those had not yet been identified. The Commission must base its opinions on the particular facts. 29 Del. C. § 5807(c). The Commission advised he could work on the identifiable contracts where he had no involvement; must recuse from the one where he subsequently said he had some involvement; and as far as future contracts, he could return to the Commission once he had additional information.

12-08 Post Employment – A State employee who was involved in a program that determined if vendors were meeting State standards sought to work for a company that was regulated by her agency after retiring. For 2 years after leaving State employment, she may not represent or otherwise assist a private enterprise on State matters where she: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. 29 Del. C. § 5805(d). She would be running a program for the company, and such programs were not part of her State duties. She also would be creating some new programs. As those were not matters for which she was responsible, she could work on those matters. However, if her former agency sent in inspectors to see if the company was in compliance, she was to recuse from anything to do with that matter, e.g., escorting them through the facility, etc. As far as any discrepancies that the State inspectors found, she would not respond to those matters because the individuals responsible for those regulated areas would respond. The Commission advised she could accept the job, as long as she did not participate in, or interact with, the inspectors from her former agency.

11-59 - Post Employment: 29 Del. C. § 5805(d). A State employee believed a private company that contracted with another division in his agency, may have an opening in the near future. If so, he wanted to apply, and if hired, leave State employment to work part-time. The work he would do is not like the work at his State job. However, he said it is possible that in the job, he may encounter some clients from his former agency that he dealt with, but it would be a rare exception because his function was more administrative and not primarily directed toward his division's clients. However, if he had contact with them, he could not recuse because no one else would be there since he would be working at night and/or on weekends. He asked for a waiver, if necessary, to deal with clients from his division that he had worked with. The

Commission found there was no conflict of interest unless one of his Division's clients whose case he made a decision about contacted him on that particular matter, which had a very limited probability, he was allowed to accept those few calls.

11-58 - Post Employment: A former State employee had previously requested a post-employment opinion on certain matters. He returned with a request on whether he may work for his private employer on 3 of his former agency's contracts. Two contracts were not previously considered by PIC. On one contract, he was not involved in the contractor selection process; or any of the tasks under the agreement. On the 2nd contract, he was not involved in the selection process. The contract was still in the negotiation stage so no tasks had been assigned. As a former employee, he did not write letters soliciting contractors who were interested; was not on the selection committees; was not involved in any negotiations to execute the contracts. He said that these contracts are for another section in his former agency, and his work was with a distinctly different division. The 3rd agreement was brought to the Commission's attention last time when it dealt with a specific portion on that contract. It did not rule on whether he could work on the rest of the contract because he did not have the particular details at that time. The Commission bases its decisions on the particular facts of each case. 29 Del. C. § 5807(c). He subsequently learned 23 other tasks are in the contract. He wanted to know if he could work on some of those, as he was not in any way involved with those matters from the beginning when his agency sought interested contractors. He, and a representative from the private company, provided a table of the projects: the completed ones; ones he would not work on; and the 4 tasks he wanted to work on. The Commission found that the employee would not be prohibited from working on the first two contracts, as long as he did not work on any tasks under those contracts while employed by the State, and could work on those 4 tasks in the 3rd contract, as he had not been directly and materially responsible for those matters.

11-52 - Post Employment: A former State employee asked if he could work on 6 contracts that his former agency had with the private company where he now worked. For 2 years after leaving State employment, former employees may not represent or assist a private enterprise on State matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible while with the State. 29 Del. C. § 5805(d).

(1) Contract A: He was not involved with the contractor or the substance of the contract, and did not draft, review the draft, or have any other connection to the contract.
(2) Contract B: He was not involved in selecting the contractor. As far as the substance, it had not yet been determined what specific projects would be performed but he said the substance would not be on any matters he worked on for the State.
(3) Contract C: He was involved in drafting the language, reviewing the substance of the contract and recommending approval.
(4) Contract D: He worked on the language and was involved in discussions about certain aspects of this contract. He said he would not work on those particular aspects but wanted to work on other aspects of the contract. Regarding those aspects, he was not involved in recommending or selecting the contractor, but did prepare the contract language which laid out the conditions, and the duties to be performed under the contract.
5) Contract E: He did not select the contractor or consultant but reviewed the proposed contract limits, potential costs, etc., and wanted to continue performing that work, only in more detail. Additionally, he was involved in looking at certain substantive provisions of the contract and discussing them with a contractor. He said the work would not differ substantially from his State work, except a different level of detail.

6) Contract F: He was not involved in the selection process but provided comments on one portion of the contract. He would like to continue to work on that portion, and would like to work on other tasks in the contract but those tasks had not yet been identified by his former agency.

The Commission decided he could work on Contracts A and B as they were not matters on which he gave an opinion, etc., he properly concluded he should not work on Contract C; he should not work on Contract D and E, as he was directly and materially responsible for those matters; and should not work on the particular portion of Contract F for which he was directly and materially responsible. PIC couldn't render a decision on whether he could work on other tasks under that agreement as there were no particular facts on which to base a decision. 29 Del. C. § 5807(c).

11-47 - Concurrent and Post-Employment: A State employee, and an out-of-State partner, started a corporation and wanted to be able to write books, prepare media releases, screen plays and speeches; work with clients to set up strategies for their projects; and develop strategies for the corporation's projects. Their firm may also be involved in political consulting and investor relations. He noted a statute that applied only to employees in his agency which contained specific restrictions. This Commission's jurisdiction is limited to interpreting only 29 Del. C., chapter 58. 29 Del. C. § 5809(2) and (3).

He also asked the Commission if some of the work would violate the concurrent employment law, and if some would violate the post-employment law. For 2 years after leaving their State job, former employees may not represent or assist a private enterprise on State matters where 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).

The employee said if things worked out with the corporation, he planned to leave State employment. He would then like to introduce two companies to the regulators from other States. One offered direct e-mail to persons who opt in, and he thought it would benefit those persons to receive e-mails from the regulatory offices of the various States. The other company contracted with his State agency on certain matters. He thought other States might use their services. The Commission found the post-employment law would not be violated as long as the State employee was dealing with other States.

11-32 – Post Employment: A former employee asked if he could work on certain contracts that his private employer had with his former State agency. Former employees cannot work on State matters, for 2 years, if they are matters where the former employee: (1) gave an opinion (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter. 29 Del. C. § 5805(d). Some of his work would be for the State of Maryland. That would not be a "State [of Delaware] matter." His letter also identified 15 State of Delaware projects that he would not work on. His private employer did not have any of those contracts. That meant they would not be asking him to represent or assist them on those State matters. *Id*. For the State of Delaware contracts the company did have, he would not perform the same type of work that he did for the State, and none of those contracts went through his State office while he was a State employee. As they had not reached his office, he could not have been directly and materially responsible. 29 Del. C. § 5805(d). However, one contract was open-ended, and his former agency had not identified any work needed under that contract. PIC must base opinions on the particular facts of each case. 29 Del. C. § 5807(c). The Commission decided it would

not be a conflict of interest for the employee to work on the Maryland matters, as long as those projects were not connected to his State of Delaware work; and no conflict to work on the contracts that he did not work on while with the State. For the open-ended contract, there were no facts on which to base a decision, and he was told he could return when he had further details.

11-18 - Concurrent/Post Employment: A State employee worked full-time for one State agency, and part-time for a different State agency. She was leaving her full-time position and remaining in the part-time job. She asked if she could contract with her full-time agency after she left. She dealt with State clients in her full-time job, and in her part-time job. She also would deal with State clients if she privately contracted with her former agency. However, the types of clients in each State agency were different. The contract clients were a new subset of persons who would be receiving assistance as a result of a federal grant. The Commission considered her situation under both the post-employment law and the concurrent employment law. That was because someone in her full-time agency may think the post-employment law should apply because she was terminating that job, and normally it would. However, as she would still be a State employee because of her part-time job the concurrent employment law actually applied. Under the post-employment law she could not represent or 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 noted, she would not be dealing with the same set of clients. She did not draft, write, review, etc., the contract. Under the concurrent employment law, she must file a full disclosure of her financial interest in a private enterprise that does business with the State. 29 Del. C. § 5806(d). She filed as required. In either State job, she could not review or dispose of matters pertaining to that private employment. 29 Del. C. § 5805(a)(1). She did not. Her part-time State job had nothing to do with the contract work. She also could not represent or assist her private enterprise before her own agency. 29 Del. C. § 5805(b)(1). That would not occur as the contract work did not involve her part-time State agency. The contract was publicly noticed and bid. 29 Del. C. § 5805(c). The Commission decided there was not a conflict of interest under either law as long as she did not have an overlap in clients between the two jobs; she could not use State time or resources for her private work; she could not use confidential information from her full-time job to assist her in the part-time job.

10-19 - Post Employment: A former State employee asked if he could work on a contract that his private employer was seeking with his former agency. For 2 years, he may not represent or assist them on State matters where he: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter. 29 Del. C. § 5805(d). The former employee was not in any manner involved with the contract. As to the substance of the contract, design work, the former employee had completed some design work but not on the projects that will be in the new contract. However, the former employee said that if the company gets the contract, and if for some unexpected reason any of the ones he designed came up, he would recuse. The Commission found that if the company got the contract, the former employee may work on the projects in it, unless any of them are designs he was responsible for as a State employee.

10-08 - Post Employment: A former teacher asked if she could privately contract with 2 school districts. She had never been employed by either District. She wanted to contract to work on a grant application for the Districts. She was not in any way responsible for such grants as a

State employee. The post-employment law bars her only from private work on matters for which she was directly and materially responsible as a State employee. As she did not work on the matter while she was a State employee, she was not barred from the contract by the post-employment law.

10-07 - Post Employment: A former State employee was contacted about accepting a job by a company which contracts with her former agency division, where she had been acting division director before leaving State employment. Although she dealt with some company officials while with the State, she has had no contact, nor sought a job, with them. She left the State approximately 1 year ago. The company has 13 State contracts. Of the 13, she was involved in two. Her involvement was serving on the review committees for both contracts (one was 6 years ago; and the other was 8 years ago). As Acting Director in the last year and 1/2, she had program oversight. In her State job, she dealt directly with senior level company officials on the broad scope of insuring services were offered. She was not involved in how services were implemented, etc. These same company officials will continue to have responsibility for dealing with her former agency as far as oversight. Also, they were not involved in an upcoming bid on a State contract. Her job will not be contract oversight, but direct work with the staff and clients. It will be a clinician driven responsibility, rather than administrative. Specific activities would be establishing and providing specialized counseling to staff and clients, which was never part of her State duties. Rather, her counseling skills were garnered from prior jobs. Her work also would include day-to-day operations, including supervising staff, and working directly with clients, which was not part of her State job. The Commission decided that as to the 11 contracts she never worked on, she had no responsibility and could work on them, and for the other 2, she would not be working on the same substance matter as she will not be involved in the administrative oversight of the contracts, and her work will differ because it is much more hands-on with supervising people, giving care, etc.

09-31 – Post Employment- Agency Interpretation: 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.

09-23- Post Employment - Lobbying: 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 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 could 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.

09-16 – Post Employment - Local Official: A local official asked if a former Council member acted contrary to the post-employment law by representing a private enterprise on certain local matters when he had participated in decisions for that same private enterprise, and two years had not passed. The former Council member did meet with local government officials regarding matters pertaining to the private enterprise, and he also spoke at a public meeting in which he said he was speaking not only for himself but for the private enterprise. However, none of the matters being discussed were anything that arose while he was on Council, but arose afterwards. The Commission decided there was no violation as he did not represent or assist them on matters on which he had worked while with the Council.

08-62 – Post Employment - Contract for New Population of State Clients: An employee was offered a contract with her agency to work on its grant if she left State employment. The grant established a new population of clients for the agency. She was not involved with the grant request at all. Her State job was 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).

08-61 – Post Employment - "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 was publicly noticed and bid. Her only involvement was to proofread and correct typos in the grant submission. If she was 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. Generally, 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.

08-59 – Post Employment - Contract to Perform Same Job; 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 to perform the work. 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". Similarly, it found that the literal application of the law must apply.

08-56 - Post Employment - Meaning of "Opinion": A State employee asked if he could accept a private contract with his agency for 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 meeting with a group that discussed the feasibility of obtaining a grant. Although initially opposed, he subsequently told the group he changed his mind. Thereafter, his division obtained the grant. He then wanted to seek employment 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, the group considered members' opinions on how the agency operated. 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 employment would be contrary to the post-employment law.

08-20 – Post Employment - 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

08-17 – Post Employment - Private Firm Request: A former State employee accepted a job with a private firm. The employer required 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. A contract was awarded to the firm several years ago, before the employee worked for the State. The firm had completed that work, and did 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.

07-53 - Post 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 – Post Employment - "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 wanted to resolve the issue so it was clear what he could work on. In his private job, he was 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.

07-23 – Post Employment - Foster Care: A State employee filed a disclosure stating 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, the Commission 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).

06-67 – Post Employment - Knowledge 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 did business with his local government. He provided a list of

government duties, and a list of the duties he would 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 for 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 violation because 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.).

06-62 – Post Employment - 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.

06-53 - Post Employment - Local Official: 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 worked for a local government. He planned 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 had 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 a matter for which he had been directly and materially responsible, 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 job. 29 Del. C. § 5805(d). Persons from his former government agency were 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 was 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 had contracted with the local government where he worked, but had no active 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 could 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).

06-50 Post Employment - No Details; No Ruling: A former State employee wrote to the Commission 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 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).

06-35 – Post Employment - 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.

06-32 – Post Employment - "Matter". 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 DelDOT'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 DelDOT'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 DelDOT 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 DelDOT 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 DelDOT. 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 SR26 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

01-21 – Post Employment—Limiting Exposure to 'Matters Involving the State': A State employee asked if employment as the Director of Nursing at a long-term care facility would violate the post-employment provision. Based on the following law and facts, we concluded that the conduct will not violate that provision as long as the former employee was removed from activities related to the former Division's survey of the facility, as indicated below.

(A) Applicable Law

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

(B) Application of Law to Facts

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

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

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

The former employee expected that nursing skills, acquired independently of the State job, rather than knowledge of the agency rules, would be the skill used as a Director of Nursing. Obviously, nursing skills were needed for the State job and the new job. In the State job, those skills were used to identify problems under the survey rules and regulations. However, those rules and regulations would not be a factor in all of the day-to-day activities a Director of Nursing would encounter, e.g., staff meetings, participating in decisions on whether a client should be

moved to a hospital for immediate care, etc. Also, as it related to the State survey, the skills to be used would be on the other side of the coin. Rather than identifying a problem under the rules, the Director and staff would determine the cause and the necessary care to correct the problem--which was not a duty on the survey team.

The Code does not ban former State employees from working in the same occupation. Rather, it limits their occupational work in areas where they gave an opinion, conducted an investigation or was otherwise directly and materially responsible for matters involving the State. In a prior opinion dealing with a similar situation where a former employee served on a team that evaluated group homes, we held that as long as she did not deal with the team; was not present when the team inspected; her name was not used by the facility to influence inspectors; and she did not advocate for the facility before the inspectors, that her conduct would not violate the post-employment law. *Commission Op. No. 97-20.* We are to be consistent in our opinions. 29 Del. C. § 5809(5). Accordingly, with the above restrictions, we found no violation of the post-employment law.

01-19 – Post Employment—Working on Same 'Matter' – Waiver Denied: Based on the following law and facts, the Commission concluded that it would violate the post-employment law if a State employee went to work for a private company to work on the same project she was working on for her Department. It also concluded that a waiver would not be appropriate.

(1) Applicable Law

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

(2) Application of Facts to Law

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

(3) Consideration of Waiver

The Commission may grant a waiver if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a).

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

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

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

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

Here, the very purpose of the law would be contravened if she were permitted to accept private employment to perform the exact same job. That is because the public could well see this as a "revolving door. " First, she walked into this State job untrained to do the particular work involved. She learned that skill at the agency's expense as part of its contractual agreement with the private company to help train her. She said if she works for the private contractor, she would walk back through the same door of the same office where she now works for the State; sit at the same desk; do the same work, but get paid more than she would as a State employee. In addition to higher pay, she would receive company stock options, health benefits, etc. That would be in addition to the 15 years she has vested in a State pension. Besides the increase in pay she would receive, the company would receive a financial benefit because it gets a "mark-up" if the agency uses her as its hired consultant on this particular job. She said she wanted to go with the private company because she thought there would be better job opportunities and because the private company, like other consulting companies, could be more flexible in its hours than her State agency. Again, this could be viewed as using the "revolving door" for her personal advantage.

This is not to say that she could not leave the State and get a higher salary, better promotion opportunities, and more flexible hours. All of that could be available through this private company or any other firm <u>as long as</u> she did not work on the same project for which she was responsible. This gives her mobility to move to the private sector, but stays within the legal restriction that is driven by the public concern. For example, the company's representative said that the company is the largest firm of its type in the United States. He also said that it has projects other than this particular project. As she could still seek employment with the private company or another company without violating the Code, we must conclude that the literal application of the law is necessary to serve the public purpose.

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

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

We have already noted that she can accept employment with the company or any other private enterprise as long as she does not work, for two years, on matters for which she was

responsible while employed by the State. Thus, we find no undue hardship for her.

She said that if the agency has to select someone else the project "would just fall apart" because "you get to know people and you know their personalities" and it helps build "a working relationship with the contractor, which is sometimes not the easiest thing to do. And once they're comfortable that you can do your job, well, they rely on you." She added: "I think if I walked out now and they took somebody else and put them in there, it would cause a workplace disharmony." She has a financial interest in obtaining employment with the private company, and it has a financial interest in seeing her continue in the same job as its employee as it will receive a mark-up. We cannot find this to be an "undue hardship" for her or the company. Further, the agency's representative expressed no concern about the project "falling apart" or "workplace disharmony." In fact, the private company's representative, pointed out that when a State employee is doing the same work as a contract employee who makes more, that it "creates some havoc" and "there is animosity." Thus, it appears that if she walked out as a State employee and walked back into that same office the next day doing the same work as a consultant, that would cause the "workplace disharmony" which she said she wished to avoid.

The agency's representative said she had the experience and does a good job, and that "it makes the most sense to have [her] continue to do the work since she's already halfway through both of those construction projects and she already is up to speed on everything." Certainly, it would make the most sense to have the person with the most knowledge and continuity perform the work. But we previously noted that the very hardship imposed by the post-employment law--a former employee may not work on the same job for which they were responsible--is that the agency loses that knowledge, continuity, working relationship, etc. *Commission Op. No. 97-18.* While we understand and sympathize with the desire to have her continue doing the exact same DelDOT work, only as a private contractor, that is the very hardship imposed by the statute; it is not excessive. *Id*. As every former State employee could bring continuity and familiarity to performing the same duties for which they were responsible, if a waiver were granted solely on that basis, the former employee would always have an advantage over competitors for the contractual job. *Id*. That would defeat the purpose of the restriction.

The agency's representative said he has a shortage of people within the State who could perform the particular type of work, which consisted of book entries and computer data entries. His options would be to hire a consultant other than her. He said that is difficult as even the consultants do not have people with that particular type of experience on the agency's jobs. However, she was not trained to do that particular type of work when she began the job. While workers in the private sector, who consult on such work, may not have experience with this particular agency, there was no indication that such people were not available to perform the job. The other option, would be to do what he said he has been forced to do lately-- "to get people that may have some office experience but don't really have office experience in the [agency's] environment. So they're not familiar with all the terminology and what we do out on [agency] projects." Again, lack of familiarity of terminology does not mean they cannot perform the computer and book work required. As there are other persons who could perform the job, we cannot find an "undue hardship."

(5) Conclusion

It would violate the clear language of the post-employment law if she accepted employment with the private company, within two years of leaving State employment, to work on the same project and perform the same work for which she was responsible as a State

employee. A waiver is not appropriate as: (1) the literal application of the law is necessary to serve the public purpose; and (2) no facts substantiate an "undue hardship," as other consultants are available.

01-16 – Post Employment—Consultant for a Marketing Group: A former State employee proposed to work as a consultant to a national organization which subcontracted with a research and marketing group. The Commission held that the conduct would not violate the post-employment law as someone other than the former employee would represent or otherwise assist those entities before her former agency.

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

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

While employed by the State, she was not involved in assisting companies or their employees in understanding planning for long-term care. Also, her job did not entail trying to make consumers aware of the need to plan for long-term care, how to finance long-term care, etc., so that they would not have to rely on State services for their long- term care.

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

Based on those facts, she would not be representing or otherwise assisting the national organization or the research and marketing group on matters involving the State on which she gave an opinion, conducted an investigation, or for which she was otherwise directly and materially responsible for while employed by the State.

01-12 – Post Employment—What is 'Directly and Materially Responsible'? A former Senior Level Executive Branch officer asked for guidance on representing or assisting various citizens' groups sometime in the future. At the time of the request, no particular group or their needs had been identified. By law, we must base our advisory opinions on a particular fact situation. 29 Del. C. § 5807(c). We also are to be consistent in our opinions. 29 Del. C. § 5809(5). Thus,

while no particular facts were available to render a final decision, the following information was provided as some guidance.

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

Generally, there is no trouble identifying matters on which one gave an opinion or conducted an investigation. Thus, the issue deals more with the need for clarification of "otherwise directly and materially responsible" while employed by the State. The officer had recognized that high-level State officers have a larger responsibility for the entire Department. The Commission considered the duties and powers given this individual in the statute creating the official's position. Under that law, the officer had extremely broad powers and duties. Thus, the statute would be a good starting point for determining if a matter was one for which the officer was "directly and materially responsible."

In a prior opinion, a high-level Senior Executive Officer was advised that because his statutory duties were broadly described, he should presume that he was directly and materially responsible for all the activities described in the statutory definition of his duties. However, he was not precluded from rebutting that presumption on specific projects. *Commission Op. No. 91-10.* Similarly, once this officer had a particular situation in mind, the facts could be placed within the framework of the statutory duties, and then, if necessary, the officer could return to the Commission for an opinion.

01-07 – Post Employment—Waiver Denied: The Commission was asked to grant a blanket waiver of the post-employment law on the basis that a former State officer said that he would not be able to obtain employment in the State without a waiver. Based on the following law and facts, the Commission held that a blanket waiver was not appropriate. Rather, it concluded that the officer's employment required curtailment of certain activities to insure compliance with the post-employment law. However, that decision did not preclude him from returning to the Commission for further guidance or requesting reconsideration of the waiver, based on specific facts which may arise in the future.

The Commission may grant a waiver if the facts substantiate an "undue hardship." 29 Del. C. § 5807(a). Here, the facts did not substantiate the alleged hardship--that because of the limits of the post-employment law, he could not obtain a job in Delaware. In fact, he had been offered a job in Delaware. No facts substantiated, at the time of the request, that the private enterprise would not employ him with the limits imposed by the law. He had not talked to the company about the post-employment limits and asked if they would still hire him; rather, he simply told them he would seek a waiver. Without facts to substantiate that he would not be hired with those limits, we could not find an "undue hardship."

We understood his concern about being able to move from the public sector to the private sector. That concern is incorporated into the Code because the stated purpose is to set specific standards to insure confidence in government, but also encourage citizens to assume public office and employment by not "unduly circumscribing their conduct." 29 Del. C. § 5802(3). Thus, in setting the post-employment standard, the General Assembly did not place a

total ban on former employees representing or otherwise assisting a private enterprise on matters involving the State, It merely limited their activity in three discrete areas--where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible while employed by the State. 29 Del. C. § 5805(d).

This gives former employees the latitude to accept private employment and work for private enterprises in many ways without violating the Code. In his case, the facts indicated there was still much he could do for the private company without violating the law. First, the job required him to provide managerial oversight for the private enterprise's operations and activities, including identifying service needs, service development and implementation, and evaluations of service provided. Based on the description, these activities dealt with the private enterprise's internal and day-to-day operations and would not involve representing or assisting the private enterprise on matters involving the State. As those activities do not include working on "matters involving the State," then working on them would not violate the post-employment law. Second, he expected to get involved in educating communities about certain aspects of the private enterprise's services. Again, no facts showed that such activities would entail "matters involving the State." Thus, he was free to engage in that conduct. Third, he expected to work to raise funds for the private enterprise. That would be achieved by approaching private foundations, the federal government, and the State. Dealing with private foundations, associations, and the federal government would not entail representing or otherwise assisting on "State matters." Thus, he was free to seek funds from private foundations and the federal government.

However, the red-flag goes up on the post-employment restriction regarding obtaining funding for the private enterprise **from the State**. That meant he would "represent or otherwise assist" the private enterprise "on matters involving the State." We must then narrow that representation/assistance down to whether it would be on "matters" where he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible.

As an example, he said that the private enterprise gets millions of dollars from the State under a State contract with his agency. He said he would not negotiate or re-negotiate that contract with the State as that would be a "tremendous conflict of interest." We agree. As a Senior level executive officer, the State contract was a responsibility of his agency. Because of his position, a contract of that magnitude was certainly his responsibility. Accordingly, he was correct in deciding to recuse himself on that matter. Similarly, the private enterprise wanted to seek money from a State source other than through the above-mentioned contract. While employed by the State, he chaired an Advisory Committee which recommended to the General Assembly and the Governor how to spend particular funds. If he represented or otherwise assisted the private enterprise in obtaining funding from that source, he would be dealing in matters where he: (1) **gave an opinion** on how to spend the money; and (2) **was directly responsible** for recommendations concerning that money. Such activity would violate the post-employment law. These two instances illustrate where he should draw the line in terms of soliciting funding or contracts from the State for his private enterprise.

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

He also said that the private enterprise might want him to advocate for legislation and

policies at the State and Federal level. We note again that any action on Federal matters is not within the purview of the State post-employment law. He was free to engage in those activities. At the State level, he said that the private enterprise had a government relations group and a lobbyist who did 96% of the lobbying. Consequently, he did not expect to have a lot of interfacing with State employees and the General Assembly along that line. However, an example he gave was that there might be a bill to change certain laws pertaining to an issue over which he had responsibility while employed by the State, and the private enterprise might ask him to go to the General Assembly and testify. The particular issue was one where he was responsible for targeting certain funding for that issue when he chaired the Advisory Committee. Moreover, in his State position, outside of chairing the committee, he and other senior level officials were asked to identify 10 areas of concerns for the State and the possible legislation he was speaking of fit within those areas he had helped identify. Based on the information he provided, it was logical that the type of legislation he thought they would want him to lobby on would result in implementing policies and spending State funds in areas for which he had been directly and materially responsible.

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

Obviously, neither he nor this Commission could foresee every possible situation that may arise within the next two years. Moreover, we must make our decisions based on particular facts. 29 Del. C. § 5807(c). Thus, as guidance to him on whether his activities would pose problems under the post-employment law, we used these particular instances to assist him in complying with the post-employment provision. As issues arose, he was advised to review the post-employment law, this opinion, and if necessary seek further advice from this Commission.

01-01 – Post Employment—Working on Open-Ended Contract: A State employee was involved two years ago in awarding a 3-year, open-ended contract. Under that contract, the selected contractor was to provide professional services for certain contract aspects after the agency identified a project. Since the award of that contract, the agency had identified 39 projects needing such studies or analyses. The State employee was involved in 21 of the projects as a manager. Regarding the remaining projects, he was in no manner involved. He asked what restrictions would apply if he went to work for the contractor.

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

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

He also asked if he could represent or otherwise assist the company if it was awarded future contracts. Specifically, he asked if he could work on: (1) an open-ended contract that he expected to be awarded in the Spring; and (2) other future contracts, as yet unidentified, in which he would be involved in the marketing aspect for the company.

As to both matters, he said they would be new contracts on which he had no involvement while employed by the State. To the extent those contracts would be on matters in which he had no involvement, he would not be prohibited from representing or otherwise assisting the private company. However, as the exact terms of the contracts were unknown at this time, if those contracts should, by their terms, encompass matters on which he was involved during his State employment, then he would be restricted from working on those matters. For example, if a project identified in the current open-ended contract, were incorporated in the new open-ended contract to be issued in the Spring, then, consistent with this opinion, he would not be permitted to work on that matter. As the new contracts are issued, he was advised to review the post-employment law, refer to this opinion for guidance, and if necessary, return to the Commission for additional advice.

00-49 – Post Employment—No Work with Former Agency: Based on the following law and facts, the Commission concluded that employment with a private firm which contracted with a former State employee's former Division, would not violate the post-employment provision as the private employer was not going to assign him to work on projects with his former Division.

No State employee may represent or otherwise assist a private enterprise on matters involving the State for two years after termination if they are matters on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while employed by the State. They also may not improperly use or disclose confidential information gained from their State position. 29 Del. C. § 5805(d).

His former agency contracted with a private enterprise as the provider of certain network matters. While employed by the Division, he participated in that contract by: (1) putting together the contract requirements; (2) selecting the contractor; and (3) monitoring the contract. Based on those facts, he gave an opinion and was otherwise directly and materially responsible for the contract while employed by the State. However, at his job with the private enterprise, he would not be assigned to work on any projects with his former Division, and the proposed scope of his private employment responsibilities would not include those network related tasks in Delaware. We have held that where an individual gave an opinion on a State contract but would not work on that "matter" after leaving State employment to work for the contractor, then there was no violation of the post-employment law. *Commission Op. No. 94-15.*

00-46 – Post Employment—Contracting with Former School District – Waiver Granted: NOTE: When a waiver is granted, as in the case below, the proceedings before the Commission become a matter of public record. 29 Del. C. § 5807(a).

Dear Dr. Brandenberger:

The Cape Henlopen School District asked if it would violate the post-employment provision if Dr. Hubert Mock privately contracted to be the Assistant Principal at Lewes Middle School, when less than two years before he served as the Principal at Milton Middle School before retiring. If a violation is found, the School District asks for a waiver. Based on the

following law and facts, the Commission concluded that the contract would violate the post-employment provision. However, it agreed to grant a limited waiver based on the School District's statement regarding the hardships it has had in obtaining an Assistant Principal. The waiver is limited to the remaining time in the present semester. However, the School District is not precluded from seeking an extension if it can show due diligence in trying to find someone else to hire as the Assistant Principal.

I. Applicable Law

Post-Employment Restriction: No person who has served as a state employee, state officer or honorary state official shall represent or otherwise assist any private enterprise on any matter involving the State, for a period of 2 years after termination of his employment or appointed status with the State, if he gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of his official duties as a state employee, officer or official. Nor shall any former state employee, state officer or honorary state official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit. 29 Del. C. § 5805(d).

Waiver Provision: The Commission may grant a waiver to the specific prohibitions if it determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee, officer, official or state agency. 29 Del. C. § 5807(a).

II. Facts

In the last week of August, a week before the 2000-2001 school year started, three assistant principals in the Cape Henlopen School District resigned and took employment elsewhere in the State. After advertising and interviewing, the District was only able to replace one assistant principal at an elementary school, leaving the assistant principal-ships at the high school and Lewes Middle School open. The four candidates interviewed for the middle school did not possess the required qualifications, and the candidates for the high school position withdrew their applications. A district office administrator was transferred into the high school principal-ship to do "double duty" as an instructional supervisor and as principal. Other teachers holding the required certificates to be an assistant principal were teaching in "critical skills." The School District said it did not intend to pull those teachers from its teaching staff because of the need for teachers in those areas and because of the impact on the students and parents if a teacher were pulled during the school year. Additionally, none of those teachers had applied for the position when it was announced. The School District said it did not want to bring in such person for a limited time while it sought a qualified candidate who would take the position for the long-term. The School District said it planned to re-announce the position in the spring, as it believed the candidate market would be more plentiful at that time. It also said it was unlikely that qualified applicants would want to leave their positions at other schools at this stage of the school year. It said that it had not considered the likelihood of going out and looking for contractors for the position. According to the correspondence, Leading & Learning, Inc. contracted with the School District and Dr. Mock to provide the services of Assistant Principal at Lewes. Leading & Learning, Inc., is the name placed on reserve by Hubert D. Mock, according to the Secretary of State's Division of Corporation's office, but it is not registered as a corporation. Dr. Mock was approached by the School District to serve as the Lewes Middle School assistant principal. Dr. Mock has come out of retirement at least twice in the past to accept such substitute jobs, and has been serving in this present position in a reported-time basis. He apparently does not want to come out of retirement again; nor does he want to

continue in a reported-time basis because once he earns $10,300, by law, he will experience a $3 to $1 pension offset.

III. Application of Law to Facts

A "private enterprise" means "any activity conducted by any person, whether conducted for profit or not for profit...." 29 Del. C. § 5804(8). Accordingly, this Commission has held that a private contract of employment with the State constitutes a private enterprise. *Commission Op. No. 94-10*. Consistent with that ruling, the Commission finds that Dr. Mock, who seeks to contract with the School District, through his own activity or through the auspices of the corporate name reserved by him, is acting on behalf of that private enterprise in seeking a contract and fulfilling that contract which deals with matters involving the State. As he is acting as a private enterprise, the next issue is whether his representation is on matters for which he was directly and materially responsible while employed by the State. "Matters" are defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(6). This Commission has held that where there is a substantial overlap between the matters worked on while employed by the State and the post-employment matters involving the State, then there is a violation of the post-employment provision. *Commission Op. No. 96-46*.

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Here, Dr. Mock, while employed by the State, was the principal of a middle school. He now seeks to contract to be an assistant principal in the same School District over students in the same school grades. The job description for an assistant principal state that the job goal is: "To assist the principal in providing school-wide leadership and to learn the role of the principal." Additionally, the performance responsibilities are to: (1) "Assist the principal in the overall administration of the school;" and (2) "Serve as the principal in the absence of the regular principal." These facts indicate a clear overlap of responsibilities between a principal and an assistant principal. Further, in comparing the job description of the principal and assistant principal, the performance responsibilities for both jobs include overlapping responsibilities in such areas as scheduling, budget requests, inventories, safety inspections and drills, student attendance, maintaining discipline, supervising teachers and departments, and maintaining relationships with students, parents, and faculties, etc. *(Compare, e.g., Assistant Principal Job Description Items 1,2, 3,4,5,6,7,9,10,11 and 14, to Principal Job Description Items 5, 13, 14, 40, 41, 39, 37, 21, 17, and 11)*. It is logical that there is an overlap since the goal of an assistant principal's job is to "learn the role of the principal." *(See, Assistant Principal Job Description).*

Based on those facts, a majority of the Commission concluded that there was a sufficient overlap to conclude that Dr. Mock would be working on matters under the private contract for which he was responsible while working for the School District.

IV. Should a Waiver Be Granted?

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

The purpose of the post-employment statute is to instill the public's confidence in the integrity of its government. *Commission Op. No. 99-15*. In the context of the post-employment law, public confidence has been weakened by a widespread perception that government officials use their office for personal gain, particularly after leaving the government. *Id*. The main reason for public concern is that former employees may use information, influence, and

access acquired during government service for improper and unfair advantage in later dealings with the government. *Id*.

Here, the School District, faced with the need for an assistant principal just as the school semester started, sought out Dr. Mock to fill the position. He was hired on a reported-time basis. If he continued in a reported-time basis there would be no violation of the post-employment law, because he would not be considered a "former employee," but a current employee. *Ethics Bulletin 007*. He does not want to remain in a reported-time basis because as a retiree, he must have a pension offset of $1 for every $3 he earns above $10,300. 29 Del. C. § 5502(a)(3). Every State retiree is subject to that pension offset if they return to work for the State. A waiver, which would permit him to avoid the pension offset, would mean he receives the full salary of an assistant principal, plus his full pension. The public may see his request to avoid the pension offset as turning his knowledge of the job into a situation of personal gain that, by law, other State retirees do not have. Thus, the literal application of the law is necessary to serve the public purpose.

(2) Is there an undue hardship on the former employee?

"Undue hardship" means "more than is required" or is "excessive." *Commission Op. No. 97-18*. The alleged hardship on the former employee is that he would suffer a pension offset if he cannot privately contract. We have held that the very hardship imposed on any State retiree who is re-hired by the State is that they must suffer the pension offset. *Commission Op. No. 00-26*. The statutorily imposed offset is no greater for Dr. Mock than any other State retiree. Moreover, such offsets are not unique to persons other than State retirees, as the State offset is based on the Social Security earnings limits for retirees under that system. 29 Del. C. § 5502(a)(3). Accordingly, we cannot conclude that the pension offset for Dr. Mock is “excessive."

(3) Is there an undue hardship on the agency?

Based on the details referred to in the statement of facts, e.g., three assistant principals resigning right at the beginning of the semester, lack of qualified applicants, etc., we conclude that the School District established an "undue hardship," and therefore grant a waiver on that basis. We note that Dr. Mock could be hired without violating the Code, e.g., coming out of retirement as he has in the past, or being paid on a reported-time basis. Apparently, he is not agreeable to those options. Thus, if the School District is to use his services until it can find someone qualified, it would be by private contract. With those facts in mind, we place a time limit on the waiver of the remaining time in this semester to allow the School District to seek certified candidates in-house, or through other hiring options available to the agency. In the event the District cannot find a qualified applicant in that time, it is not precluded from seeking an extension if it can show due diligence in trying to resolve the matter.

V. Conclusion

Based on the above facts and law, we conclude that contracting with Dr. Mock as the assistant principal in the same school district and at the same grade level where he was previously principal, and where there is a substantial overlap in the responsibilities of a principal and an assistant principal, would violate the post-employment provision. However, a limited waiver for the time-frame of this semester is granted without prejudice to seek an extension.

00-41 – Post Employment—Project Manager: A State employee asked if accepting employment with an engineering firm would violate the post-employment law, as the firm was a consultant to the Department where he worked. Based on the following facts and law, the Commission concluded that the proposed conduct would not violate the Code.

(I) Applicable Law

Former employees are restricted for two years from representing or otherwise assisting a private enterprise on matters involving the State if their representation/assistance will be on matters in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). They also may not improperly use or disclose confidential information gained as a result of public position. *Id*.

(II) Application of Law to Facts

The firm wanted to hire him as its project manager. Among other things, it wanted him to manage two agreements it had with his former agency. He did not participate in the interview or the selection of the firm for either agreement or manage the agreements after the firm was selected. Those matters were handled by a project manager in a separate section of his agency. However, he had some involvement in the agreements as follows:

(A) Agreement 1: Under this agreement, the firm was the sole source provider of certain surveys. When surveys were needed, the section he worked for made the request through the agency's project manager. Because he worked in the section, he had occasion to request surveys. He could not select the provider as that was predetermined by the agreement, in which he did not participate. He also did not decide how costs would be controlled or paid, etc. Rather, when his section requested the survey through the project manager, the manager contacted the firm for the work, reviewed the proposed fee, gave notice to proceed, and authorized payment. As part of the former employee's function, he reviewed the survey after its completion. However, he had no expertise in conducting such surveys, so he could not look for accuracy or in any way evaluate the firm's work. Rather, he checked for certain standard information, e.g., tax or project numbers, etc. Technical or quality reviews of the survey were the project manager's function.

(B) Agreement 2: Under this program, another State agency worked with him in buying an easement. He had no contact with the firm and the purchase had no material impact on the firm's agreement with his agency. Again, oversight of the agreement as it related to the firm (fiscal, administrative or managerial) was the project manager's responsibility.

Based on those facts, as to Agreements 1 and 2, he did not give an opinion, conduct an investigation, nor was he otherwise directly and materially responsible for those matters. He also asked about two other responsibilities he expected to have in his job with the firm. In the first instance, he would not be representing the firm before the State. Rather, he would represent it before local governments. The Commission has held that where the representation/assistance of the private employer was before local governments, not the State, that there was no violation of the post-employment law. *Commission Op. No. 98-12*. In the second instance, he was not sure which contracts, if any, the company would want him to respond to. Without the relevant facts, we could not render a decision. *Commission Op. No. 96-74*. He was advised to seek additional guidance, if necessary, if such contracts arose.

00-36 – Post Employment—Contract to Perform Former State Job – Waiver Denied: A State employee sought to privately contract with her former Division to perform the same job she had while employed by the State. Such conduct would violate the post-employment law, so she sought a waiver. Based on the following law and facts, a waiver was denied.

The post-employment law tries to strike a balance so as not to discourage public service. Thus, post-employment contracts are prohibited for two years only if the post-employment work with the State agency deals with matters on which the former State employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

In a 1996 opinion to this individual, the Commission held that her proposed post-employment contract with her Division came within the prohibitions § 5805(d), but we granted a waiver. For the reasons in this opinion, that waiver is no longer effective, and we did not grant a new one. Waivers may only be granted if the literal application of the law is not necessary to serve the public purpose of the statute or there is an undue hardship on the agency or the employee. We are required to be consistent in our interpretations of the law. 29 Del. C. § 5809(5). Applying the waiver provision, we have denied a waiver where an agency had a program in operation for a number of years and wanted to contract with a former employee to work on the same matter, but the agency had not fully addressed options that could result in no violation of the Code. *Commission Op. No. 99-15*. In that case, the agency project began a number of years before the employee left State service. When she was ready to retire, it had not fully explored rehiring her under such options as part-time, temporary, or casual/seasonal as permitted under the personnel laws. *Id*. Moreover, it had had years to train a replacement, but had not worked to insure that the replacement was trained. *Id*. The agency sought a waiver on the basis that it needed to have her work on the program because of her knowledge and expertise and it needed her to train her replacement. *Id*.

Here, the former State employee and her former Division said that her expertise was needed because of her knowledge of a particular program, and the agency needed her to train others. However, as in the above referenced opinion, the program has existed for years, at least since 1996, when we issued our initial opinion. We granted a waiver in 1996 on the representation that: she planned to leave because of medical reasons in January 1997; the agency might not be able to reduce the number of hours she worked; and if it could not reduce the hours, it wanted the option to contract with her. We granted it on that limited basis. *Commission Op. No. 96-60*.

In this most recent request, she said she received the 1996 waiver "with the understanding that the waiver would only be exercised if [the Division] was not able to change my status to part-time." She did not leave in January 1997, but continued to work for the Division until June 1999. During that time the Division did, in fact, reduce her hours to 30 per week. In June 1999, she then exercised her waiver, and entered a one year contract with the agency to work for 20 hours a week. During that time, an employee was hired to replace her. The former employee said she worked with her replacement for a year. Also, a person was assigned to another facility to handle the program at that location.

The former employee said: "it was just not possible to pass all of the information on to key staff within [the agency] within one year." However, it had not been just one year. The former employee and the agency had known since at least 1996 that she was considering leaving because of her alleged medical condition. The agency got her work hours reduced to accommodate her medical condition even as the program continued to grow. In February 1999,

she submitted notice that she planned to leave in June 1999. In June, she accepted a private contract to perform the program work on a 20-hour per week basis. Thus, she and the agency had years for her to pass on information. Yet, she specifically stated that there was some information that she still had not passed on to the agency, even after all those years.

Post-employment laws were passed because the public's confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *"Ethics in Government Act," United States Senate Report No. 95-170*, p.32. The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id*. Here, the public could well suspect that if in all those years she did not "pass on" all the information that the agency needed, that she was using information acquired during government service to place her in a position to control the knowledge and the agency then must rely on her through a contract to provide it with the information needed by its employees.

Further, the agency had made little, if any, effort to obtain the services it needed in a manner that would not violate the Code. First, it could hire her in a part-time position. The agency stated that it has not found an "appropriate" part-time position that related to her career field. However, when the agency needed to convert her State position to a part-time permanent 30-hour position, it was able to do so. When she accepted the private contract and the agency then needed to convert her position back to a full-time position, it also did so. Now, it stated that it would take a number of weeks to get a casual/seasonal position. However, it had been on notice since her contract expired at the end of June that one option it could exercise so that the Code would not be violated would be to hire her as a casual/seasonal, but no facts indicated that those weeks were used to obtain the temporary or casual/seasonal position. The agency's representative said at the Commission's meeting that not only had the program existed for many years, but that the federal government had required States to implement the program. Logically, if the States must implement the program, and it has existed for many years, it seemed there would be other persons qualified to do the work with whom the agency could contract. Yet no facts indicated that the agency ever made an effort to contract with anyone but her. Again, this could raise suspicion that as a former employee she was in a position to obtain a "leg up" on others who were equally qualified but were not given the chance to compete. This goes to the very heart of the reason for the post-employment law.

She stated that there will be an "undue hardship" if she cannot contract with her former Division because her private business would lose $30,000 a year for the 20 hours she worked per week. Again, we must be consistent in our opinions. We have held that "undue hardship" means "more than required" or "excessive." *Commission Op. Nos. 97-18 and 99-15*. The very hardship imposed by the statute is that as the law precludes former employees from working on matters for which they were responsible, then they cannot expect after they leave State employment that the State would still be a source of substantial income to them to perform their former job. It is the hardship any former employee must experience. Moreover, she said she had already contracted with another State agency and planned to contract with another Division of her former agency. Thus, it did not appear that she was without income as a result of not being able to contract with her former Division. While she pointed to the fact that she was in an automobile accident in 1994, and that was why she left State service, she did not claim that she could not work as a result of those injuries. In fact, she anticipated seeking even more contracts. Rather, it was the financial loss she claimed as a hardship. Nothing in the Code of Conduct prohibits her from contracting with private sources or local or federal agencies. In fact, under appropriate circumstances, contracting with the State may be permissible as long as it

was not on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible.

In conclusion, under these particular facts, we did not grant a waiver for her to contract with her former Division to work on matters for which she was responsible because: (1) the literal application of the law was necessary to serve the public purpose; (2) no facts indicated an "undue" hardship on her; and (3) the facts did not substantiate an undue hardship on the agency because there were still legal means of achieving its needs without violating the law, either by: (a) finding a casual/seasonal position for her; or (b) finding another contractor.

00-34 – Post Employment—Employment as a Lobbyist: A former General Assembly employee asked if he could lobby on behalf of his private employer on matters before the General Assembly in certain areas. Based on the following law and facts, a majority of the Commission's quorum concluded that his post-employment activities would not violate the post-employment law.

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

We are required to be consistent in our opinions. 29 Del. C. § 5809(5). The post-employment law does not prohibit representation before an individual's former agency, unless the representation is in one of the three areas that trigger the provision--matters where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for matter while employed by the State. *Commission Op. No. 96-75*. Thus, the issue was whether his representation as a lobbyist on matters affecting his private employer would constitute representing it on "matters" in those three areas. In deciding if the representation was on the same "matter," Courts look to whether there is a substantial overlap in the facts regarding the matters worked on for the government and the matters on which the individual will represent the private enterprise. *Id*. (*citing United States v. Medico*, 7th Cir., 784 F.2d 840 (1986); *CACI, Inc. v. United States*, Fed. Circ. 719 F.2d 1567 (1983)).

Like the federal Courts, Delaware's Courts look to the particular matter on which the State official worked to see if there is an overlap with his private representation. *Beebe 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). In *Beebe*, a former member of the Health Resources Management Council represented a company before the Council on a certificate of need (CON) request. *Id.* at 17. He had served on the Council for five years. *Id*. It was argued that his representation violated the post-employment law. *Id*. The Court found that while he was a Council member, he did review CONs; however, the record showed that he did not review the two applications before the Council. The Court held that "since he appeared before the Council in a matter for which he had no direct and material responsibility while on the Council, he did not violate the statute." *Id*.

Here, as in *Beebe*, the former employee wished to represent a private enterprise before his former State entity. The "matters" on which he would represent the private employer related to agriculture, manufacturing, and taxes. As a State employee, he was an Administrative Assistant. He supported the General Assembly members on such things as constituent

relations, liaison with other government offices, issue research, and other administrative needs, as directed by the legislators. He had "little, if anything" to do with agricultural issues and did not recall working on manufacturing issues while employed by the State. Under Delaware law, he was entitled to a "strong, legal presumption of honesty and integrity." *Beebe, supra*. Thus, based on his statements, he did not give an opinion, conduct an investigation, nor was he directly and materially responsible for matters relating to agriculture and manufacturing. Regarding tax issues, while working in the General Assembly, he might, for example, be asked by a member for the effect on a family of four if certain tax changes were passed. He would contact the Controller General's office and ask it to develop a formula for determining the impact. If research were needed, he contacted the Legislative Council's Research Division. He gave the information from those entities to General Assembly members to use in speeches and/or he might write a press release about the proposed bill and its impact. In his private job, he would reach out to businesses or people in the community on tax issues. His private employer might develop a policy on the impact on those persons and have him contact the General Assembly to advocate the company's policy. No facts indicated that as a State employee he was responsible for reaching out to businesses or people in the community on tax issues, nor did he research tax issues or develop formulas for determining tax impacts on businesses or citizens. Thus, based on the facts provided, it did not appear that he was directly and materially responsible for those matters.

The Commission also advised him that he must register with this Commission within five days of qualifying as a lobbyist. 29 Del. C. § 5832. His employer must complete an employer's authorization at the time of his registration or not later than 15 business days after his registration. 29 Del. C. § 5833.

00-29 – Post Employment—Former Board Member to Represent Clients Before Board: An appointee to a State Board, which the Code of Conduct defines as an "honorary State official," wanted to represent persons who opposed a private company's application for a certain license from the Board on which he previously served. Based on the following law and facts, the Commission concluded that his representation would not violate the post-employment law.

(I) Applicable Law

For two years after leaving a State appointed position, honorary officials may not represent or otherwise assist private enterprises on matters involving the State if they are matters on which the official: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while in their appointed position. 29 Del. C. § 5805(d). They also may not improperly use or disclose confidential information gained from their public appointment. *Id*.

(II) Application of Law to Facts

The honorary State official had resigned his appointment to a Board which, by statute, was responsible for such matters as granting, refusing, and canceling certain licenses. (Citation omitted). A private company was applying for a license and the clients he sought to represent opposed the company's application. While serving on the Board, he was in no manner involved in reviewing or otherwise considering this particular application.

Delaware Courts have held that where an appointee left a State Board and later represented an applicant before his former Board, he was not representing or assisting his client on a "matter" for which he was "directly and materially responsible" while on the Board as he

had no part in reviewing the particular applications pending before his former Board. *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). Consistent with *Beebe*, we held that as he was not involved in the private company's application while on the Board, his representation would not violate the post-employment law based on those facts.

He did say that a principal of the company had applied for a number of licenses from the Board, but not as that particular company. He was on the Board when the principal of the company applied for at least one license. He also said the Board took disciplinary action against the principal regarding one of his licenses. The former appointee did do not recall participating in either action. Also, he asked the principal's attorney if his client recalled his participation in any disciplinary proceeding. The principal had no recollection of his participation. The former official said that if he were involved in such matter, it might raise a different issue. Delaware cases have held that past violations of certain license holders are obviously relevant when they seek another license. (Citation omitted). Thus, if he were involved in a violation decision on the license holder, it might raise a different issue. The former appointee had asked the Board's staff to search its data bank to see if he was involved in matters related to the applicant company or its principals, but had not obtained the results by the time of the Commission meeting. For purposes of the advisory opinion, we presumed that his recollection and that of the principal was correct--that he was not involved in matters related to the applicant company or its principals. We did not speculate on what the result might be if the search revealed other information. Rather, once he obtained the information, he was advised to reassess his situation. He was referred to *Beebe* and Commission decisions on other post-employment issues. Specifically, he might wish to review *Commission Op. No. 96-75*, which discusses the meaning of "matter" in the post-employment law and cites several federal cases interpreting "matter" as used in a similar federal post-employment law. At the Commission's meeting, he also said he would like to represent other clients before the Board. We must base our opinions on a "particular fact situation." 29 Del. C. § 5807(c). Without the facts, we could not make a ruling. For guidance, he was referred to this opinion, the *Beebe* case, and our synopses on post-employment issues. Should he need specific guidance when a particular fact situation arises, he could return to the Commission for a decision.

00-27 – Post Employment—Former Case Manager Working for State Contractor: A State employee asked if she could accept employment with a company which contracted with the State. She was not involved with the contract program while employed by with the State. Based on the following law and facts, the Commission concluded that such employment would not violate the post-employment law.

(I) Applicable Law

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

(II) Application of Law to Facts

As a State employee, she was not involved in preparing the contract or selecting the contractor. Thus, she did not give an opinion and was not directly and materially responsible for the preparation or award of the contract. Regarding the substance of her responsibilities as a

State employee as it related to the contracted program, she performed client evaluations; determined their eligibility; and was a case manager for clients in the program. As case manager, she obtained therapy services for the clients by working with their insurance companies and their primary care physicians. Under the State contract, the company she sought to work for was one of a number of contractors which provided therapy, but the decision on which contractor would be used was based on insurance coverage programs. Some clients could be eligible for Medicaid, and she would refer families to the Medicaid program for a decision on eligibility.

In her job with the private company, she would not: perform development evaluations; manage cases of clients; or provide therapy services as she was not a therapist . Rather, she would be an in-house nurse educator, giving training to nurses and developing educational and orientation programs for nursing staff. Those activities were not part of the State contract with the company, nor was she responsible for such matters in her State job. The only connection to the clients in the program was that some nurses she may train for the company may provide nursing care to some State clients. Based on the above facts and law, her employment would not violate the post-employment law.

00-26 – Post Employment—Pension Offset is Not a Hardship: The Commission, based on the following law and facts, could not grant a waiver allowing a former State officer to violate the post-employment law when there was a legal means for the State to access his expertise without violating that law. The Commission found no "undue hardship" which would permit a waiver, and concluded that the literal application of the law was necessary to serve the public purpose.

(I) Applicable Law

The post-employment law prohibits former State employees from representing or assisting a private enterprise on matters involving the State, for two years after leaving State employment, if they are matters on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d). Waivers to such prohibitions may be granted if: (1) the literal application of the law is not necessary to achieve the public purpose or (2) an undue hardship would result on any employee, officer, official or State agency. 29 Del. C. § 5807(a).

(II) Application of Law to Facts

A State officer retired after many years with the State. During the last six years, he held a high-level position. It was stated that his expertise was needed for a smoother transition for the State officer who would assume his position. The officer selected to replace him had more than a decade of experience with the agency. According to the written request, there was "full faith and confidence in him." However, it was stated that the former employee's experience "is unprecedented"; his advice is much valued; and his advice was needed on a fairly limited basis over the next couple of months. There were certain critical months when more of his assistance and advice would be needed. He would work on matters for which he was directly and materially responsible, so a waiver was sought to let him privately contract with the State to work on those matters because of his expertise.

(A) Is there an undue hardship on the State?

"Undue hardship" means "excessive or more than is required." *Commission Op. No. 97-18*. We have noted that the very hardship imposed by the post-employment law is the State loses the expertise of those who leave State employment. *Commission Op. Nos. 97-18, 99-15*. The individual had retired for health reasons, and had been re-hired in a temporary position. Thus, the State could access his expertise during those "critical times" without violating the post-employment law by keeping him in the temporary position as provided by State law. *See*, *Ethics Bulletin 007*. We must be consistent in our opinions. 29 Del. C. § 5809(3). Recently, a State employee retired for health reasons and wished to privately contract with the State on matters for which he was responsible. The agency said it would be "dangerous" to not have his years of experience in overseeing a critical contract. As the agency could have his expertise without violating the post-employment law, no waiver was granted. *Commission Op. No. 00-17*. Here, too, the State's need for this individual's expertise can be met without violating the law. Thus, we found no "undue hardship" for the agency.

(B) Is there an undue hardship on the former employee?

The former employee had agreed to work with the State on those matters "as a favor and due to his loyalty." It was stated that this was not a case where the former employee necessarily needed a job. Also, while his doctors concluded that he could not work full-time, they had not said that his health precluded him from working the number of hours that were anticipated by him--40 hours a month. Moreover, this was not a situation where, as a result of being hired as a temporary, he would not receive health benefits because, as a retiree, he could still participate in the State's health benefits program. Rather, he did not want a pension offset. He said: "I don't feel I want to suffer and that means I can only work 4 hours a week or less to stay out from under the penalty." He said that if the earnings limit in the first retirement year were based on a yearly rather than a monthly limit, he would not seek a waiver. Thus, the main "hardship" which limited his hours if he were re-hired as a temporary employee was the pension offset law, not his health.

First, while the General Assembly prohibited former employees from privately contracting to work on certain matters under the post-employment law, it gave such employees a means to work for the State on such matters in a temporary status. However, the General Assembly concluded that if a retiree returned, they must have a pension offset. 29 Del. C. § 5502(a)(3). The only exception is if they returned as a registration or election official or as a juror. 29 Del. C. § 5502(b). There is no exemption based on the reason for retirement, such as health reasons. We must assume that if the General Assembly felt there should be other exceptions it would have added them to § 5502(b).

Second, we do not administer that law. *Commission Op. No. 00-17*. We cannot waive laws over which we have no jurisdiction, including the pension offset law. *Id*. The very hardship imposed by that law on any retiree, other than those exempted, is that they must "suffer" the pension offset. *Id*. Even if we could waive that law, we would have to be consistent with many prior opinions which have held that the very hardship which is imposed by law is not an "undue hardship." *Commission Op. Nos. 97-18; 97-41; 99-15; 99-21; 00-02 and 00-17.* Thus, we could not waive the pension offset as an "undue hardship" even if we administered that law. It was stated he was not seeking a waiver of the pension offset law. However, granting a waiver of the post-employment law would have exactly that effect. That effect was what raised concerns in deciding if granting a waiver would serve the public purpose, which we addressed below.

(C) Is the literal application of the law necessary to achieve the public purpose?

Post-employment laws, like other conflict of interest laws, are meant to insure public confidence in the integrity of the government. *"Ethics in Government Act," United States Senate Report No. 95-170,* p. 32. Public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id*. The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with the government. *Id*. at 33. Those concerns are addressed by a "cooling off period" in post-employment laws. *Id*.

Similarly, the Delaware Legislature said the Code of Conduct is to insure public confidence in the integrity of State government. 29 Del. C. § 5802. To instill that confidence, it set a two-year "cooling off period." 29 Del. C. § 5805(d). That prohibition limits the actual or perceived unfair advantage in subsequent dealings with the State. *Commission Op. No. 97-18*. We noted those public concerns in *Ethics Bulletin 007*, when we informed agencies that there was a legal means (temporary employment) established by the General Assembly to access those who left full-time State employment. In providing that access, the General Assembly set certain legal limits on: (1) the individual's ability to financially capitalize; or (2) exercising undue influence for an improper and unfair advantage in later dealings with their government. *Ethics Bulletin 007*, p. 2 & 3. One legal limit cited, which helped insure those purposes, was the pension offset law. *Id*. The effect of that limit was that temporary employment did not hold the same financial enticements as a private contract. *Id*.

Assuming the former employee worked 40 hours a month for $50 per hour, he would earn $845 in hourly wages for the first 16.8 hours. Beyond those wages, he would receive his full pension (unknown amount). For the remaining 23.2 hours, he would earn $1160, subject to recoupment of $580 at the end of the calendar year as the offset. This resulted in $1,425 in hourly wages, plus whatever he received as his State pension. If a waiver were granted, he would earn $2,005 per month plus his entire pension. It was because of that financial difference that he did not want to "suffer" the pension offset. Avoiding that pension offset would certainly be seen as financially capitalizing. Moreover, he wanted a waiver from the Code of Conduct so that he could circumvent another law. We have held that where the proposed conduct would appear to contravene other laws, such conduct does not instill the public's confidence in its government. *Commission Op. No. 98-31*. As that is the very purpose of the Code, the literal application of the law is necessary to achieve the public purpose.

The written request for a waiver stated that for the Commission to "dictate an arrangement that would penalize him financially would not serve the public purpose." We have stated above why granting a waiver would not serve the public purpose. Moreover, we have not "dictated" that arrangement. The pension offset was dictated by the General Assembly, and as the Commission cannot use its waiver authority to undo the arrangement that the General Assembly believed was appropriate for State retirees who return to work for the State, it would be up to the General Assembly to amend § 5502 if it decided it was necessary.

00-25A – Post Employment—Insufficient Facts: A State employee asked if it would violate the post-employment law if he privately contracted to give training to a number of State agencies after he retired. A number of agencies discussed possibly contracting with him, but at the time there were no known details about those possible contracts. We must base our opinion on the particular facts. 29 Del. C. § 5807(c). As to those "possible contracts," there were no facts on which to base an opinion.

00-25B – Post Employment—Applies to Matters "Involving the State": A State employee had worked for two different agencies during his State career. While employed by those agencies, he developed and gave training programs to a number of other State agencies. He did not intend to contract with the two agencies which had employed him. Thus, he would not represent or assist his private enterprise before his own State agencies. However, he asked if he could privately contract to give training to another State agency. Based on the following law and facts, we found that such contract would violate the post-employment law.

(I) Applicable Law

Former State employees are restricted for two years from representing or assisting a private enterprise on matters involving the State if they are matters on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d) (emphasis added). They also are prohibited from improperly using or disclosing confidential information gained from public employment. *Id*.

(II) Application of Law to Facts

The post-employment law does not restrict the representation of former employees only to matters "involving the State agency by which they were employed." Rather, it restricts the conduct on matters "involving the State." Had the General Assembly intended to limit the post-employment conduct only to dealing with the State agency which employed the individual, it could have done so because it clearly restricted the representation of current employees "before the State agency by which they are employed." *See*, 29 Del. C. § 5805(b). To give meaning to the phrase "involving the State" we recognized that State employees could be responsible for matters which involved more than their employing agency. That was true in his particular situation. He developed training programs as an employee of the two agencies where he worked. But his responsibilities, at least while employed by one agency, were broader than just to the employing agency because he was tasked with developing training programs that applied to persons in any State agency. Thus, on the broad scale, the training programs were matters "involving the State." Next, that broad application must be placed within the other terms of the statute. *Commission Op. No. 96-75*.

Whether a "matter" he was responsible for while employed by the State was the same "matter" on which he would represent or assist his private enterprise, depended on whether the "matter" fits within the three discrete areas of the post-employment law--"matters" on which he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible. *Id*. For them to be the same "matter," there must be a "substantial overlap" of the facts. *Id*. Here, while employed by the State, he developed the concept of a particular program; he turned it into an 8-hour course; he presented the course; and it was offered to State employees from all agencies.

To decide if that program was the same "matter" on which he wished to contract, we looked at what he would present to the contracting agency to see if there was a "substantial overlap." For the contract program, he was taking a 2-hour segment of the 8-hour program which he conceived and developed for his former State agency. He would focus on the "core principles" in that 2-hour segment. Courts have held that even where there have been a few adjustments to the "matter" of the contract, it can be the same matter if the facts substantially overlap. *Commission Op. No. 96-75 (citing United States v. Medico*, 7th Cir., 784 F.2d 840 (1986)). While he intended to tailor the 2-hours to the particular agency, the program concept

was the same concept he developed while employed by the State; the 2-hour course was a direct abstract of the 8-hour course; and he would use the exact same "core principles." Moreover, the description of the purpose of the course was the same in the course he developed while employed by the State, as it was for the contract course he wanted to present. Accordingly, there was a "substantial overlap" between the courses, making the contract course the same "matter" for which he had been directly and materially responsible for while employed by the State.

00-20 – Post Employment—Working for Private Company on State Contracts: A Division Director who planned to leave State employment asked if she could accept a position with a private company and work on either of two State contracts the company had with a separate Division. As to one contract, the private employer was bidding on it, but it had not been awarded. The other contract was awarded while she was employed by the State. However, based on the following law and facts, the Commission concluded that: (1) as to the contract on which the company was bidding, she had absolutely no involvement in the matter; and (2) as to the existing contract, her only involvement was to coordinate events to insure that representatives of the private company were at State events to discuss the contractual services they offered with potential State clients. Thus, she was not directly and materially responsible for those contracts while employed by the State.

(I) Applicable Law:

For two years after leaving State employment, former State employees may not represent or otherwise assist a private enterprise on matters involving the State if they: (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). They also may not improperly use or disclose confidential information gained as a result of their State position. *Id*.

(II) Application of Law to Facts

In her State position, she had no decision making authority nor was she in any manner involved in putting together either contract or selecting contractors. Thus, she did not give an opinion, etc., as to the substance or awarding of the contracts. With the private company, she might be involved with the contracts as follows:

(A) The contract on which the company was bidding on: If awarded the contract, the company wanted her to be the contract manager. While employed by the State, besides not being involved with the contract, she had no dealings with the company on the contract in any way. Thus, it was not a matter on which she gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for while employed by the State.

(B) The existing contract: If the company was not awarded the above contract, it wanted her to manage the existing contract which was issued by a Division other than hers. That Division managed the contract and, under the contract, the private company managed a federally funded program. She was not responsible for the contract or the program while employed by the State. However, her office had a grant for a different program which was responsible for outreach and enrollment of children in certain programs, including the one managed by the private enterprise. Because of overlapping program goals in her Division's program and the contract program, her office coordinated with the private company to be at events, such as certain fairs, where people could learn of the programs. The private company

then assisted in enrolling those who were eligible. If she managed the private company's State contract with another Division, her former Division would coordinate with her to insure that the company's representatives would be available for such events. As her only involvement with the contract while employed by the State was to coordinate to insure that the company's representatives were available at such things as fairs, and another Division was responsible putting together the contract; awarding the contract; and managing the substance of the contract with the private company, she was not directly and materially responsible for the matter.

00-17 – Post Employment—Pension Offset Law Cannot be Waived by Commission: A State agency wanted to privately contract with a former State employee to perform the same job he had while employed by the State. Such conduct would violate the post-employment law. *See*, 29 Del. C. § 5805(d). The agency asked for a waiver so that the former employee would not suffer the "hardship" of the pension offset which is imposed when a retiree is re-hired by a State agency. *See*, 29 Del. C. § 5502. The Commission may waive the Code of Conduct provisions if there is an "undue hardship" on the agency or the employee. 29 Del. C. § 5807(a).

The Commission held that it would not grant a waiver so that the former employee could violate the post-employment law. It reached that conclusion because there was an existing law which permitted retirees to be re-hired by their former agency and work on matters for which they were responsible without violating the post-employment provision. *See*, 29 Del. C. § 5502. However, that law stipulated that if they were re-hired they would have a pension offset. *Id*. The Commission cannot waive any laws except the ones in Title 29, Chapter 58. *See*, 29 Del. C. § 5807(a). Moreover, the Commission can grant a waiver only if an "undue hardship" is established. *Id*. "Undue hardship" means "excessive or more than is required." *Commission Op. No. 97-18*. The mere fact that the former employee would suffer a pension offset if re-hired under the existing law and personnel rules for retirees was the very hardship that any former employee would experience. As the agency could hire him without violating the post-employment law, and as no "undue hardship" was established, we had no basis on which to grant a waiver.

00-12 – Post Employment—State Nurse to Private Nurse Practitioner: A State nurse left State employment to be a Nurse Practitioner at a Day Care Center. During her State employment, one of the Divisions she worked for contracted with the Center. She left that Division and worked for another Division before leaving the State. While at the first Division, she did not prepare the contract or select the Center as the contractor. However, she performed health assessments of the Division's clients who might qualify for care at the Center. Her State job entailed: functional assessments (e.g., could clients bathe themselves); portions of medical evaluations (e.g., blood pressure); and obtaining the clients' recollection of their medical history. That was part of the data used to decide if clients qualified for the State program. The medical assessment of the level of nursing home care needed by clients must be decided by a physician. The physician's level of care decision did not always agree with the level assessed by a State nurse. If there were differences, the State could discuss the issue with the physician. She was not responsible for such discussions or any decisions arising from them. She asked if her private employment would violate the post-employment law.

For two years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State if they are matters where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible, while employed by the State. 29 Del. C. § 5805(d). Former employees also may not improperly use or disclose confidential information gained through their public position. *Id*.

In applying the facts to the law, the Commission found that she did not give an opinion and was not otherwise directly and materially responsible for the State's contract with the Center. However, her post-employment activities may have required her to represent or otherwise assist that private enterprise on matters related to the contract in the following ways: (1) providing day-to-day nursing duties for the Center's clients, some of whom could be State clients. She would give clients medical care and develop a medical care plan. For a State client, the State may periodically come to, or contact, the Center regarding a client and she might be asked about a client's care; how they are responding, etc.; and (2) providing primary care in collaboration with a physician for the Center's clients and clients from surrounding communities. Again, some clients could be State clients. Her former Division may need the physician's medical assessment for certain programs. The physician might instruct her to perform physicals, etc., to aid in assessing the level of care. If there were a difference in the physician's assessment and the State's, the State may ask how the level of care was reached, which could include requesting information she obtained from the physical exam.

Obviously, in her State and private positions, she was a nurse. However, while the broad subject "matter" may be the same, the facts must overlap substantially in order for it to be the same "matter" on which a former employee gave an opinion, etc. *Commission Op. No. 96-75*. At her former Division, she did not provide day-to-day care to State clients. Regarding her State job to perform functional assessments, she would not perform functional assessments in her private capacity. Rather, she might be asked by the physician to perform physicals and the information she obtained may be used, with other information, by the physician to make an assessment. Thus, while the subject "matter" is nursing, the type of nursing responsibility at the State and the responsibility in her new job did not overlap sufficiently for her conduct to violate the Code.

00-02 – Post Employment—Timing of Two Year Restriction – Waiver Denied: A former State officer who headed a division wanted to represent private companies before that division. Based on the following facts and law, the Commission concluded that: (1) the conduct would violate the post-employment law; (2) it could not grant a waiver; and (3) the 2-year restriction took effect when the individual terminated employment with the State.

I. Facts

In a prior opinion to this State officer, the Commission held that he could operate a consulting business and engage in certain activities identified in that opinion, but was restricted from representing or assisting private clients in obtaining State contracts through his former division. The basis of that opinion was that as he was the Director of the Division, he was, among other things, directly and materially responsible for the laws and policies regarding contracting. *Commission Op. No. 99-43*. As the post-employment law restricts former State employees from representing or assisting private enterprises, for 2 years, on matters involving the State for which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible, to the extent his post-employment activities entailed representing or assisting private clients in obtaining State contracts, such action was prohibited. He was not precluded from consulting with clients on such matters as: obtaining private sector contracts; advising them on customer service, etc.

This request sought a waiver of the post-employment law on the basis that the Commission's prior ruling prohibited him from assisting small businesses in their attempts to obtain an equitable opportunity for doing business with the State. Further, he argued that

because he projected obtaining the majority of his consulting clients from persons who sought assistance in obtaining State contracts, the ruling would have "shut down" his consulting business. Second, he detailed a change in his circumstances which had resulted in a full-time job. Now, in addition to the consulting work, he was contemplating representing his full-time employer on a State-wide network contract. Third, in meeting with him on the request, he said he had certain other interests he would like to pursue relating to State contracts. Fourth, he wanted to know if the two-year restriction applied from the time he left his Division, or from the time he left State employment.

II. The Waiver Request

A waiver may be granted if the literal application of the statute is not necessary to serve the public purpose or there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a). Although he initially asked for a waiver, he said during the Commission meeting that he was no longer seeking a waiver. However, because he said that he wanted more "broad based strokes" to help him understand the law and because he said his position may continue to change in the future, and as he gave the Commission particular facts to deal with, the Commission addressed the waiver request based on those facts.

(A) Is the literal application necessary to serve the public purpose?

The public purpose of the post-employment restriction, as stated in our prior opinion is to insure the public's confidence that former State employees do not use information, influence and access acquired during their State service for improper and unfair advantage in dealings with the State after they leave public office. *Commission Op. No. 99-43*. The 2-year "cooling off" period in Delaware's post-employment law instills the public's confidence by preventing former employees from exercising undue influence on their former colleagues; obtaining a "leg up" for their clients over other competitors; or financially capitalizing on their former employment. *Id.*

To the extent that he was saying that small businesses would not get equitable treatment in State contracts, if he did not represent them, the statute does not authorize a waiver based on the needs of a private enterprise. 29 Del. C. § 5807(a). Moreover, while he was the Division Director, he worked with another State office to publish a Procurement Guide "designed to assist the small business person in his/her effort to contract with State agencies." Also, any business, small or large, could ask to be placed on the Division's list of vendors that wished to receive notice of all contracts the State puts out for bids. Thus, free assistance was available specifically for the small business person. He now sought to provide clients with the same assistance in obtaining State contracts that he provided in a free publication while he was a Division Director, which could be interpreted as financially capitalizing on his former employment.

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions. Similarly, the new procurement law enacted while he was a Division Director and in which he was involved, stated that its purpose was to create trust, fairness and equitable treatment for persons who deal with the State procurement process. 29 Del. C. §6901. Thus, the procurement law and the Code of Conduct have a common purpose of

achieving trust, fairness and equitable treatment in the conduct of and decisions made by government officials.

If a waiver were granted so he could represent and otherwise assist those small businesses on contracting with the State, it was not likely the public purpose of either the procurement law or the Code of Conduct would be served because it would raise the very concerns which the post-employment law, and the procurement law, seek to prevent--undue influence, favoritism, etc. Accordingly, no waiver was granted on that basis.

(B) Undue Hardship

The law does not permit us to grant a waiver on the basis of an undue hardship on a private enterprise, only if there is an undue hardship on a State employee or State agency. 29 Del. C. § 5807(a). Thus, no hardship waiver could be granted on the basis that any small business would suffer a hardship if he could not represent them. Further, no facts suggested any hardship on a State agency. Accordingly, the issue was if there was an undue hardship on him. The Code of Conduct requires that the hardship be "undue," which means "more than required" or is "excessive." *Commission Op. No. 97-18*.

He said that since he initially projected obtaining the majority of his private consulting business clients by offering them advice and assistance in obtaining State contracts when he initially started, that the Commission's prior ruling would have shut down his consulting business. However, in his previous request, he said he also intended to offer consulting services for such things as customer service improvement, business opportunities in the private sector, etc. We held that as such services would not entail representing or assisting a private enterprise before the State, he could engage in those consulting activities. His present request stated that he was now employed full-time by a company as its marketing director. Finally, while he stated that our prior opinion would shut down his consulting business, it appeared that he was still operating it as a side-line because in this request he asked for another ruling regarding a client who was seeking his consulting services. Thus, our prior ruling did not preclude him from having a consulting business. It limited that consulting business so that he did not work on matters which the post-employment law prohibits. The mere fact that a former employee cannot work on the same matters for which they were responsible, is not, by itself, an "undue hardship." *Commission Op. No. 97-18*. Rather, it is the very hardship imposed by the statute. *Id*.

In considering if an undue hardship waiver should be granted, the Commission, in the past, has considered the Code of Conduct provision which says "that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3). *Commission Op. No. 97-34*. Weighing this concern aids in insuring that citizens will accept public employment and also have the latitude to move to the private sector. Here, he had authority to operate a consulting business, with certain restrictions. He also had full-time employment with a private company. Clearly, he did have the latitude to move to the private sector. Accordingly, we found no facts to substantiate an "undue hardship."

III. Activities on Behalf of his Full-Time Employer for State Contracts

Regarding his full-time job, he said he would develop new business for the company, which provided information technology services. Such services would entail "network services." While employed by the State, his Division issued a State-wide contract for network services. In

his prior request he asked if his consulting business could represent private clients on that contract. We held that he could not represent or assist a private enterprise on that contract as it was created while he was the Division Director, and, by law, he was responsible for all central contracting.

In this request, he said that he will not be involved with the State's contract for network services for the next two years. However, he then went on to say that "if [...] is selected as a subcontractor" on the State's contract, "I will have no involvement in the contracting process since the primary vendor will be the lead contact" with his former Division. He said that his full-time employer plans to participate in the State's contract as a subcontractor. Apparently, the subcontractors had not yet been selected. The mere fact that the primary vendor would "be the lead" with his former division, did not mean issues could not arise under the post-employment provision.

The plain language of the Code not only restricts former employees from "representing," but also restricts them from "otherwise assisting" a private enterprise on matters "involving the State" if those matters are ones for which they were otherwise directly and materially responsible. 29 Del. C. § 5805(d). The Statewide network contract was a matter "involving the State." In our prior opinion we held that he was responsible for the matter. The mere fact that the primary vendor would be the "lead contact" with his former Division, did not necessarily mean that he would not be "otherwise assisting" the private enterprise on that matter. For example, if he acted as the company's representative to assist it in getting a subcontract with the contractors, he would be assisting it in obtaining a subcontract on a matter "involving the State" that was put together while he was the Division Director. Moreover, the contract specified that his former agency must agree to and approve the subcontractors. Because we held that it would be improper for him to represent or otherwise assist his private consulting clients on that network contract in our prior opinion, if he represented or assisted his full-time employer in getting the subcontract, which his former colleagues approved, the only difference was that he changed who he would represent or otherwise assist. It raised the same issues of undue influence, obtaining a "leg up" for the private enterprise, and financially capitalizing on his prior position. In effect, the public perception would be that he was trying to do through the backdoor what we would not permit him to do through the front door. The public's concern of undue influence or favoritism could be heightened by the fact that his full-time employer bid to be the primary vendor but was not selected. A few months later, it hired him and he now sought to assist them in getting a portion of the very contract which they were denied. Clearly, that did not instill the public's confidence in the integrity of its government, as it could have raised the appearance that he would use the influence which resulted from his State employment to obtain a subcontract on a matter for which he was responsible. This did not mean that the company could not seek to subcontract; only that he could not represent or assist them in obtaining the subcontract.

He also asked if he could represent and assist his full-time employer in obtaining network contracts with State agencies for services which were independent of the State network contract. The example he gave was that if an agency had a need for "maybe a website," and the contract was for less than $50,000 then it would not have to be publicly noticed and bid. Rather, he said the agency could contract directly with a company. The problem, as we saw, it was that the laws and policies on when, and how, a State agency could directly contract come into play when agencies are deciding if it was appropriate to deal directly with the contractor. In our prior opinion we held that, by statute, he was responsible for those laws and policies. Specifically, by law, he chaired the committee that set the standards for such "small purchases" for all State agencies. Moreover, he was involved in writing the State-wide law that established

the committee and the issues it addressed. Additionally, while he was the Division Director a contract was issued for various computer services, which identified a particular contractor who provided services for websites. Perhaps more significant was that all State agencies that participated in central contracts were required to have the appropriate agency staff participate in user groups, which were established, convened and chaired by him as the Division Director. The significance of this was that those same agency persons were the persons he would work with to get a direct contract with their agency. This would place him in the position of dealing directly with the key people he dealt with as chair of the user group. The effect was that he would "represent and assist" his full-time employer in matters "involving the State," and it would require his expertise on matters on which he gave an opinion and was directly and materially responsible for while employed by the State. The effect on the public's confidence in the integrity of its government would be that he would be able to obtain a "leg up" over his employer's competitors because he basically wrote the rules for the "small purchase" procedures, and would be representing and assisting it before the various agencies key staffers who were part of his user group.

IV. Other Clients He Would Like to Represent/Assist in Getting State Contracts

He had other interests he would like to pursue and said it was not clear to him if, under our prior ruling, he would be able to engage in the activity. The example he gave was that a private client approached him in his consulting capacity to see if he could help it obtain State contracts for designing and printing brochures, etc. He asked if the Commission's prior ruling would permit him to go before agencies other than his former division.

We first noted that merely changing clients did not affect the application of the law. Since we had just ruled that he could not represent or assist his full-time employer to obtain contracts with other agencies, we had to be consistent in our ruling. However, to aid him in understanding why the results were the same in this opinion and our prior opinion, we again note: (1) The post-employment law does not limit the restriction to working on matters involving the former employee's prior agency. Rather, it limits working on matters "involving the State," if they are matters in which the former employee gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for while employed by the State. (2) In his case, the statute was clear that as the Division Director, his responsibilities were beyond just his agency. Specifically, by law, his "powers, duties and functions included central contracting for material and services throughout the State." (Citation omitted). He made the appointments to, and chaired, the committee which had the responsibility to "advise as to the effectiveness of and make recommendations for changes to the State's procurement laws, policies and practices." (Citation omitted. He also was responsible for the user group which consisted of the key staffers from all State user agencies. (Citation omitted). (3) It raised the specter that he could use his former position to get a "leg up" for his client or exert undue influence on those making the contract decision because: (A) he wrote the rules of the small purchase procedures; (B) those rules apply to all State agencies; and (C) he worked directly with the key persons who would make the agency decision.

V. Does the 2-year Restriction Apply from the Time He Left His Division or from the Time He Left State Employment?

He worked for the Division for six years and approximately one year prior took a job with another State agency. He asked if the 2-year "cooling off" period started when he left the Division or whether it started when he left the other State agency. The statute is clear that the time restriction begins after the person leaves State employment. It says: "for a period of 2

years after termination of his employment or appointed status with the State..." 29 Del. C. § 5805(d). If the language is clear and unambiguous, the words must be given their plain meaning. *Coastal Barge Corp. V. Coastal Zone Indus. Control Board*, Del. Supr., 492 A.2d 1242, 1246 (1985). However, as courts have given "some weight" to the argument that the lapse of time is one factor to consider in deciding if the activity is the same "matter," we have also considered whether the lapse of time changes the "matters" for which a State employee was responsible. *Commission Op. No. 99-16 (citing CACI, Inc.-Federal v. The United States*, Fed. Cir., 719 F.2d 1567 (1983) (post-employment contract was not the same "matter" because of elapsed time and difference in scope and approach).

In *Opinion No. 99-16*, a former State employee asked to contract with the State on a computer payroll program. She worked on a computer payroll program approximately ten years prior. In that time period, the computer system, the data for the system, etc., had radically changed because of new technology and new criteria for the payroll program, etc. Under those facts, we held that the lapse of time resulted in the program not being the same "matter" for which she had been responsible. In our prior opinion to him, and in this opinion, we noted that the "matters" for which he was responsible were matters such as the laws, rules and regulations governing procurement. He was directly involved in the procurement laws that passed in 1996; the rules and regulations implementing those laws; chaired the contracting and purchasing committee; co-authored the Procurement Guide for Small Businesses, etc. When asked what negative effect it would have on him if we concluded that the two-year period started when he terminated State employment, he said that the network services contract would be up for renewal in 2001 and he wanted to represent his full-time employer when the contract was renewed. We noted again that the network services contract was a matter that was decided when he was the Division Director. No facts indicated that the lapse of time between when he left the Division and moved to a different State agency resulted in any significant change to the procurement laws, rules and regulations, or the substance of the network contract. Thus, the 2-year period started when he terminated State employment.

99-48 – Post Employment—No Contact; No Representation; No Assistance—No Violation: Legal Counsel for a private company asked if it would violate the post-employment law if a former State employee went to work for the company if she agreed not to: (1) contact her former office for any business purpose and (2) represent or assist the private enterprise in any matter involving her former office. Based on the following facts and law, the Commission found no violation.

While employed by the State, the employee gave input on tasks incorporated into a program which was contracted out. She left State employment to work for a private company before the State issued the solicitation for bids. The former employee contacted her former State office, asking when the solicitation for bids would be issued. The State agency, apparently concerned about her involvement, initially said the private company could not bid on the contract because the former State employee worked there, and it would violate the post-employment law.

The company's attorney, contacted the Commission's legal counsel for information on its interpretation of the post-employment law. Having reviewed the statute and the Commission's interpretations, the company's attorney wrote to the State agency, and advised it that the private company would isolate her not only from working on the contract, but on anything concerning her former office. The company's attorney believed those restrictions would avoid a violation of the post-employment law. Although the State agency apparently was no longer saying the

private company could not seek the contract, the former employee decided to seek an opinion from the Commission.

As the company's attorney observed in her letter to the State agency, the statute does not ban a private enterprise from seeking State contracts merely because they hired a former State employee. Rather, it restricted the former employee's conduct on behalf of the private enterprise on matters in which they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). The restriction is meant to balance two concerns: (1) that State employees do not use their former position as a means to obtain a "leg up" for the private enterprise over its competitors by using their prior connection to exert undue influence on former colleagues, while (2) encouraging citizens to seek public employment by giving them the latitude to find employment in the private sector without "unduly circumscribing their conduct." *See*, 29 Del. C. § 5802. Thus, we have held that the statute is not violated if the former employee is employed by a company which contracted with the State as long as the former employee did not work on matters which fall within the three discreet areas identified in the statute. *See, e.g.*, *Commission Op. Nos. 94-05; 96-71(B).*

Here, the former employee did not make the final decision on the terms of the contract, but she gave input on tasks that became part of the contract. Thus, she gave an opinion on those matters. However, she had agreed not to represent or assist the private company on that contract. Moreover, while the statute restricted her activities in only those three discreet areas, she had agreed not to contact her former office regarding any business matter for the two-year period. As the former employee will not represent or assist the private company on any matter involving her former State office, then she clearly would not be representing or assisting them on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible for while employed by the State. Accordingly, her conduct did not violate the post-employment law.

99-47 – Post Employment—Time Changes "Matter" Again: The contract a former employee sought was within the 2-year time frame after he left State employment. However, the contract was with a State agency where he worked more than 20 years ago. Thus, the question was if the "matters" on which he sought to contract are ones on which he: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d).

The substance of the contract was conceived years after he left one agency and went to work for another before retiring, he was not involved in any funding decisions; the drafting of the agreement; or the substance thereof. Moreover, he said that the decisions in implementing the program, obtaining funding, and writing the contract, etc., were not made by any of the agency's employees with whom he worked more than 20 years ago, as the only person still in the agency with whom he worked held a secretarial position. The contract would require him to deal with some non-government entities which he dealt with 20 years ago, but the substance of the project was different from the substance of his work 20 years ago. The project also required work on strategic planning, which he had not done. As the contract called for him to work with non-government agencies, he would not work on any issue dealing with the agency which most recently employed him. Thus, he would not be representing or assisting his private entity before his more recent employer.

Based on those facts, he would not be working on matters in which he gave an opinion, conducted an investigation, or was otherwise directly and materially responsible while employed by the State, which is prohibited by the post-employment law, 29 Del. C. § 5805(d).

99-45 Post Employment—Working for Firm that May Contract w/ State in Future: A State employee accepted employment with a company which previously contracted with her former agency. It no longer had the contract. Based on the following law and facts, such employment would not violate the post-employment provision.

For two years after leaving State employment, State employees are restricted from representing or assisting a private enterprise on matters involving the State, if those matters are ones on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. 29 Del. C. § 5805(d). Former employees also may not improperly use or disclose confidential information gained as a result of their public position. *Id*.

The employee's employment with the private company would be in business development. She would prepare the company's documents; develop and present business proposals; and research new business opportunities. Because the company dealt with many government agencies, not only from Delaware, but other States, she could be developing business proposals that would be presented to Delaware State agencies. However, the company would not assign her to work on any projects related to her former agency during the 2-year restricted period. Thus, while she put together parts of the agency's contract as enhancements were made, the private company no longer had that contract. Accordingly, she would not be representing or assisting them on that matter. Even if the company were re-selected under a blanket bid, since she would not be working on any projects related to her former agency, she would not, during the 2-year restricted period, be working on matters on which she gave an opinion, conducted an investigation or was otherwise directly and materially responsible, which is prohibited by the post-employment law. 29 Del. C. § 5805(d).

99-44 Post Employment—River and Bay Authority Not a Private Enterprise: A State employee was leaving a position with a State agency to work for the Delaware River and Bay Authority. Based on the following law, the Commission concluded that the post-employment law did not apply in the particular situation.

The post-employment law restricts former State employees from "representing or assisting a private enterprise on matters involving the State..." in certain matters. 29 Del. C. § 5805(d). "Private enterprise" means "any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the State or of any political subdivision or of any agency, authority or instrumentality thereof." 29 Del. C. § 5804(8).

The Delaware River and Bay Authority (the "Authority") is a bi-state agency created by a compact between the States of Delaware and New Jersey, 17 Del. C. § 1701, *et seq.* (the "Delaware-New Jersey Compact"). Delaware Courts have held: "The Authority is a creature of an interstate compact entered into between the State of Delaware and the State of New Jersey and it is a governmental agency of both states." *The Delaware River and Bay Authority v. Gauntt Construction Company*, Del. Ch., C. A. No. 9952, Hartnett, V.C. (January 19, 1989). As the authority was a governmental agency of Delaware and New Jersey, it was not a "private

enterprise" as defined in the Code of Conduct. Thus, the two-year post-employment restriction would not apply to employment with the Authority. Even if the post-employment law applied, the employee would not be working on projects for the Authority which were worked on at the other State agency. The River and Bay Authority wrote its own construction contracts and the individual would work on its contracts. That would not constitute representing or assisting it on the other agency's matters or where the individual gave an opinion, conducted an investigation or was otherwise directly and materially responsible, which are the circumstances set forth in 29 Del. C.§ 5805(d).

99-43 Post Employment—Consulting on Matters for Which Employee was Responsible: A former State employee asked if it would violate the Code of Conduct if he started a consulting business to assist clients in improving certain areas of their businesses including obtaining State contracts. Based on the following law and facts, we concluded that representing and assisting clients to obtain State contracts raised ethical issues because of his former State position.

The employee initially worked for one agency a number of years then moved to another agency, not long before he decided to retire. He was developing a private consulting business, and planned to ultimately make it his full-time career. Accordingly, the applicable Code section is the 2-year restriction on former employees representing or assisting private enterprises on matters involving the State if they are matters where the individual gave an opinion, conducted an investigation; or was otherwise directly and materially responsible during State employment. 29 Del. C. § 5805(d).

As a consultant, he wanted to consult with Delaware businesses to assist them in, among other things, obtaining State contracts. He did not plan to represent clients before the agency by which he was most recently employed, but wanted to represent clients before the Division he worked in for many years before moving to the other agency. As noted above, for two years after leaving State employment, he could not represent or assist a private enterprise on matters involving the State. 29 Del. C. § 5805(d). From his description, apart from helping clients obtain contracts, he wanted to help clients improve their management practices and strengthen their customer service. Those activities would not involve the State. He also would help his clients get business within the private sector. Again, that activity would not involve the State. Accordingly, he could engage in such activities.

However, because representing and assisting his clients in obtaining State contracts, would clearly be matters involving the State, the issue became whether such activity involved matters on which he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible. If so, then the two-year restriction applied. The Commission had issued a previous opinion to him recognizing that, by law, he was responsible for duties and functions relating to contracting. *Commission Op. No. 98-30*. Also, he said he was a "policy maker." He also was a non-voting member of an advisory council which was created to advise on certain aspects of procurement laws, policies and practices. He appointed people to the council, and also chaired a committee which monitored the effectiveness the procurement process, recommended changes, and established other policies and procedures. He also was intimately involved in legislation impacting procurement.

To permit him to engage in the proposed activities would distort the purpose of the post-employment provision. The post-employment restriction was designed to prevent former employees from getting a "leg up" on other private enterprises that deal with the State. *Commission Op. No. 95-11*. We have noted that the post-employment law, like other conflict of interest statutes, attempts to insure public confidence in the integrity of the government. *Id*.

(*citing "Ethics in Government Act," Senate Report No. 95-170*, p. 32). Public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id*. The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id*. at 33. Thus, the restriction is to diminish the actual or perceived potential for using State office for personal gain, or improperly influencing former colleagues. The Delaware General Assembly set a 2-year "cooling off" period in recognition that with time, a former employee's actual or perceived potential for improperly influencing former colleagues/employees, or the use of public office for private gain is reduced.

Here, he set the very policies which his former employees/colleagues would apply. Having made the policies himself, and having his former employees make the decision certainly could appear to result in the very thing the statute is meant to prevent-undue influence on former colleagues and obtaining a "leg up" on competitors. The issue of how the laws and policies he established should be interpreted could be critical to making decisions. For example, he said he wanted to be involved in professional services contract. His own explanation was that professional services contracts are unlike material contracts. In the latter, there are objective criteria that can be used in deciding if a contract should be awarded, e.g., the number of beans that should be in each can. However, he said professional services contracts were "a bit more nebulous." This meant that the opportunity to influence could be greater in those types of contracts.

Because representing and assisting private clients in obtaining State contracts would constitute matters for which he was directly and materially responsible, such activity would violate the post-employment law.

99-40 Post Employment—Restriction Not a Total Ban on Working on "Matters" Involving the State: A former State employee accepted a job with a company which did business with his former agency. In his request, he said that the post-employment law "prohibits former employees to work on any state job, for two years."

(A) Applicable Law

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

(B) Application of Law to Facts

First, in his correspondence, the employee said the post-employment restriction "prohibits former employees to work on any state job, for two years." He was informed at the Commission's meeting that the law does not impose a complete ban on working on matters involving the State. Rather, the General Assembly recognized that to encourage citizens to assume public office and employment, the standards of conduct must not "unduly circumscribe" the activities of State employees. 29 Del. C. § 5802(3). We have noted that to achieve that purpose, the General Assembly, rather than placing a total ban on working for a private enterprise on matters before the State, chose to limit the restriction to the three discreet

triggering provisions identified in the statute. *Commission Op. Nos. 98-12; 97-21; 96-75*. Thus, we considered the particular facts in the context of whether there had been an infringement in any of those three discreet areas.

During his State employment, he worked for a number of years in a section that dealt with private consulting firms. During that time, he was not involved in the consultant selection process. Thus, he did not give an opinion and was not directly and materially involved in awarding any contract to the private firm which sought to hire him. As to the matters for which he was responsible, his work was such that he worked on very specific projects. He identified 11 projects he worked on for the State. Nine of those projects had been completed, at least in his area of expertise. The private company had no involvement in the other two projects. Thus, he would not be representing or assisting the private company before the State on those matters. He expected the private company would be involved in new projects and would want him to work on those matters. New projects would not be matters on which he worked while employed by the State. Moreover, the work the company would want him to perform on the projects was not in the same area of his expertise on the State projects. Thus, as to those new matters, he would not be representing or assisting the company on matters on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible for while employed by the State.

(C) Conclusion

As he would not be representing or assisting the company on those matters on which he worked for the State, and as any new projects would not be matters on which he gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for at his State agency, we found no violation of the post-employment restrictions.

99-33 – Post Employment—Time Can Change the Definition of "Matter": A State employee asked if it would violate the post-employment law if she privately contracted with an agency after she left State employment to work on a computerized accounting program. While employed by the State, she had worked on such a program but a number of years had elapsed and during that time the program had changed. Based on the following law and facts, the Commission found that because of the substantial changes in the program since she last worked on it, that it was not the same "matter" for which she had been responsible for while employed by the State.

(A) Applicable Law

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

(B) Application of Law to Facts

Twelve years ago, a State employee for an agency dealt with its accounting system. She left that agency and worked in a number of different agencies in subsequent years. In her most recent State job, the agency was not on the State's financial management and payroll system. The passage of time can be given "some weight" in deciding if the activity is the same "matter." *Commission Op. No. 99-16* (*citing CACI, Inc.-Federal v. United States*, Fed. Cir., F.2d 1567 (1983)). In applying the passage of time, the question is if, during that time, the "matter"

underwent a change sufficient in scope such that it is not the same "matter." *Commission Op. No. 99-16.*

Here, while she had worked on an accounting system for the State, and wanted to work on an accounting system under the private contract, the agency which sought to contract with her said there were very specific differences between the program she had worked on and the program on which it wanted her to contract. Additionally, she had no responsibilities for developing the new program; was not contracting with any of her former State agencies; and would not develop the system as she did at her agency 12 years ago. Rather, she would identify the contracting agency's processes and decide how that information fit into the new system so the data could be converted and cleaned-up, and explain how the new system worked to program users. Thus, consistent with *Commission Op. No. 99-16,* it did not appear that she was contracting on the same "matter."

(C) Conclusion

As we find that the former employee was not contracting to work on the same "matter" because of fundamental changes in the system, we found no violation of the post-employment provision.

99-29 – Post Employment—Private Employer Contracts w/ Former Agency: A State employee asked if it would violate the post-employment provision if, after retiring from the State, she accepted employment with a private company which contracted with her agency. Based on the following law and facts, we concluded that it would not violate the post-employment provision.

(A) Applicable Law

For two years after terminating State employment, the Code restricts State employees from representing or assisting a private enterprise on matters before the State in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(c). They also are prohibited from improperly using or disclosing confidential information. *Id*.

(B) Application of Law to Facts

The private company the employee wanted to work for contracted with her State agency. She was not responsible for selecting any contractor, including that company, or for overseeing if the company complied with the contract. Thus, as to those matters, she did not give an opinion, nor was she directly and materially responsible. Some duties with the private company did not include representing or assisting the private company before the State, as the duties were internal with the private company.

The employee served on a committee that dealt with placement of State clients in the program run by her private company, but would not be representing or assisting the private company before that committee because no contractors were invited to those meetings. Additionally, she did not anticipate that the private company would ask her to represent or assist them in responding to any new contracts or contract renewals during the two-year time frame imposed by the post-employment provision. If they should ask, she said she would seek advice from the Commission on whether she should participate.

One interaction she expected to have with her former agency was to provide information on the private company's programs in Delaware to unit meetings of certain State employees with whom she had worked while employed by the State. Thus, she would be representing the company before her former employees. She said that all contractors met with the agency's staff at least once a year to update them on changes that occurred in the contract services. For example, contractors may introduce new staff members; discuss services they had added; or discuss services they would no longer provide. The post- employment restriction on representing or assisting private enterprises is designed to prevent former employees from getting a "leg up," through undue influence on their former colleagues, on other private enterprises that deal with the State. *Commission Op. Nos. 95-11 and 97-18*. Here, she clearly would be representing the private company on matters before her former staff. However, the Commission noted that the agency staff before whom she would appear did not decide which contractors would be used; the company already had the contract with the State; every contractor gave those presentations; the meetings were limited in number; and the substance (introducing new staff, etc.) of her representation, were facts that diminished the possibility that she would be using her former State position to obtain a "leg up" for her private company. She also said that in the 30 years she worked for the State, every private agency in Kent and Sussex County for which she could go to work had contracted with her Department, which would make it next to impossible for her to secure employment in her career field.

(C) Conclusion

The Commission concluded that there was no technical violation of the post-employment restriction, and even if there were an improper public perception, it would grant a waiver because her interaction with her former staff would be on a limited basis; all contractors had the same opportunity; the staff did not make the contracting decisions; and her employment opportunities would be severely limited.

99-28 – Post Employment—Responding to Agency's RFP Regarding Federal Regulation: A former State employee went to work for a private consulting firm which wanted to respond to a Request for Proposal (RFP) issued by an agency other than her former Department. For the following reasons, we concluded that participation, on behalf of the firm, would not violate the post-employment law.

(A) Applicable Law

Former State employees are restricted from representing or assisting a private enterprise on matters involving the State for 2 years, if those matters are ones on which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. 29 Del. C. § 5805(d). They also are restricted from improperly disclosing or using confidential information gained by their public position. *Id*.

(B) Application of Facts to Law

An agency issued an RFP seeking technical assistance in implementing a particular program. The contractor would be required to:
(1) Analyze the final Federal Regulations relevant to the substance of the contract;
(2) Prepare documents for: (a) waivers if there were inconsistencies; (b) the FY 2000 State Plan for the project; and (c) a Caseload Reduction Report; and

(3) Recommend budget and program modifications to an existing relevant program.

The legal issue was whether as a State employee, she gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for the same matter while employed by the State. The "matter" was the RFP and the substance thereof. First, as to the RFP in general, it was issued by an agency other than hers. It dealt with issues in which her former agency was not involved. She was not involved in putting together the RFP. Thus, she did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for the RFP while employed by the State. As to the RFP content matter:

Item 1--The Federal Regulations to be analyzed were issued four months after she left her State position. She was not involved in those Federal Regulations during her State employment. Rather, her understanding of the federal laws on this particular program resulted from employment with the federal government before coming to work for the State. The regulations were to be analyzed within the framework of a waiver on the subject matter obtained by the State when she worked for the federal government. She was not involved in putting together the waiver request or implementing the request while employed by the State, as her Department was not responsible for such matters. Thus, she did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for that matter while employed by the State.

Item 2—(a) Waiver regarding inconsistences - She was not responsible for preparing any such document while employed by the State, so she did not give an opinion, conduct an investigation, and was not otherwise directly and materially responsible for the matter while employed by the State.

(b) FY2000 State Plan - While employed by the State, she had no direct responsibilities for developing or implementing this program; nor did she participate in or have input into the State Plan. However, there were two circumstances which resulted in a connection between her State Division and program clients or funds. (1) Her division investigated certain allegations and it may have investigated clients who were eligible for the program under the contract. However, her division investigated matters other than whether the clients were eligible for the contracting agency's program. Thus, in her State capacity, she did not give an opinion on whether the clients were eligible for the program, as that decision was made by the contracting agency; nor did her division's authority or decisions to investigate entail consideration of program eligibility. The legislation relating to the program also set time limits on receiving benefits and imposed certain sanctions that may result in families losing program benefits. The contracting agency decided if families would lose eligibility. It continued to track families after they lost program benefits, and hired a private contractor to periodically contact and assess the families. Among other things, the contractor assessed the families on matters related to the area investigated by her agency. Her agency did not develop the contract or select the contractor, as that was done by another agency. However, in developing the contract, the agency worked with her staff to develop an interagency agreement to identify procedures and protocols to be used by the contractor in areas that her agency investigated. If the contractor, in assessing the families, also found problems related to the area investigated by her agency, a referral was made to her division for investigation. Again, the client's loss of program benefits or eligibility had no bearing on her agency's investigatory decisions. If no problems were found, the contractor issued a report to her and to the agency which hired the contractor. The RFP to develop the FY 2000 plan did not encompass procedures and protocols to identify areas investigated by her former agency. Thus, while she worked on that matter while employed by

the State, it was not a matter that would be addressed by the RFP. (2) The RFP would institute a plan for the use of program funds. As a State employee, she did not make decisions about the use of the program funds. However, her division, as part of its FY 99 budget request sought an increase in the number of State employees in her division through the General Fund. Although her agency sought the positions, the Budget Office, in negotiations with another agency, decided to fund the positions from the program funds, not the General Fund. As she did not participate in that decision, she did not give an opinion, etc., on the use of any program block funds for the positions. Although the program funding for the positions began six months after she left employment, a supervisor was hired for one of the program-funded positions before she left. Tracking the use of the program funds for the position was the responsibility of another division within her Department, without input from her Division. Thus, she did not give an opinion, etc., on any financial accountability for the funds.

(c) Caseload Reduction Report - While employed by the State, she was not involved in caseload reduction reports regarding the program recipients. Thus, she did not give an opinion, etc., on this matter.

Item 3--Budget Program and Recommendation on Existing Relevant Program. The agency issuing the RFP ran this particular program in conjunction with another Department. She was not involved in this program. Thus, she did not give an opinion, etc., on this matter.

Item 4--Duties after responding to the RFP. If her company was selected as the contractor, the follow-up duties would include working with a team which would work with the State to prepare the FY2000 State plan; attend public hearings on the program; help the State maximize the percentage of clients who were participating in appropriate work; and keep the State from suffering any penalties under program guidelines. She was not responsible for those matters while employed by the State.

(C) CONCLUSION

For the above reasons, we found no violation if she participated on behalf of her private employer to respond to another agency's RFP regarding the particular program.

99-27 – Post Employment—Engineering Work for a Private Firm: A former State employee asked it if he could work for an engineering company without violating the post-employment law, since he would not work on the same projects he worked on for the State. Based on the following law and facts, the Commission found no violation.

(A) Applicable Law

Former State employees are restricted, for 2 years, from representing or assisting a private enterprise on matters involving the State, if the matters are ones where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible while employed by the State. 29 Del. C. § 5805(d). They also may not improperly use or disclose confidential information gained as a result of their State position. *Id*.

(B) Application of Law to Facts

A former State employee held a position in the State in the area of engineering. He did not immediately go to work in that field, but later decided to pursue a career in engineering and

was offered a position with a firm which contracted with his former agency. While employed by the State, he was not involved in selecting contractors. Thus, while employed by the State, he did not give an opinion and was not directly and materially responsible for selecting the firm for any contract. The substance of his work for the State dealt with engineering aspects on a number of State projects. Those projects had been completed, so it was not expected that he would be representing or assisting the firm on those matters. The projects the company wanted him to work on were not projects he worked on while with the State. Thus, he was not responsible for those matters. If the company were selected for other agency projects it was not expected that they would be projects on which he worked while with the State. However, he and the representatives of the private company indicated that in the unforeseen event that such a project should arise, he would remain aware of the post-employment restrictions and return to the Commission if additional advice was needed.

99-25 – Post Employment—Agency Contractor: A State employee accepted employment with a private enterprise which contracted with his agency. He asked for a waiver if the employment violated the Code. Based on the following law and facts, the Commission concluded that his employment would not violate the Code, if he did not represent or assist the private enterprise on certain matters, as detailed below.

(A) Applicable Law

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after leaving State employment, 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). They also may not improperly use or disclose confidential information gained from their public position. *Id*.

(B) Facts

The State employee said he managed contracts from award to completion. In managing the contracts, he had daily contact with contractors, material producers, subcontractors, and consultants on manpower requirements. Also as part of his duties, a number of years ago he was on a three-member Shortlist Panel. The panel reviewed responses to Request for Proposals (RFPs) to his agency and discussed the abilities of the various companies to perform the contracts, e.g., which was best suited for the job based on facts such as competence, availability, manpower, etc. The firm he wanted to work for was one of more than a dozen which submitted responses to the RFP for a services agreement. It was primarily for another section in his agency, but his section piggybacked so it could staff projects for peak demands. After the discussions, the Panel recommended five (5) applicants to the final selection committee. The firm which sought to hire him was one of the five (5). He was not on the final selection committee. The agreement was awarded to the company in 1997.

Approximately two years ago, he removed himself from the Shortlist Panel to avoid making decisions regarding contractors because he was aware of the post-employment law. He had not served on a Shortlist Panel since then, and had made no decisions on responses to RFPs from the firm or any other contractors which submitted responses. After the agreement was awarded, his involvement with the company consisted of working with his supervisor and subordinates on staffing requirements and notifying the company of those requirements to meet the contract demands. In essence, he was a "people mover": identifying the people skills needed at a particular site; contacting the firm regarding the need; and insuring that it provided the right people, at the right place, at the right time. Neither he, nor his district, evaluated the

company's contract performance; that was done by another section. He had no dealings with the firm on matters other than this particular agreement. If employed by the company, he would be their "people manager." That is, if his former agency contacted the company, needing people at certain locations, he would identify the skilled people; send them to the location; etc. However, the company said he would have absolutely no involvement with the agreement on which he had served on the Shortlist Panel and had subsequently dealt with the company. The firm said its intent, though not finalized, would be to have him assume a role on a future project which it had with the agency. He said that while employed by the agency, he was in no manner involved with that project. He said that the company had "not finalized" whether he would work on that future project because it was still working on the details of assignments, but he definitely would not work on the agreement on which he had made decisions.

(C) Application of Law to Facts

The post-employment law is meant to strike a balance between two concerns. First, is the public's concern that government employees who hope to move to the private sector will favor firms they think may offer employment later and after government employees move to non-government employment, they may exercise undue influence on their previous government co-workers. *Commission Op. No. 96-75* (*citing United States v. Medico*, 7th Cir., 784 F.2d 840, 843 (1986)). Second, is the government's concern that it employees be able to move from private to public employment and back again so that the government can secure skilled employees who otherwise are unwilling to work in public service at current pay rates. *Id*. The Delaware General Assembly recognized those interests in its findings that the conduct of officers and employees of the State must hold the respect and confidence of the people, but also found that it is necessary and desirable that all citizens be encouraged to assume public office and employment, and that their activities should not be unduly circumscribed. 29 Del. C. § 5802. To balance those interests, the General Assembly set a two-year "cooling off" period during which former State employees are restricted in their dealings with the State, but limited the restriction to three "discreet and isolated transactions" which trigger the prohibition. *Id*. Thus, the Code does not completely ban former State employees from working for a private enterprise which had dealings with the State. Rather, the former State employees may not work on those matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. Former State employees are also restricted from improperly disclosing or using confidential information gained from their State employment. 29 Del. C. § 5805(d).

As he was on the shortlist panel and recommended that the hiring firm, and four (4) other companies, be considered for an agreement with his agency, and had dealt with the company on a routine basis regarding providing personnel, it appeared that he gave an opinion on the agreement and had been directly and materially responsible for the particular matter while employed by the State. However, as noted, he would not work on that agreement for the company. We have held that where a former employee gave an opinion on a State contract, he could accept employment with a private enterprise as long as he did not work on that specific matter. *Commission Op. No. 94-10*. Accordingly, here, it would not violate the Code if he worked for the company, as long as he did not work on this particular agreement, since he was not involved with other matters pertaining to the firm.

Regarding his expected involvement in the other agreement, while that may constitute representing or assisting the private enterprise on matters involving the State, he did not give an opinion, conduct an investigation, and was not otherwise directly and materially responsible for that matter while employed by the State. Delaware Courts have held that such representation

does not violate the post-employment statute. *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).

(D) Conclusion

As the Commission found that he would not be representing or assisting the firm on matters in which he gave an opinion, conducted an investigation, or for which he was otherwise directly and materially responsible, it found no violation based on the proposed activities. It noted that the firm had not "finalized" his assignments. Accordingly, he was advised to remain alert to the post-employment restrictions, and if necessary, return to the Commission if he needed further guidance.

99-22 – Post Employment—YMCA: WAIVER GRANTED: Dr. Timothy Brandeau asked if it would violate the post-employment law if he accepted employment as the Executive Director, Resource Center of the YMCA of Delaware, which had a contract with his State office. Based on the following law and facts, the Commission concluded that if he worked on that contract it would violate the post-employment provision; however, it would grant a waiver.

Former State employees may not represent or otherwise assist a private enterprise on matters involving the State, for 2 years after terminating State employment, if they gave an opinion, conducted an investigation or were otherwise directly and materially responsible for such matter in the course of official duties. State employees also may not improperly use or disclose confidential information gained by their public position. 29 Del. C. § 5805(d). "Private enterprise" includes both "for profit" and "not for profit" organizations. 29 Del. C. § 5804(8).

As Chief of Community Services for the Division of Youth Rehabilitative Services (YRS) in the Department of Services to Children, Youth and Their Families, Dr. Brandeau wrote the request for proposal (RFP) for a contract that was awarded to the Resource Center. He also was on the contract selection panel which selected the YMCA. That action occurred in 1996. The contract would be re-bid in FY 2002 (calendar year 2001). Because he wrote the RFP and served on the contract selection panel, he clearly gave an opinion and was directly and materially responsible for the contract. He said that if he were prohibited from accepting employment with private enterprises which contracted with the State on such matters, he would not be able to work in this field in Delaware, because he has been responsible for approximately 40 contracts dealing with services for delinquent youth.

To the extent that his statement reflected a belief that the post-employment law prevented him from working for any private enterprise which contracted with his agency, the Commission wished to clarify that the post-employment statute is not that broad. Rather, the provision is only triggered if former State employees represent or assist a private enterprise on matters in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. Thus, he could accept employment with the YMCA without violating the post-employment provision if he did not represent or assist them on the singular contract for which he was directly and materially responsible. *Commission Op. No. 94-05* (former State employee may work for private enterprise which contracted with his agency, but not on contract where he gave an opinion); *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). However, he said the YMCA could not isolate him from that single contract, and sought a waiver. The Commission may grant a waiver if the literal

application is not necessary to serve the public purpose, or there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a).

Ms. Babette Racca, YMCA's Vice President of Operations, stated that it would be a hardship on the YMCA because the YMCA had numerous contracts with State agencies and it would be a hardship if State employees were not available. Again, to the extent this reflected a belief that private enterprises are banned from hiring former State employees just because the company had State contracts, that was a broader interpretation than what is provided by the statute. Moreover, the authority to grant a waiver based on an undue hardship is limited to undue hardships on the State employee or the State agency. 29 Del. C. § 5807(a). Thus, we had no statutory authority to grant a waiver based on any hardship on a private enterprise. The purpose of the Code of Conduct is to instill the public confidence in the integrity of its government. 29 Del. C. § 5811.

The specific concern of the post-employment provision is to address the concern that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain. *Commission Op. No. 97-18*. The main reason for public concern is that while employed by the government, an official may make decisions favorable to a private enterprise to secure subsequent employment or may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id*. at 33. Reflecting that concern, post-employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id*. Here, the contract decision was made in 1996. Thus, his decision on that contract did not appear to have been predicated on a job opportunity with the YMCA which did not occur until some three years later. This minimized the appearance that the decision was made for personal gain. Additionally, while the contract was with his agency, the contract was actually a State-wide program and the bid panel consisted of multiple agencies, such as the Attorney General's office, the Public Defender's office, and others, again minimizing the possibility that he could use this opportunity for personal gain. Also, the possibility of giving the YMCA a "leg up" over competitors in the award of the contract was limited because the YMCA was the only bidder to submit a State-wide proposal, which more effectively achieved the contract purposes because otherwise the State would have had to have two or three contractors. Moreover, the contract would not be re-bid until FY 2002, which meant he would not have the opportunity to influence former State colleagues on the re-bid decision during the two-year "cooling off" period.

Since the contract was awarded, he had limited interaction with the YMCA, as its Vice President of Operations said that the YMCA had dealt with him perhaps five times in three years, as there were two levels of organization between him and the state employee who managed the contract. Similarly, at the YMCA, the person who would actually manage the contract would be two levels of organization removed from him. We also noted that when a waiver is granted, the rationale for permitting the State employee to engage in conduct which contravenes the statute, becomes available to the public so that they have the opportunity to realize that their concerns have been addressed. 29 Del. C. § 5807(b). Based on the multitude of facts which limited the possibility of any personal gain for him because of his State position, and limited the possibility of the YMCA obtaining a "leg up" over its competitors if he were permitted to work on that singular contract, when he would not be responsible for managing the contract, we granted a waiver on the basis that the literal application was not necessary to serve the public purpose.

99-21A – Post Employment—Non-Profit with State Contracts: A former State employee wanted to accept a job with a non-profit private enterprise which had contracts/grants with her agency. Some of the contracts/grants were with her former office. She was involved with each of those contracts/grants, as part of her State position. The private enterprise also had other contracts with other sections of her Department, but she was not involved in those matters. Based on the following facts and law, the Commission concluded that she could accept employment without violating the post-employment law if: (1) she did not represent or assist the private enterprise on certain contracts; and (2) she worked on contracts issued by other sections of her Department because she was not involved in those matters.

(A) Applicable Law

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after termination, if the matters are ones in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). Former employees may not improperly use or disclose confidential information gained while employed by the State for personal gain or benefit. *Id*.

(B) Facts

In her State position, some of the services provided by her office were achieved by contracting with private enterprises. While employed by the State, she wrote Requests for Proposals (RFPs) for contracts; served on contract selection panels; and exercised oversight of the contracts after they were awarded. She left State employment to work for a non-profit organization which had a number of contracts/grants with her former State office. She was involved with each of those contracts/grants, as part of her State job. In her private employment, she expected to oversee and supervise the non-profits administrator who oversaw three contracts with her former office to insure that the non-profit met its contract obligations. She also said that she had worked on a program to obtain a federal grant for her agency. The grant was awarded to the State and it was expected that the non-profit would compete for the grant money. She, and her former agency, sought guidance on whether it would violate the Code if she represented or assisted the non-profit in seeking that grant money. The non-profit had contracts with other sections of her department but she was not involved in those contracts.

(C) Application of Facts to Law

Contracts 1, 2 and 3: In each case, she was involved in writing the RFPs and was on the review panels which selected the non-profit as the contractor. Thus, she gave an opinion and was otherwise directly and materially responsible for the matters while employed by the State. If she represented or otherwise assisted the non-profit on those matters, it would violate the post-employment law. First, regarding any contract renewal, she said two of the contracts would not come up for renewal before the State within two years, at which point her 2-year post-employment restriction would have ended. The other contract was re-bid annually, but she would recuse herself from the competitive process on that contract. Thus, she would not be representing or assisting the non-profit in any contract renewal process during the 2-year restriction period. Apart from not participating in the contract renewals, she said that all proposals and contract budgets were prepared by the non-profit's contract administrator who was: well-experienced; had worked on the particular contract for a number of years; and could seek consultation on contract aspects from other parties in the company. The administrator would normally handle all issues requiring interaction with her former State agency, but she was

concerned that her level of involvement would increase if there were unforeseen circumstances, such as a catastrophic illness. No facts indicated a reason to expect such an event. We must base our opinions on a particular fact situation. 29 Del. C. § 5807(c). Thus, we could not speculate on what may be proper if a catastrophe occurred. Should that occur she could seek further guidance if needed. Thus, limiting the opinion to the particular facts, it did not appear that she would be representing or assisting the private enterprise on those matters because those duties were delegated to another employee who had handled those contracts for a number of years, and she was recusing herself from any contracting renewal activities.

Responding to RFP on State Grant: The State was expected to issue an RFP within the next month and would later select the winning contractor. She expected the non-profit to compete and asked if she should participate on behalf of the company in seeking the funding. In her State position, she participated in writing and developing the grant proposal to the federal agency which gave the State the grant. The federal grant application she wrote provided an overall framework of what was to be accomplished with the use of those resources. The RFP would be more specific about the requirements. While she did not write the RFP, she participated in the grant implementation committee which had general discussions of the RFP. The committee met twice monthly to discuss start-up and other issues related to implementing the grant. She also attended advisory committee meetings about the grant as a staff member to the project, and participated in several national and regional training conferences related to the grant. The latter activity included representation to a regional center which provided technical assistance to States which had such grants.

Her former agency asked if her participation would be a conflict, because "we genuinely don't know and so we need guidance on that." An agency representative said it would not want to go through a rather extensive RFP process, if some vendor who was not selected came back and challenged her participation. She also noted that the non-profit would not want to be disqualified because of her participation. The agency representative said that all stakeholders at the community and state levels were given the opportunity to participate at a training meeting earlier in the year to expose them to grant information to which the former employee was privy.

The post-employment provision is meant to insure that former employees do not use their former position to "get a leg up" on other competitors or use the influence they derive from their former employment to influence their former co-workers in making decisions. *Commission Op. No. 95-11*. Here, the non-profit had bid on and been awarded a number of State contracts. Thus, it seemed to have some expertise in responding to RFPs. It is unclear why it would need her expertise in responding to the RFP. Certainly, since she wrote the grant request for federal dollars for the program, in doing so she explained what would be done with the money and how it would be achieved. Since she convinced the federal government to fund the program, then she would have an intimate understanding of what program proposals the government would respond to--which would be the essence of the RFP. Moreover, she participated in twice-monthly meetings about implementing the grant and general discussions regarding the RFP, and attended national and regional training conferences regarding such grants. While all stakeholders had the opportunity to participate in a training meeting, it was unlikely that they could have acquired the intimate knowledge and familiarity she had with the program.

It could appear to competitors and the public that if she wrote the non-profit's response to the RFP it would have a "leg up" because she developed the grant proposal--the essence of the RFP. Additionally, competitors and the public could perceive that the non-profit could receive preferential treatment during the selection process because the RFP resulted from her project and her former colleagues would be involved in deciding who got the contract. Thus, it

appeared that her activity would violate both the letter of the law and the spirit of the post-employment provision.

Other Contracts with her Agency: The non-profit had other contracts with another section of her former agency, but she was not involved in those activities. As the post-employment provision is only triggered by working on matters where the individual gave an opinion, conducted an investigation, or was otherwise directly and materially responsible, we have held that where a former State employee had no input to or control over contracts with his former agency, it would not violate the post-employment provision if he worked on those matters for the private enterprise. *Commission Op. No. 94-11.* Accordingly, it would not violate the post-employment provision for her to represent or assist the non-profit on those matters.

99-21B – Post Employment—Home Visiting Program: WAIVER GRANTED W/ RESTRICTIONS: A State agency asked if the Commission would grant a waiver for one of its former employees to work for her private employer, a non-profit organization, on some matters for which she had been directly and materially responsible for while employed by the State. The non-profit had a number of contracts/grants with her former agency, but she did not intend to work on most of them. Rather, the agency sought a waiver so she could work on two matters for which she had been responsible.

Applicable Law

Former State employees may not represent or otherwise assist a private enterprise on matters involving the State for two years, if on those matters 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 disclose or otherwise improperly use confidential information gained in their State position. *Id*. "Private enterprise" includes both for profit and non-profit organizations. 29 Del. C. § 5804(8). However, the Commission may grant a waiver to particular prohibitions if the literal application of the law is not necessary to achieve the public purpose, or there is an undue hardship on the State agency or the employee. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings become a matter of public record. 29 Del. C. § 5807(a).

Lori Tudor, a former State employee asked if it would violate the post-employment provision for her to serve as Director, Programs and Services for Children and Families First (CFF). CFF has contracts/grants with her former office. She was involved with each of those contracts/grants, as part of her State position with the Department of Services for Children, Youth and their Families, Division of Family Services, Office of Prevention (OP). She and the agency sought a waiver for her to work on two matters, but she would not represent or assist CFF on other contracts for which she had been directly and materially responsible.

Home Visiting Program Contract - As a State employee she worked on developing the contract and was involved in reviewing the RFP language which was written by another unit of her State agency. However, she did not: write the RFP; participate in the review process of the bid applications; or select the contractor. CFF was one of three non-profits selected to fulfill the contract. As she worked on the contract development and reviewed the RFP language, such actions required an opinion by her and directly and materially involved her in the matter. Thus, if she represented or otherwise assisted CFF on the matter, it would violate the post-employment law. However, both she and her former agency asked for a waiver so she could represent CFF at meetings with the State and more actively participate in assisting CFF in

complying with the contract obligations. Part of the reason for the request was that the CFF employee who was responsible for the contract was recently hired and did not have the experience in budgeting, planning, proposal development, and participating in complex partnership and interactions with high level officials that the project involved. To the extent that evidenced a hardship on the private enterprise, the statute only gives us authority to grant a waiver based on a hardship for the State employee or State agency. *See*, 29 Del. C. § 5807(a). However, the State agency pointed out that the contract was a new initiative for the State, involving a number of State agencies and three non-profit organizations. When the contract was awarded, the agency anticipated that Ms. Tudor would be in-house and it would have the benefit of her 30 years of State experience in overseeing the program. We have held that the very hardship imposed by the post-employment provision is that a State agency loses the benefit of the experience of its former employees. *Commission Op. No. 97-41*. Thus, to have an "undue hardship" requires more. *Id*. What was significant about losing her expertise was that it came at a critical stage--when the program was in its "start-up" phase. Moreover, the agency had little lead time to make the transition because of her retirement shortly after the contract was awarded.

We also placed the facts in the context of the purpose of the post-employment provision which is to ensure that State employees do not use their public office for personal gain by making decisions that could result in employment opportunities for them or would result in giving the private enterprise a "leg-up" on competitors, or give them an unfair or improper advantage in later dealings with their former agency. *Id*. Here, although she was involved in developing the contract, she did not participate in the review process of the various bidders, and did not select the contractor. Also, the selection of CFF and the other non-profits involved was made by others before she was aware of any employment opportunity with CFF. Thus, no facts indicated that her decisions in developing the contract resulted from any prospective employment opportunities or so that CFF would have an advantage over its competitors. On a broader scope, she had made every effort to identify other matters with CFF where she could recuse herself, which indicated that where possible she did not seek to even create the appearance that she was trying to use her former position to give CFF a "leg up." Thus, the public concerns were diminished by the multitude of facts. Further, when a waiver is granted, the proceedings become a matter of public record so that the public can be assured that its concerns have been considered. 29 Del. C. § 5807(b). For all those reasons, we granted a waiver for her to represent and assist CFF on the matter.

Community Resource Committee-A waiver was also sought so that Ms. Tudor could represent CFF on a Community Resources Committee which would do such things as develop: a common language between prevention providers, citizens, and government; training for prevention professionals; and a means to assess prevention programs. The Community Resources Committee was comprised of more than 60 entities, both State and private, and anyone who wanted to participate could do so. From that group, working groups were established and would report back to the Committee. Her former agency would have a representative working with each working group as staff. She, nor her agency, expected that the Committee or the working groups would generate any funding opportunities. In her State job, she worked on the planning and led the initial Committee meetings. Thus, it appeared that she was directly and materially responsible for the matter while employed by the State.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the former employee or the State agency. 29 Del. C. § 5807(a). As noted above, the public purpose is to insure that former employees do not "get a leg up" on other competitors or capitalize on their former employment and unduly

influence former colleagues in their decision making. Here, CFF, through her representation and assistance, would not achieve a "leg up" on other competitors because the Committee was open to anyone, thus all had the same opportunity. Moreover, it did not appear that CFF, through her representation and assistance, would financially capitalize from her former employment, because the Committee would not be generating funding opportunities for any participants. It also does not appear that CFF would capitalize in any other manner because the nature of the Committee was to develop a cohesive program on common language, training and assessment based on input from a multitude of State and private organizations. Also, there would be few people from her former agency participating on the Committee by comparison to persons from approximately 60 other organizations, both private and State. Thus, we concluded that the literal application of the provision was not necessary to serve the public purpose and granted a waiver for her to participate on the Committee, which: (1) was open to anyone; (2) would not generate funding opportunities for CFF or any other organization that was involved; (3) would not permit the people from her former agency, who would serve as staff to the Committee, to generate or decide funding opportunities; and (4) because of its structure and nature, did not appear likely to result in people from her former agency showing any preferential treatment to CFF.

99-16 – Post Employment—Working on a Matter Years Before Retirement: A State agency asked to privately contract with a former State employee who had recently retired. The contract was to work on a system which she had worked on more than a dozen years before in her State capacity. It asked if the 2-year post-employment restriction applied, as it had been more than two years since she worked on the system.

(A) Applicable Law

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after termination, if the matters are ones in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). Former employees may not improperly use or disclose confidential information gained while employed by the State for personal gain or benefit. *Id.*

(B) Facts

In the early 70's through early 80's, the former employee led the development and design of a State system which the agency said might have a material relationship to the contract work which it wanted her to do. However, she performed the work for an agency other than the one that sought to contract with her. Also, in the early 80's she moved to another state position where she had only some limited managerial exposure to the system she had worked on, but did not deal with any systems development or design. Then, she moved to another state position at a higher managerial level. It did not involve working on the system. In the interim years, legislation was passed which resulted in implementing a new system. The system changes had been going on for years. The agency wanted to contract with her to work with several State agencies to insure an accurate conversion to the new system. During her State employment, she had not worked with the new system. Initially, the agency approached her after retirement, but she was not interested in getting involved in an intensive project. It then sought out other persons with applicable knowledge without success, so it went back to her and she agreed to accept the work.

(C) Application of Law to Facts

The agency said it was unclear if the two-year restriction applied because although she developed and designed a system to accomplish the work during her State employment, she had not worked on such matters for the past several years. The statute is clear that the time restriction begins after the person leaves State employment. It says: "for a period of 2 years after termination of his employment or appointed status with the State if he gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of his official duties as a state employee...." 29 Del. C. § 5805(d). If the language is clear and unambiguous, the words must be given their plain meaning. *Coastal Barge Corp. V. Coastal Zone Indus. Control Board*, Del. Supr., 492 A.2d 1242, 1246 (1985). However, Courts have given "some weight" to the argument that the lapse of time is one factor to consider in deciding if the activity is the same "matter." *CACI, Inc.-Federal v. The United States*, Fed. Cir., 719 F.2d 1567(1983) (post-employment contract was not the same "matter" because of elapsed time and difference in scope and approach).

Thus, the issue was if the post-employment contract with her covered a "matter" on which she gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for while employed by the State. First, as to the contract in general, no facts indicated that she developed the concept or formulated the contract which she sought, or was in any manner involved in making State decisions regarding the contract. Second, as to the subject matter of the contract as compared to her activities while employed by the State, we have held that where the general subject "matter" is the same, there must be a factual overlap between the activities as a State employee and the post-employment activities. *See*, Commission Op. No. 96-75 (*citing 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, the general subject matter was the same--the contract was to work on a system which she worked on in a State position. In fact, she developed the system, and later, had some managerial related responsibilities pertaining to the system. However, in more recent years, her work was unrelated. The significance of the time lapse is that during that time, the system she developed was being eliminated and a new system was being implemented. The new system had different software; new calculation methods, etc. In converting to the new system, some data did not convert. She would lead a team to clean up the conversion errors. There were fundamental differences in the new system for which she had no responsibility while employed by the State, and the old one which she developed. Also, the scope of the work was different in that she was responsible for overall development of the old system, but would now be responsible for cleaning up conversion errors. Thus, we concluded that the post-employment activity was not a "matter" for which she was directly and materially responsible for while employed by the State.

99-15 – Post Employment—Contracting with Former Employee: WAIVER DENIED. A State agency wanted to contract with a former State employee to perform portions of the job she had with the State. As such activity would violate the post-employment law, the agency asked for a waiver. The Commission did not grant a waiver.

(A) Applicable Law

No person who has served as a state employee, state officer or honorary state official shall represent or otherwise assist any private enterprise on any matter involving the State, for a period of 2 years after termination of his employment or appointed status with the State, if he gave an opinion, conducted an investigation or otherwise was directly and materially

responsible for such matter in the course of his official duties as a state employee, officer or official. Nor shall any former state employee, state officer, or honorary state official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit. 29 Del. C. § 5805(d). The Commission may grant a waiver to the specific prohibitions if it determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of the law or would result in an undue hardship on any employee, officer, official or state agency. 29 Del. C. § 5807(a).

(B) Facts

Early the prior year, a State employee told her agency that she planned to retire around mid-summer/early fall of 1999. She had been assigned for about six years to a project which the agency had convinced the General Assembly to implement. Implementation required changes in computer programs and the State employee was to take existing requirements and ensure that the programmers had the modifications. The agency thought it had convinced her to wait to retire until after the project was implemented. Anticipating her retirement, the agency developed "a transition plan" to ensure "knowledge transfer" before she left. "Knowledge transfer" meant having her replacement "become knowledgeable in the new system" because the exiting State employee knew how the system worked and how it effectively implemented the program.

The agency assigned her replacement to start working with her so it would have the "knowledge transfer." However, the agency said the problem was that her replacement was responsible for other matters that had to be completed on a continuing basis. It also said there had been a tremendous challenge because so many of its people were working on the new program. The agency said that she was "going back and forth between commitments to the project that she'd worked on for 5 or 6 years, and her desire to start to phase out and enjoy retirement." To convince her to stay, it emphasized that it would work on phasing in someone else and phasing her out so she did not "have the burden of the management responsibilities on her shoulders, and then she could also run down the amount of time that she was spending on the project and ease her way out." It said that someone, it did not know who, would have to "backfill" for the person who would be working with her.

In the fall of 1998, the employee announced that she was leaving in January, instead of late summer-early fall 1999. The agency "talked about using those two months to have a crash course" with her replacement. It started the process, but did not continue. Rather, it convinced her to stay by asking her to "think about the things, if you would, that we could do that might get you to stay." In early winter, she said she would retire in January but agreed to work up to 30 hours per week through the middle of the year to provide the knowledge transfer and help implement the new system. She would be paid $75 per hour. Her salary was never negotiated, and "she did not have a specific number," but the agency said it believed that she wanted to be paid comparable to what private sector contractors who contract with the agency were paid. Its software vendor had employees that received $140 to $250 an hour and its programmers, who were with another company, were paid about $125 an hour, but some were paid $90 an hour. The agency told her to keep the total contract below $50,000, because if it went over that amount, it would have to publicly notice and bid the job under the procurement rules. The employee agreed, with the conditions that she not: (1) work full time; (2) function as project leader; and (3) be responsible for daily operations. She also did not want any pension offset. As a full-time State employee, she made more than $65,000 per year, which equated to just over $33 per hour for a 37½-hour week. The agency said she probably worked more than 60-75 hours a week while employed full-time, so the dollar per hour should not be compared to a

40-hour week. It said that many of its employees were working those kinds of hours, and were not paid by the hour, as are consultants.

The Commission noted that as a matter of law, employees at her level, and many other State employees with such salaried positions, were not entitled to overtime pay. After she retired at the beginning of the year, she was hired as a temporary State employee, receiving $75 per hour. By law, retirees hired as temporary State employees are subject to a pension offset. 29 Del. C. § 5502(a). However, if she privately contracted with her agency there would be no pension offset. The agency said it knew that privately contracting with her would violate the post-employment law and would require a waiver. The agency said that "replacement knowledge" could be obtained, either internally or in the competitive market. However, it later said it could not find one or even several persons to replace her "knowledge of the application of the vendor product to accommodate Delaware's unique process and legal requirements." It said that any combination of hiring, reassignment or contractual arrangement that did not include her would either delay implementing the system from six (6) months to one (1) year or terminate the project. It said that "in any scenario, [she] would need to be retained to train her replacement." However, it later said that if she did not continue, it would not terminate the project. It also said that the Governor and General Assembly were aware of the resources needed for implementing the system and had given it substantial financial resources to obtain software, etc., but it was more difficult to obtain persons to "backfill" so that knowledge transfer could occur.

(C) Should a waiver be granted because the literal application of the prohibition is not necessary to achieve the public purpose?

The public purpose of the Code of Conduct is to insure public confidence in the integrity of its government and that public employees avoid conduct in violation of the public trust or conduct which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1). In the context of post-employment, it has been noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *"Ethics in Government Act," United States Senate Report No. 95-170*, p. 32. The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id*. at 33. Reflecting that concern, post-employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id*. Here, if a waiver were granted, she would receive more than double her hourly wage when she was employed full-time, while working fewer hours and having significantly less responsibilities, and receive her entire State pension.

While the agency pointed out that she was being paid less than its private vendors who program the system, those private vendors were not subject to the Code of Conduct. Moreover, she was not a programmer. The agency had stated that it knew the marketplace for those programmers bears out the kind of hourly rates that they get. Thus, not only was her work not comparable, but the field selected by the agency on which to base her pay was one of the best paying of all career fields. No facts indicated what the "marketplace" would bear for her "knowledge transfer," nor was such information sought. The agency said "there wasn't any negotiation over price." Rather, "it was willing to do whatever it took"; but "we had to stay within the $50,000 bid requirement" so the contract would not require public notice and bidding. While the agency stated that comparing her State salary of just over $33 per hour was not justified, there were several reasons why her State salary had bearing:

(1) That was the job she was doing [except for fewer hours and fewer responsibilities] and that was the pay rate she would have received if she stayed full-time with the State until the project was completed.

(2) The General Assembly acknowledged a relationship between the State salary and the salary to be paid when a State retiree turns around after retirement and is re-hired to perform the same State job because it provided specific laws for such persons and connected the salary to existing State positions, and directed that they have a pension offset. 29 Del. C. § 5502(a). We have noted that the effect of those laws was to prevent State employees from experiencing a windfall as a result of their public position. *Ethics Bulletin 007*.

(3) Using the State salary as the pay base was, in our experience, a common method used by agencies in negotiations. In every situation where an agency had sought and been granted a waiver of the post-employment law, they had used the former employee's State salary to establish the pay rate. *Commission Op. Nos. 91-18; 95-11; 96-60; 97-41; 98-15.* Basing the salary on the State pay served to diminish the perception that former employees were using their former State job to financially capitalize and obtain an unfair advantage. Here, the public could suspect that she used her public position involving access to information on the program, access to colleagues, etc., to create a very favorable employment opportunity for herself, giving her an unfair advantage over other possible competitors, especially as the agency acknowledged that the "replacement knowledge" can be obtained either internally or in the competitive market, but then eliminated the possibility for persons in the competitive market to compete by keeping the total below the procurement law's public notice and bidding requirement. The public could see that as preferential treatment by her former colleagues, or using public office for private gain. That is not to say that she, in fact, used her public position to capitalize, but the public purpose is to "avoid any justifiable impression" that the public trust was violated. 29 Del. C. § 5802(1). Thus, the literal application of the statute was necessary to achieve the public purpose, and no waiver was granted on that basis.

(D) Should a waiver be granted because of an "undue hardship" on the employee or the agency?

"Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary,* p. 1290 (10th ed. 1992). No facts were presented to indicate a hardship on the former employee.

The basis for the alleged hardship for the agency was that she had job knowledge which needed to be transferred. The agency based its request on her knowledge of both the old and the new system. Basically, it was saying that she knew the system. What any former employee brings to the table in a post-employment situation is that they have an understanding of the policies, procedures, etc., and can arguably do the work faster and cheaper because of their prior work in the same area. *Commission Op. No. 97-18*. However, the very hardship imposed by the statute is that the former employee's familiarity with the work is lost. Logically, the "loss of knowledge" argument could be used any time a former employee is contracted with to perform the same function for which such employee was directly and materially responsible. *Id.* If those facts alone created "an undue hardship," then the two-year restriction would never apply. *Id*.

The agency also stated that it had time constrictions to meet. We first noted that the agency said she had worked on the program "for the last 5 or 6 years." During that time, certainly knowledge of the system was imparted by her to others working in the agency. Additionally, the agency was alerted to her retirement a full-year ago. The agency said it had

started the transition plan, so there should have at least been some "knowledge transfer." Further, it had hired her replacement who knew the current system, thus, reducing the "knowledge transfer" that needed to occur. The function of project leader had already been transferred to her replacement. The agency also said that the "crash course" with the replacement had started before the former employee was enticed to stay. Thus, some "knowledge transfer" had occurred. Additionally, the agency had her for more than three months as a part-time employee since her retirement to make the "knowledge transfer." There were other options the agency could have pursued, but did not implement. According to an agency representative the agency could have kept her on at her old salary and reduced her hours and responsibilities. It also could have stayed within the confines that the General Assembly provided in the statute on temporary hiring of retirees and avoided a post-employment violation. It could have explained to her that her condition that the pension not be offset, which would require a private contract, would result in a violation of the post-employment law. We noted that when it informed her that she would have to keep the contract below $50,000 so that they did not "run into the problem" of the procurement law requirements, she agreed to stay within those confines. It also could have continued the "crash course" since it knew what she wanted would violate the post-employment law. However, in the face of knowing that contracting with her would violate the Code of Conduct, the agency did not try to negotiate. On the day the agency came to the Commission for a waiver, it still had never spoken with her about remaining as a temporary employee rather than violating the Code. It had not even asked what she would do if the Commission did not grant a waiver. Where we have granted waivers as a result of time restrictions, the agencies have at least negotiated with the former State employee to try to keep the salary in line with their State salary to reduce the actual or perceived possibility that the former employee has turned their public position into a means of financial gain. Moreover, in those cases, agencies tried to find other sources through internal sources or public notice and bidding, etc., before seeking a waiver. *See, e.g., Commission Op. No. 97-18.*

We understand that "hindsight is always 20/20," but in this case there were still options available to the agency:

(1) stay within the confines of the statute regarding temporary hiring of retirees, and there will be no violation of the post-employment provision;

(2) negotiate an agreement, like other agencies, that is based on a salary that diminishes the actual financial capitalization of the former State position and the appearance of favoritism in the award of the contract.

(E) Conclusion

No waiver was granted based on the foregoing facts because: (1) the literal application of the prohibition was necessary to achieve the public purpose; (2) no facts indicated an undue hardship on the former employee; and (3) the facts did not substantiate an undue hardship on the agency when there was a legal means to achieve the same result-- having her continue with the agency--without violating the post-employment law and there were means of diminishing the very concerns which the post-employment law is meant to prevent--having former employees capitalize on their past relationship with the State.

99-13 – Post Employment—Serving as a Mediator: A former State officer was asked to mediate between his former agency and a company regulated by that agency. The dispute concerned implementing a regulation. While employed by the State he was directly and materially responsible for the regulation that the company later challenged in Court. He was

asked by another State to mediate because the dispute could affect other States in regulating similar companies.

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after termination, if the matters are ones in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). Former employees may not improperly use or disclose confidential information gained while employed by the State for personal gain or benefit. *Id*.

While he was employed by the State, a regulation was passed, which the company contested in court. The Court found the official record supporting the regulation was insufficient and remanded the regulation to the agency. The agency re-drafted the regulation, with minor adjustments, and resubmitted it with a more robust record. The proposed regulation was signed by the individual who took over his former position. The State requesting that he mediate was one of 13 States, including Delaware, which comprised a regional commission created by the U.S. Congress. Its purpose was to make recommendations for federal measures to be applied in all or part of the region if such measures were needed. Consequently, the member States of the commission had an interest in seeing a resolution reached because of a possible regional impact on their States. Moreover, States outside the commission's area had an interest in seeing the matter resolved because if the region could not resolve compliance problems, States outside the region could go to the federal agency involved and argue that if this region were not complying, then their regions should not have to comply with the federal measures.

The former State officer was approached by one of the commission States to mediate because of his knowledge and understanding of the control measures, with the understanding that both parties (the State of Delaware and the private enterprise) would agree to have him as the mediator. Mediators act as a neutral third party to help disputing parties reach agreement and normally cannot impose a decision on the parties. *Black's Law Dictionary*, p. 981 (6th ed. 1990). The concern which the post-employment provision seeks to address in restricting former employees from representing or assisting a private enterprise before their former agency is to insure they do not use their influence to obtain a decision or action favorable to their private enterprise. Here, the former employee would not be seeking a decision or action favorable to his private enterprise as a result of his mediation. Based on those facts, the Commission concluded that his conduct did not constitute "representing or assisting a private enterprise.

99-11 – Post Employment—State Job Required Interacting with Contracting Agency's Division: A State agency asked if one of its divisions could contract with a former State employee to provide staffing services on a division project. Based on the following law and facts, the Commission held that it would not violate the post-employment provision.

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after termination, if the matters are ones in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. 29 Del. C. § 5805(d). Former employees may not improperly use or disclose confidential information gained while employed by the State for personal gain or benefit. *Id*.

While employed by the State, the former employee did not work for the agency which sought to contract with her. However, her State duties required her to work with one of its

divisions on certain budget matters. The same division wanted her to contract on its project. The matter on which she gave an opinion for the division while employed by the State related to its budget. If she contracted with the division, she would not be responsible for its budget. Rather, she would write requests for proposals for certain aspects of the agency's programs; arrange community forums; perform staff work for the agency (e.g., put together agenda, draft minutes; and participate in meetings); attend agency meetings; work on assignments from those meetings; act as liaison with contractors; assist in writing contracts; and perform day-to-day project coordination. As the matters for which she would contract were not matters on which she gave an opinion; conducted an investigation, or was otherwise directly and materially responsible for while employed by the State, the Commission found no violation of the post-employment provision.

98-41 – Post Employment—Work on Contract Issued by State Agency: A private enterprise was awarded a contract in 1991 which remained inactive until the General Assembly approved going forward on the project. The agency turned to the private enterprise to begin the contract performance. Because it had hired a former employee from the agency, a decision was sought on whether it would violate the post-employment provision if he worked on the project.

The post-employment provision restricts former employees from representing or assisting a private enterprise on matters involving the State for two years after leaving State employment 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). It also prohibits former employees from improperly using or disclosing confidential information gained while employed by the State. *Id*.

In this instance, the project was awarded to the company to establish the parameters of the work, prepare a concept, and give a cost estimate in 1991-1992. The former employee was not employed by the agency until several years later. After going to work for the agency, he was asked several years ago to provide an updated cost estimate for the project. After he left State employment, the company was advised that the long dormant project would be re-activated.

The facts clearly demonstrated he could not have given an opinion; conducted an investigation; or have been in any manner directly and materially responsible for any part of the contract when it was awarded more than 7 years ago, as he was not employed by the State. As to the cost estimates provided by him some time ago, it was the Commission's understanding that such estimates were not material to the re-activation of the project because: (1) the scope of the project had changed; (2) the alignment was moved; (3) the updated estimate was a rough estimate for construction, not design, and the former State employee's duties with the private enterprise would be design; and (4) new cost estimates must be prepared as a result of the changes in the project and the elapsed time. As the project was not the same as when he gave a cost estimate; as new estimates were necessary for the project as now envisioned; and because he would be working on the design aspect, not construction for which he gave an updated estimate, the Commission found that his proposed activity would not violate the post-employment provision.

98-39 – Post Employment—Contracting to Provide Training to Former Agency: A State agency contracted with a private enterprise to provide training to its staff. It had contracted with

the private enterprise for similar training about 6 years before. However, a former employee from the agency was now the Director of the private enterprise. She would be part of its training team. The Commission concluded that her activities would not violate the post-employment provision.

The Code restricts former employees from representing or assisting a private enterprise on matters involving the State for 2 years after leaving State employment 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). They also are prohibited from improperly using or disclosing confidential information gained while employed by the State. *Id*.

In this instance, the former employee would represent/assist a private enterprise as its new Director and as a trainer before her former State agency. To decide if she would be representing the private enterprise on matters in which she: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State, the Commission compared her activities while employed by the State to those she would perform for the private enterprise before the State.

Her State job was as head of an agency which performed oversight functions of a regulated industry, such as initial licensing, license renewals, monitoring and supervision, complaint investigation, enforcement, development of regulations and policies, technical assistance to the facilities, interpretation and technical assistance to the community. As the head of the agency, she was responsible for insuring those functions were performed. As part of her duties, she also approved contracts, including a contract for the private enterprise to provide training to her staff more than six years ago. The agency sought to contract with the company again to provide training on such topics as complaints, rules, legal and constitutional issues, enforcement and ethics. It was expected that the former employee would provide training on regulatory investigations. She had made such presentations at national conferences and was considered an expert in the field. The reason the agency wanted to contract with the private enterprise for training was because it had an influx of staff needing training. Although the private enterprise provided annual seminars, the agency could not afford to send all of the staff to the seminar and wished to bring the company in to perform the training.

Here, the contract had not yet been entered into and no facts indicated that the former employee was in any manner responsible for the contract. On a broader level, her responsibilities as head of the agency were not as a trainer to the agency, which she sought to do. While she made presentations on regulatory investigations at national conferences while employed by the State, and it was expected that she would train her former agency's employees on investigations as part of the private company's team, the Commission did not find that training the staff on regulatory investigations was the same matter for which she was directly and materially responsible while employed by the State. Her State work focused on the licensing, investigation, etc., in the particular industry, while staff training was provided by outside agencies such as the private enterprise.

98-38 – Post Employment—Subcontracting on State Contract: A former employee wanted to serve as a consultant on certain aspects of a State contract. Approximately 40 other bidders were seeking to work on the same contract. The agency had not made any decision regarding who would get the contract, nor had decisions been made regarding subcontractors. Thus, it was possible that he might not even be selected. However, as he had approximately three months left on his post-employment restrictions, he asked if he could submit a letter of intent.

The post-employment provision restricts former employees from representing or assisting a private enterprise on matters involving the State for 2 years after leaving State employment if the former employees: (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). It also prohibits former employees from improperly using or disclosing confidential information gained while employed by the State. *Id*. While employed by the State, he was not involved in any decisions on the particular contract. Thus, he did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for the contract while employed by the State.

Regarding the substance of the contract, the Commission compared the substance of the contract to the work the employee performed while employed by the State to decide if the contract substance encompassed matters for which he was directly and materially responsible while employed by the agency. The particular contract projects had not yet been identified, as the contract was open-ended for "miscellaneous" projects. Thus, it could not be ascertained if the particular projects which would later be identified would be matters for which he was responsible while employed by agency. However, as the agency still needed to reduce the number of applicants to a short-list; have pre- proposal meetings with short-listed candidates; followed by possible oral interviews to select successful candidates; etc., it was likely that before the particular projects were identified that the 2 year period would expire.

Although the Commission could not address the particular projects, it considered the particular type of work he wished to do regardless of the projects. Specifically, he wanted to subcontract to perform work which he said he had not done for the State in 15 years. However, more recently, from 1992 until his retirement, he was responsible for similar work. He said that in that job he considered the work different because he had a broader scope of responsibility--more of a coordinator and facilitator than "hands-on" work which he would do if selected as a subcontractor. The Commission found no violation.

98-36 – Post Employment—Working for Company with Agency Contracts: A former State employee asked if it would violate the post-employment provision if he worked on projects which were awarded by his former agency to his new employer. State employees may not represent or assist a private enterprise on matters involving the State, for 2 years, if the matters are ones on which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible while employed by the State. 29 Del. C. § 5805(d). They also are prohibited from improperly using or improperly disclosing confidential information gained while employed by the State. *Id.*

The individual worked for a State agency for 2 years. During that time, he was rotated through various sections for exposure to a variety of aspects of his agency's projects. He was assigned to work on four specific agency projects. None of them were awarded to his new employer.

His new employer sought to have the former State employee work on four projects it had been awarded by his agency. While working for the State, he was not involved in any manner with these projects. Accordingly, the Commission found that the projects on which the company sought to use him were not matters on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible, and there would be no violation of the post-employment provisions.

98-22 – Post-Employment—Developing Computer Systems: A State employee asked if she could work for a company which contracted with her former agency. State employees may not represent or assist a private enterprise on matters involving the State for 2-years after leaving State employment on matters where 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). They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

While employed by the State, she did not participate in or have any decision making authority regarding the company's contract with her agency. Also, the contract did not deal with the area for which she was directly and materially responsible--monitoring certain Delaware agencies for compliance with a federal program. As part of that program, she also used certain computer skills. Specifically, she was the data manager for an agency program which involved putting data into the program for reports to the federal government. She also put information on the Web site.

The private enterprise planned to use her managerial and computer skills. Specifically, as it related to dealing with State agencies, if an agency decided to have the company write a computer program, she would work with the agency to decide what was needed-- the kind of reports they wanted, how they wanted the final product to operate, etc. She would convey that to the company's computer specialists who would write the program. Once that was done, she would take it to the agency to see if the program filled the need; would provide training; and would write training materials. In effect, she would assist in developing systems. She had nothing to do with developing systems for her former agency, rather, she collected and input data into existing systems.

At the time, the company wanted her to work with State agencies other than her former agency. However, the company said it was possible that she might be asked to work on the contract with her former agency. If the company decided it needed her to work on matters for her former agency, she was advised that she may not represent or assist the company on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible. As the Commission bases its decisions on particular facts, 29 Del. C. § 5807(c), it could not render a decision on speculation that she might possibly work for the private company on matters involving her former agency which would violate the Code. Accordingly, she was advised that if the company sought to have her work on matters involving her former agency, she should review the post-employment provision and cases interpreting that provision, and could return to the Commission for further guidance based on the particular facts.

98-21 – Post-Employment—Working with Agency Clients: A State employee asked if it would violate the post-employment provision if she accepted a position with a private enterprise which contracted with her agency.

State employees may not represent or assist private enterprises on matters involving the State for 2- years after leaving State employment on matters where 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). They also may not improperly disclose State confidential information or otherwise use such information for personal gain or

benefit. *Id.*

The private enterprise had a contract with her former agency to provide certain services to clients. She was not involved in selecting the private enterprise for the contract or in preparing the contract for her agency.

In her State job, she worked with clients but did not refer any clients to the private enterprise. Rather, the clients she worked with were referred to another State agency for the particular services. If after a given period of time, the clients still needed the services, the other agency could refer them to a contractor such as the private enterprise. If employed by the private enterprise, she would work with its clients and would have some dealings with her former agency. Specifically, if the client did not comply with the requirements needed to obtain the services, she could recommend to her former division that a sanction be imposed. Her former division would decide what, if any, sanctions were appropriate. She was not previously involved in recommending sanctions against clients assigned to the private enterprise. The Commission found no violation.

98-20 – Post-Employment—Computer Services for the State: The Commission determined that proposed post-employment activities by a computer specialist would not violate the post-employment provision.

State employees may not represent or assist private enterprises on matters involving the State for 2- years after leaving State employment on matters where 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). They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

While employed by the State approximately 14 months previously, the individual worked for his agency as a computer specialist. Before leaving State employment, his agency assigned him as a computer support specialist to another State agency. Before that, he was assigned as the computer support specialist for two other State agencies. He was seeking to contract back as a computer support person for a different State agency.

As a computer support specialist, he worked with the agencies to assist them with identifying and developing their specific computer needs. The contract he sought would also require him to identify and develop specific computer needs for a different agency. However, he was in no manner involved with the agency decision regarding the issuance of the contract. Also, the new agency he would work for had its own specific needs and systems which did not overlap with those on which he previously worked. He had no dealings with anyone in that agency while employed by the State. As he was in no manner involved with the systems needs of the agency which needed the computer specialist, the Commission found no violation of the post-employment provision.

98-19 – Post-Employment—Training Contract with Former Agency: The Commission concluded that it would violate the post-employment provision if a State employee were selected and accepted a contract to develop a training program for a State council after she left State employment.

Former State employees may not represent or assist a private enterprise on matters involving the State for 2 years after leaving State employment if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for such matters while employed by the State. 29 Del. C. § 5805(d). They also may not improperly disclose or use information gained from their public position for personal or private gain. *Id.*

The purpose of the post-employment provision is to insure that former employees do not capitalize on their former employment to get a "leg up" on other competitors or exercise undue influence on their former colleagues, or cause a public perception of impropriety. *See e.g., Commission Op. No 97- 41.*

While employed by the State, she was responsible for a custom training program for her agency and said she was "the State expert" on the particular training subject matter "both nationally and locally." The responsibilities included assisting employers with developing and underwriting this particular type of training program. Also, her former unit offered to act as consultants to private enterprises to design training programs suitable to their needs in a particular area.

One of her duties as the unit's director was to serve on a State council. It identified how State and Federal funds would be used to develop and upgrade the particular area for which her unit had responsibility. This resulted in Requests for Proposals (RFPs) and selecting contractors. This year the council issued an RFP seeking contractors for certain programs. She wanted to seek the portion of the contract pertaining to the specific training development requirements. According to the RFP, the training was designed to meet specific training needs of one employer or a group of employers in the same product area. Therefore, the Commission found that the subject matter of the services to be provided under the RFP were, in essence, the same services for which she was directly and materially responsible while employed by the State. Thus, the Commission found that it would violate the post-employment provision for her to contract for such services.

The council received responses to the RFP from a number of other persons for the contract. As nothing indicated that the applicants were not qualified to fulfill the contract, nothing indicated an undue hardship for the agency. Accordingly, we did not grant a waiver under those circumstances.

98-17 – Post Employment—Returning to Work with Former Private Employer: A State employee had worked for his agency for a few months then decided to return to the private corporation where he worked before accepting State employment. He asked if returning to his previous employer would violate the post-employment provision.

The Commission determined that his proposed post-employment activities with the private enterprise would not violate the post-employment provision as he would not have any dealings with his former State division.

State employees may not represent or assist private enterprises on matters involving the State for 2- years after leaving State employment on matters where 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). They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

While employed by the State, he investigated complaints by clients who received services from State agencies and private enterprises. While employed by the State, he was not aware of, nor involved in, any complaints against the private enterprise where he would be working. Although it had a State contract, he was not involved in putting together the contract or selecting the contractor. The contract was with a different agency than the one for which he worked.

The job with the private enterprise would not result in dealings with his former division. Rather, he would train the private enterprise's employees. He might also conduct in-house investigations of its employees, if a client filed a complaint. The clients were not the same clients he dealt with while employed by the State. The private enterprise had State clients referred by an agency other than his, and he was not involved in any of that agency's decisions and did not work with its clients. The private enterprise did not operate the same type of facility, or have the same clients, as the ones he was responsible for while employed by the State. Any contact he might have with the State would be with Divisions other than the one where he was employed. Although the private enterprise did not anticipate any attempt to contract with his former agency, he said at the Commission's meeting that he would not have any dealings with his former division during the 2-year period. Thus, his employment with the private enterprise would not violate the post-employment provision.

98-15 – Post Employment—Waiver Granted for Agency to Hire Former Employee: The Commission may grant a waiver to the Code provisions if the literal application of the provision is not necessary to serve the public purpose or there is an undue hardship on the agency or employee. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings are no longer confidential but are a matter of public record. 29 Del. C. § 5807(b)(4).

In the following instance, the Commission granted a waiver for the Delaware Economic Development Office (DEDO) to hire a former employee during the 2-year period when the Code prohibits former State employees from representing or assisting a private enterprise before the State on matters in which they gave an opinion, conducted an investigation or were otherwise directly and materially responsible. 29 Del. C. § 5805(d).

The Commission reviewed the agency's written correspondence seeking a waiver and considered statements of Ms. Jan Abrams and Mr. James Lisa concerning DEDO's request to contract with Ms. Abrams to complete the "Incumbent Worker Project." Based on the following law and facts, a waiver was granted for DEDO to contract with Ms. Abrams for the particular project with the understanding that it would be completed, and the contract would terminate at the end of June 1998.

Former State officers may not represent or assist a private enterprise on matters involving the State for 2 years after leaving State employment if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for such matters while employed by the State. 29 Del. C. § 5805(d). Former employees also may not improperly disclose or use information gained from their public position for personal or private gain. *Id.*

DEDO wanted Ms. Abrams to complete the "Incumbent Worker Project" for which she had "primary responsibility" while employed by the State. As she was directly and materially responsible for the matter, the issue was whether we should grant a waiver. Waivers may be granted if there is an undue hardship on the State employee or agency. 29 Del. C. § 5807(a).

The agency announced, at the beginning of the year, that there was an opening for Ms. Abrams' former position. DEDO concluded that the applicants were not qualified and re-announced the job. DEDO also was trying to fill an unexpected vacancy in the same unit. Further, an employee in the unit was trying to care for an ill spouse and for aging parents out of State and had required emergency leave. Thus, DEDO was short-handed in the six-person unit which Ms. Abrams directed. Mr. Lisa said that even if DEDO filled Ms. Abrams' position the new person would have difficulty completing a project that had been underway for almost nine (9) months. The correspondence indicated that bringing in a new person midstream would cause DEDO to lose "significant momentum." Also, DEDO had a June 1998 deadline for the project to be presented at a national conference.

The agency expected to pay Ms. Abrams at her current hourly State salary rate, plus Other Employment Costs (OECs) and expenses. OECs are more than 30% of an employee's State salary. OECs are the costs the State pays for its full-time employees to cover: health insurance, workers' compensation; pension, Medicare, FICA, and unemployment insurance. The State did not pay those costs for part-time employees. Generally, an advantage of using a private contractor for State work is so the State does not incur such costs. One concern of the post-employment law is to insure former employees do not get a "leg-up" on others who might compete for such contracts. Thus, the Commission asked Mr. Lisa whether the agency normally considered paying such costs for a private contractor. Ms. Abrams responded that the contract would be 25% below the market rate. Mr. Lisa said the agency was suggesting an hourly rate; it would be putting a cap on the contract; and the contract would expire at the end of June 1998. He said he did not believe there were competitors who could do the job.

Under those particular facts, the Commission granted a waiver for the limited purpose of completing the "Incumbent Worker Project" which would be completed by the end of June 1998.

98-12 – Post Employment-- Employment by Firm Regulated by Former Agency: A State employee planned to leave State employment and asked if he could accept a job with a company regulated by his former Division. The Commission concluded he could do so with the restrictions identified below.

First, in several situations he had dealings with the company in his official capacity, but said he was not the final decision maker. However, the post-employment provision is not limited to situations where the former State employee is the final decision maker. Rather, it looks to the employee's responsibility and involvement in matters involving the State.

Specifically, the Code of Conduct restricts former State employees and officers from representing or assisting a private enterprise on any matter involving the State for 2 years if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for such matter while employed by the State. 29 Del. C. § 5805(d).

The matters involving the State on which the former employee would represent or assist the private enterprise must be placed in the context of the three triggering provisions, and the interpretation should serve the purposes for having a post-employment restriction. *Commission Op. No. 96-75.* The restriction recognizes, on the one hand, that moving between the government and private employment may create conflicts of interest or appearances of impropriety. The concern is that: (1) government employees who hope to move to the private sector will favor firms they think may offer rewards later; and (2) after they switch to the private side they may be able to exercise undue influence on those with government employees with

whom they previously worked. *Id. (citing United States v. Medico,* 7th Cir., 784 F.2d 840, 843 (1986)). On the other hand, the chance to move from private to public employment and back again may allow the government to secure skilled people who might not otherwise make public service a career at current pay rates. *Medico* at 843. Thus, "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Id.*

Having laid the framework for interpreting "matter," the Commission addressed the particular situation using the examples of the former employee's dealings with the company in his official capacity. In the first situation, he said controversies had arisen over certificates issued by his Division. His role was "to advise Division staff members . . . and the ...Secretary on these matters as they have arisen over the years." He said that "ultimately, in none of these matters was I the final decision maker." Clearly, if he advised his staff members and his Cabinet Secretary on those controversies, he "gave an opinion" and was "directly and materially responsible." The mere fact that he was not the final decision-maker, did not mean he was not "directly and materially responsible." As noted above, the statute is not limited to final decisions. Rather, it looks to the employee's responsibilities. When the staff made decisions, as the Division Director, he was ultimately responsible. Similarly, when he advised the Cabinet Secretary, who may later decide an issue, his advice was based on his training and experience as a Division Director. Thus, as to "matters" dealing with permits and certificates, he was directly and materially responsible.

In the second situation regarding a certificate, he said he had no direct decision-making authority regarding the company because the certificate was a long-standing one and the choice of the company used was not discretionary. However, he said there was much controversy involving many parties and he "had a direct policy role in a case which resulted in this company serving the community," and he was "the Administration point person on most matters dealing with this case." He said the project was "on-going" and might be so for several more months. He believed the prospective job might have him involved with customers or government representatives as the project proceeded. Again, the fact that he was not the final decision maker did not mean he was not directly and materially responsible. His statements that he had a "direct policy role" and was the "point person" supported the conclusion that he was directly and materially responsible. As he expected to be involved with customers or government representatives on the matter, he would be representing or assisting the private enterprise. However, to the extent he would be involved with the company's customers, he would not be representing or assisting the company before the State. Similarly, if his representation or assistance to "government representatives" was not before the State, e.g., local government, then he could represent or assist the private enterprise in those activities under those conditions.

Third, he gave an example of "an investigation" in which the Division was involved and was "on- going" concerning a complaint about the company. However, he indicated that he was not involved in conducting the investigation as those matters were in the jurisdiction of two other agencies. As to matters within the purview of other agencies, he would be permitted to represent or assist the company before those agencies on matters in which his agency did not participate. He said it was possible that the company might become involved in another area which his agency handled. As this matter was not one of certainty, the Commission concluded that a ruling would be premature because it must base its rulings on "a particular fact situation." 29 Del. C. § 5807(c). However, the opinion could guide him, and, of course, he could come back for a specific opinion.

98-04 – Post Employment—Employment by Firm Which Contracted with Former Agency: A former State employee went to work for a private enterprise which had a contract with his former agency. He was not in any manner involved in the contract decision. Additionally, while working for the State, he did not work for the same section with which the private enterprise contracted. Moreover, the subject matter of the contract was not within his area of responsibility. His work with the private enterprise was not likely to result in contact with the section which operated the programs he worked on for the State. Further, he would not disclose or improperly use any confidential information he may have gained through his public position. Accordingly, under those facts, the Commission found no violation of the post-employment provision.

98-01 – Post Employment—Working for a Firm Which Designs for State Agency: A State employee was his agency's liaison with companies which could be affected by his agency's design projects. Once a design was submitted to the agency by a contractor, a review process began. The employee's sole job in the process was to send proposed designs to designated companies so they could decide if the design would impact their property. If the impact required changes, the changes were made by persons who were not State employees. He played no part in any changes. Once the initial review was completed, he continued to act solely as the liaison between his agency and the companies for any subsequent changes. He had no authority to select designers; nor did he design any project.

He left the State to work for a private enterprise. He was not involved in any of its projects while employed by State, except for one project, where he was the agency's liaison. The company he went to work for had already submitted the designs, when he accepted employment. Thus, it had essentially completed its contract with the State agency. If design questions arose during construction, they would be answered by the company's designer. The former State employee would not work on that project. Therefore, to the extent he might be considered to have given an opinion or been directly and materially responsible for the project because he acted as a liaison, he would not be representing or assisting the company on that matter.

Under those facts, the Commission found that he did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for any matter involving the company, except for his limited involvement in acting as a liaison on one matter. As to that "matter," he would not be representing or assisting the private enterprise as the final plans were submitted to the agency before he was hired, and if a question arose regarding the plans, he would not handle the matter.

He was directly and materially responsible for liaison work between the State and private enterprises while employed by the State, but would not work as a liaison for the private enterprise. Rather, he would be responsible for design, engineering, and planning, which were not his State responsibilities.

97-41 – Post Employment—Contract with Former Agency—WAIVER GRANTED: NOTE: When a waiver is granted, the proceedings before the Commission are no longer treated as confidential matters. 29 Del. C. § 5807(a).

Lois Studte, asked if accepting a post-employment contract with her former State

employer, Delaware Technical & Community College (Del. Tech.), would violate the post-employment provision, and if so whether a waiver would be granted.

The Code of Conduct prohibits State employees from representing or assisting a private enterprise on matters involving the State for two years after leaving State employment 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. Former employees also are prohibited from disclosing or otherwise using confidential information gained by reason of their public position for personal gain or benefit. 29 Del. C. § 5805(d).

In Ms. Studte's case, her former agency wished to retain her immediately after retirement to develop an associate degree program for paramedics. While employed by Del. Tech, she was an advisor to the paramedic program at the Owens Campus and also represented Del. Tech in discussions regarding developing the associate degree program. Also, she worked with accreditation standards and would be involved with accreditation standards for the paramedic's degree program. Her employment at Del. Tech. involved more than those duties, as she indicated that the paramedic program was only a "sliver" of her responsibilities. However, it was clear from those duties that, as the Del. Tech. representative at the discussions concerning the paramedic associate degree program, she gave an opinion on the very program on which she would be working. Moreover, she was directly and materially responsible for the existing paramedic program at the Owens Campus since she served as an advisor to that program. The Commission concluded that the proposed contract would violate the post-employment provision.

However, the Commission may grant a waiver if: (1) the literal application of the prohibition is not necessary to serve the public purpose; or (2) if there is an undue hardship for the employee or the agency. 29 Del. C. § 5807(a).

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

The public purpose of the Code of Conduct is to insure public confidence in the integrity of its government and that public employees avoid conduct in violation of the public trust or conduct which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1).

In the context of post-employment, it has been noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *"Ethics in Government Act," United States Senate Report No. 95-170,* p. 32. The main reason for public concern is that former employees may use information, influence and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post-employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id.* In Delaware, that "cooling off period" is two years in the three areas described above. Here, while employed by Del Tech, she was specifically involved in putting together the very program for which she wished to contract. The public could suspect that she used her public position involving access to information on the program, and access to colleagues, etc., to create a future employment opportunity for herself, giving her an unfair advantage over other possible competitors. In fact, there were discussions between her, the Cabinet Secretary of Health and Social Services and the President of Del Tech beginning more than a year ago in which her willingness to contract

with Del. Tech. upon retirement was sought. That is not to say that she, in fact, used her public position to capitalize, but the public purpose is to "avoid any justifiable impression" that the public trust was violated. Thus, the literal application of the statute is necessary to achieve the public purpose, and therefore would not be a basis for a waiver.

(2) Undue Hardship

As noted above, however, a waiver may be granted if there is an undue hardship for the agency. "Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary,* p. 1290 (10th ed. 1992). Part of the basis for the request was: her 26 years of experience at the college; she knew the policies, procedures and guidelines of the College; she had extensive experience with health accreditation; and she was very knowledgeable about the Delaware health care system. As to the paramedic program, she indicated that she was "uniquely qualified" because she worked with all of the critical organizations involved with the program during the past year and could coordinate between Public Health and Del Tech. Basically, she was saying that she knew the players and knew the system. The Commission has previously noted that what any former employee brings to the table in a post-employment situation is that they have an understanding of the policies, procedures, etc., and can arguably do the work faster and cheaper as a result of their prior work in the same area. *Commission Op. No. 97-18.* However, the very hardship imposed by the statute is that any costs savings created by the former employee's familiarity with the work is lost. Logically, that argument could be used any time a former employee is hired to perform the same function for which such employee was directly and materially responsible. *Id*. If those facts alone constituted "an undue hardship," and thus a basis for a waiver, there would never be a "cooling off period." *Id.*

The other "hardship" basis was that the agency said there were significant time constraints in developing the program and that "finding another individual or firm with the requisite history and qualifications to develop and implement this program would present an undue hardship and could significantly delay the implementation of the educational paramedic program." To get the paramedic association program implemented and running by August 1999, the program development had to begin immediately. The agency looked internally for someone to perform the tasks, but the two employees who had an allied health background were not as familiar with the paramedic needs or some of the other related issues. The Dean of Academic Affairs thought if one of those two individuals were used it could delay program implementation anywhere from six months to as much as a year. The agency had not attempted to advertise the position to persons outside the agency. According to Mark Brainard, Del. Tech's Assistant Vice President, Personnel and Legal Affairs, the agency did not know if persons outside the agency would have the experience she had in matters such as curriculum development, course development, admissions standards, accreditation issues which were necessary for a paramedic program and who had familiarity with the educational side. Even so, training or finding such an individual externally or internally would cause a serious delay in meeting the deadline for starting the program.

Because "time is of the essence" in getting the new degree program underway, it would be an undue hardship on the agency not to grant a waiver in these circumstances. However, such waiver was conditioned upon: (1) work limited to that "sliver" of responsibilities related to developing the particular program; (2) the contract was for one year; and (3) as stated at the Commission meeting, Ms. Studte would take a 30% reduction in pay and will take no pay for the meetings in the spring.

While granting a waiver, we strongly encouraged the agency to be cognizant of the post-employment provision, and where it had advance knowledge that an individual was planning to leave State employment, begin looking in a timely manner for a replacement.

97-27 – Post Employment—Short Term Contract: A former State employee asked if it would violate the post-employment restrictions if he entered a short-term contract to provide computer services to input data provided by an agency for its fiscal year budget. He also asked if, in the future, he may work for a firm which might bid on other State contracts.

The post-employment law places a two year restriction on representing or assisting a private enterprise before the State on matters in which a former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible while employed by the State. It also precludes the disclosure or use for personal gain of confidential information gained while employed by the State. 29 Del. C. § 5805(d).

Here, the former employee was never employed by the agency with which he sought to contract to provide computer services. While employed by the State, he worked with computers and provided information to his agency regarding its computer needs. Some of the agency's needs were provided by the agency with which he sought to contract. However, he was not involved in any manner in providing information for his former agency's budget that would be part of the information he would input under the contract. He also was in no manner responsible for the contract which he now sought. In performing the contract obligations, he would not have any decision making authority over what numbers were input, rather he would perform merely the technical function of inputting data. He would not input any data regarding his former agency.

Regarding the possibility that he may, in the future, wish to work with a firm which may bid on other State contracts, any decision on that matter would be premature as apparently the State contract in which such firm may be interested had not yet been published for bid.

97-21 – Post Employment—Application to Temporary Employees: A State agency was considering hiring an individual to fill a position that was not funded as a permanent position. It asked about the applicability of the post-employment restrictions to the individual should she be hired. It said she would not be "the typical employee" because she was leaving private employment and may be asked to leave State employment through no fault of her own. It indicated that it believed the limit that may be imposed on others may not be fairly applied to her situation. The Commission noted the concern about those matters; however, the statute mandates that the Commission base its decisions on a particular fact situation. *See,* 29 Del. C. § 5807(c). As she had not even begun work for the State, there were no facts to apply at this juncture. The Commission said that the individual was obviously aware of the post-employment restriction and the Commission assumed she would factor that into her decision to accept State employment.

The Commission may provide assistance to an agency in understanding the Code. *See,* 29 Del. C. § 5809(10). It pointed out the following: No specific exemption or distinction appears in the post-employment restriction based on whether the employee was temporary, did not hold a permanent position, etc. Realistically, a number of people have worked for the State that did not have a permanent position: casual, seasonal employees who are hired for limited periods of

time; non-Merit employees, who could be dismissed at any time with no "cause" required for termination; and Merit position employees who have a probationary period and can be terminated during that period under the applicable Merit Rules. Although a two-year restriction applies to post-employment activities, the Commission had previously noted that the General Assembly limited the restriction to "discrete and isolated transactions" that trigger the provision so people may move from private employment to public employment and back again. *Commission Op. 96- 75*.

The first consideration is whether the former employee would represent or assist a private enterprise on matters involving the State. Further, even if she accepted employment with a private enterprise where her duties called for her to represent or assist in matters involving the State, the post-employment restriction is limited to situations where the individual: (1) gave an opinion; (2) conducted an investigation; or (3) was directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

Thus, the effect of the post-employment provision depends on what activities she engaged in while employed by the State, and whether upon exiting State employment she would be assisting any private enterprise on matters involving the State in the three areas listed above.

97-18 – Post Employment—Contract with Former Division: A few months after a State employee retired, the agency asked if it could privately contract with him to work on certain projects. The projects in the contract were projects for the Division from which he retired. The agency said if the employment would violate the post-employment provision that it wished to have a waiver granted.

Former State employees may not, for two years after terminating employment, represent or assist a private enterprise on matters involving the State where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible. 29 Del. C. § 5805(d). Although the individual did not work specifically on the projects in the contract while assigned to the Division, for the reasons given below, the Commission concluded that in reviewing his responsibilities in the Division and comparing that with the post-employment contract responsibilities proposed for the same Division, the contract would be for matters which he was directly and materially responsible while employed by the State.

In his most recent State position, he had oversight responsibility for the Division's projects. He was responsible for overseeing the last step before a project was advertised. That authority required him to review each project using the principles and practices of his profession to decide not only alternate ways to insure cost efficiency, but also to question, because of his past experience as a designer of similar projects in the same Division, the technical aspects of the project. He was also responsible for oversight of the Division employee who actually worked with the consultant to review the types of products used in design of the project.

Additionally, he was responsible for the "stewardship arrangement" on federally funded projects of the same nature. That entailed insuring that other sections involved in putting the total project together coordinated on the various project elements. He also oversaw the function where the technical project elements came together from the various sections with the financial arrangement. Thus, he administered the project contracts and supervised administrative, professional, technical, and support staff through his oversight responsibilities. As indicated in his job description, that position had "full technical responsibility for interpreting, organizing,

executing, and coordinating assignments, and for planning and developing . . . projects. A significant aspect of the work involved coordination of the administrative and technical factors related to multiple programs."

His responsibilities, if awarded the proposed contract, would require him to coordinate with other Department sections in putting together the various elements of the contracts such as administering and drafting the contracts for final advertising and award. Such work was essentially the same responsibilities he performed for the Division while employed by the State.

The agency said it was interested in contracting with the former employee because he was "very familiar with the process..." and "he knows how to take a project from the start and come up with a completed ... design." Regarding his responsibilities for the Division, it was stated that "what he did was make sure all these things come together." Thus, it was his ability to manage a project that made him an attractive candidate.

The Commission recognized that while employed by the Division he had less "hands on" input but more oversight in the process because he possessed the requisite design skills. The fact that he would be expected to do more "hands on" input under the proposed contract was of little significance because his duties would still involve matters over which he was directly and materially responsible while employed by the State. Accordingly, the Commission found a post-employment contract with the former employee to perform duties for which he was directly and materially responsible only several months previously would violate the post-employment provision.

Regarding the agency's request for a waiver, waivers may be granted if the literal application of the statute is not necessary to achieve the public purpose of the statute or would result in an undue hardship to the employee or agency. 29 Del. C. § 5807(a).

The post-employment restriction is designed to prevent former employees from getting a "leg up" on other private enterprises that deal with the State. *Commission Op. No. 95-11.* In discussing the federal post-employment provision similar to Delaware's, Congress noted: like other conflict of interest statutes, post-employment provisions are an attempt to insure public confidence in the integrity of the government. *"Ethics in Government Act," Senate Report No. 95-170,* p. 32. It noted that public confidence in government had been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id.* The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post-employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id.*

Similarly, the Delaware Legislature sought to insure public confidence in the integrity of government. 29 Del. C. § 5802. It then set a two-year "cooling off period" in areas where the former employee was "directly and materially responsible." 29 Del. C. § 5805(d). This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency.

While the agency admitted that there were other consultants who could perform the work, it wanted a waiver because it could hire him for less than other outside consultants because the agency would have to pay others a price which would include charges for overhead and profit. The agency said that while it could negotiate with other consultants on the amount charged for profit, it could not do so as to overhead. A contract with the former employee would

not contain a charge for overhead because the agency intended to make its staff available to him. Thus, the State would pay those employees' wages and benefits to work on the contract with the former employee. Additionally, the agency said he was familiar with the process and, therefore, it would take less time for him to put together a project.

As noted by a Commissioner at the hearing, nothing in the Code creates a waiver only on the basis that it would be cheaper to hire a former employee. While the Commission found the agency's concern over the cost to be commendable, it noted that every former employee could bring continuity and familiarity to performing a contract on the same duties which were performed as a State employee. That would arguably always create a cost savings to the State. If a waiver were granted only on that basis, the former employee would always have the advantage against competitors.

Further, "undue" hardship means "more than required" or is "excessive." *See, Merriam Webster's Collegiate Dictionary,* p. 1290 (10th ed. 1992); *Black's Law Dictionary,* p. 1370 (5th ed. 1989). The very hardship imposed by the statute is that any cost savings created by the former employee's familiarity with the work is lost. Logically, the "cost savings" argument could be used any time a former employee is hired to perform the same function for which such employee was directly and materially responsible. If such a hardship were considered "undue," there would never be a "cooling off" period.

Thus, to affect the public purpose of precluding an actual or perceived unfair advantage and to give meaning to "undue hardship," the Commission would not grant a waiver merely on the basis that there would arguably be a cost savings if the former employee were the contractor. As noted before, the statutory purpose is to preclude former employees from capitalizing on their past employment. Here, the agency sought to contract with a former employee who left employment with the same Division only a few months ago, on a contract which would run for more than a year. At a minimum, it could appear to the public that he had an advantage over other contractors based on his prior responsibilities with the agency, and could be capitalizing on his past relationship with the agency.

97-09 – Post Employment—Facilitating a Retreat—WAIVER GRANTED: A State agency asked if hiring a former employee, Albert Edwards, III, to serve as a facilitator at a two-day retreat on Team Building, in July, would violate the post-employment provision. While employed by the State, he performed the same duties. He left State employment in January 1997.

The Code prohibits former employees from representing or assisting a private enterprise on matters before the State where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible for a 2-year period. 29 Del. C. § 5805(d). The Commission has held that private contracts with the State constitute a "private enterprise." *Commission Op. No. 94-10*. While employed by the State, he facilitated the same type of training. Thus, he would be performing the same duties for which he was "directly and materially responsible." As the two-year period had not expired, such activity would violate the post-employment provision.

The agency asked for a waiver if the activity would violate the Code. Waivers may be granted if the literal application of the statute is not necessary to achieve the public purpose of the statute or would result in an undue hardship to the employee or agency. 29 Del. C. § 5807(a).

The post-employment provision is designed to prevent former employees from getting a "leg up" on other private enterprises that deal with the State. *Commission Op. No. 95-11.* In discussing the federal post-employment provision similar to Delaware's, Congress noted: Like other conflict of interest statutes, post- employment provisions are an attempt to insure public confidence in the integrity of government. *"Ethics in Government Act," Senate Report No. 95-170,* p. 32. It noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id.* The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post- employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id.*

Similarly, the Delaware legislature sought to insure public confidence in the integrity of government. 29 Del. C. § 5802. It then set a 2-year "cooling off period" in areas where the former employee was "directly and materially responsible." 29 Del. C. § 5805(d). This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency, while minimizing the burden on individuals who undertake government service.

Here, the written request asked for a waiver on the basis that: "While other individuals could be hired to provide this service, Mr. Edwards' familiarity with the group and the program would reduce the advance planning time required of the facilitator. This, coupled with his residing close to the retreat site, should result in cost-savings for the state." Every former employee can presumably bring continuity and familiarity to performing the same job, which arguably would always affect a cost savings. If a waiver were granted only on that basis, the former employee would always have the advantage against competitors.

Further, "undue" hardship means "more than required" or is "excessive." *See, Merriam Webster's Collegiate Dictionary,* p. 1290 (10th ed. 1993); *Black's Law Dictionary,* p. 1370 (5th ed. 1989). The very hardship imposed by the statute is that any cost savings created by the former employee's familiarity with the work, which also results in continuity, is lost. Logically, the "cost-savings" argument could be used anytime a former employee is hired to perform the same function for which such employee was directly and materially responsible. If such a hardship were considered "undue," there would never be a "cooling off" period.

Thus, to effect the public purpose of precluding an actual or perceived unfair advantage and to give meaning to "undue hardship," the Commission examined other factors brought to its attention at the hearing by Ms. Nancy Pearsall, Staff Development/Project Management. She agreed that there were others available who would like to perform the work. However, she stated that: (1) there were no internal resources or outside resources which could adequately provide the services that Mr. Edwards could provide in the time frame given; (2) it would take her a lot of time to bring someone else up to his level; and (3) his vacant position had been announced but not filled and it would require a lot of time to prepare that individual even when hired.

Because of the difficulties in finding an adequately trained facilitator and the difficulty in training someone to his level in time for this one retreat, combined with other facts such as the limited employment period, the Commission granted a waiver for the agency to contract with him for the two-day retreat. The waiver was limited to that two-day period and did not include any follow-up work.

96-81 – Post Employment—Computer Consultant to State Agency: A State agency notified 30 vendors of a computer consulting opportunity. A State employee learned of the opportunity and applied. The employee asked if it would violate the post-employment provision if she left State employment and accepted the position.

The post-employment provision imposes a 2-year restriction against former State employees representing or assisting a private enterprise on matters involving the State if the employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d). It also prohibits disclosing or otherwise using confidential information gained as a State employee for personal gain or benefit. *Id.*

While a State employee, the individual had worked on computer programs, which she would be doing if she selected as the consultant. However, she had not worked for the same agency while employed by the State; had not been in anyway involved with the agency while employed by the State; and the computer work was not on the same subject matter for which she was responsible while employed by the State. Thus, she would not be representing or assisting the private enterprise on matters on which she gave an opinion, conducted an investigation, or was otherwise responsible for while employed by the State. Further, the type of information she had access to while employed by the State was not information that would aid her in the agency contract. She said she would not disclose or use any confidential information gained as a State employee. The Commission found no violation under these facts.

96-75 – Post Employment—Defining "Matter"*:* A State employee obtained an advisory opinion from the Commission regarding his post-employment activities. *See, Commission Op. No. 96-32.* He had asked if it would violate the post-employment provision if he sought contracts with State agencies. He was not attempting to contract with his former agency. The Commission held that his proposed activities did not violate the Code. Once he submitted bids on contracts, the agencies asked to the Commission to review the situation. It asked the Commission to focus on the meaning of "matter" and the meaning of "confidential information," in the post-employment provision.

That provision restricts State employees from representing or assisting a private enterprise on any <u>matter</u> involving the State, for 2 years after terminating employment, if he: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for such <u>matter</u> in the course of his official duties. 29 Del. C. § 5805(d) (emphasis added). The provision also provides: "Nor shall any former State employee, State officer or Honorary State official disclose <u>confidential information</u> gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit." *Id.* (emphasis added).

"Matter" means "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(6). "Confidential information" is not defined by the Code.

At the hearing, an agency representative noted that "matter" is "fairly broad," and wanted to know: "Is it the same matter even though it's not the same contract, but it's a similar process?" Putting that question in the context of this case: Is the "matter" (providing computer services to other agencies) the same "matter" for which he was responsible while employed by a different agency since the "process" of developing computer programs is similar? And does

understanding the "process" constitute "confidential information"?

(A) Approach to Interpreting the "Matter"

Under the Delaware rules of statutory construction, words and phrases are to be read within their context and the construction should be consistent with the manifest intent of the General Assembly. 1 Del. C. § 303 and § 301.

In the Code of Conduct, the broad intent of the General Assembly is expressed in its "Legislative findings and statement of policy." See, 29 Del. C. § 5801. The General Assembly said that the conduct of State employees and officers must hold the respect and confidence of the public, which is achieved by following "specific standards" of conduct. 29 Del. C. § 5802. It went on to say that: "all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3).

To assure that these findings and policy considerations are applied with a fair understanding of such legislative intent, the General Assembly was careful to provide specific standards to determine whether proposed post-employment activities are permitted. Thus, the "matter" in the post-employment provision must be one in which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. *See,* 29 Del. C. § 5805(d).

The Delaware post-employment restriction uses the term "matter," and it separately defines it as "any application, petition, request, business dealing or transaction of any sort." The federal statute does not separately define "matter," but lists examples in the statutory text such as contracts, claims, etc., "or other particular matter." Regardless of approach, both restrictions identify types of "matters." Placed within the framework of the statute, the "matter" must be related to the former employee's activities and subsequent representation. In Delaware, it must be "directly and materially" related and in the federal statute, it must be "personally and substantially" related. These standards are similar. *See, WordPerfect Thesaurus* ("directly" is listed as synonymous with "personally"; "material" is synonymous with "substance"; *See also, Black's Law Dictionary,* p. 880 (5th ed. 1979) ("material" encompasses representation which is "so substantial and important" (emphasis added); *Id.* at 1281 ("substantially" includes "materially").

The Commission then considered cases analyzing the term "matter" in the federal post-employment provision, which is similar to Delaware's provision. *See, United States v. Medico,* 7th Cir., 784 F.2d 840, 842 (1986)*; CACI, Inc. v. United States,* Fed. Cir., 719 F.2d 1567 (1983). In those cases, the federal statute restricted former employees from acting "as agent or attorney for anyone other than the United States in connection with any . . . contract, claim, . . . or other particular matter . . . in which he participated personally and substantially as an officer or employee." *Medico* at 842.

The *Medico* Court spoke at length about the purpose of the post-employment provision and how that affects the definition of "matter." *Id.* at 842-843. It said that moving between government and private employment creates a risk of a conflict of interest--that people who hope to move to the private sector will favor firms they think may offer rewards later and after they switch to the private side may exercise undue influence on those they leave behind. *Id.* at 843. On the other hand, the chance to move from private to public employment and back again may enable the government to secure skilled people who are unwilling to make public service a

career at current pay rates. *Id.*

The Court stated:

> "The government can hire people for less, and attract specially skilled agents, if it allows them to put their skills to use later for private employers. It is therefore important to define 'particular matter' broadly enough to prevent disloyalty without defining it so broadly that the government loses the services of those who contemplate private careers following public service." *Id.*

The Court said those concerns were addressed by the manner in which the statute was drafted. *Id.* The court noted the "discrete and isolated transactions" which trigger the prohibition. *Id.* It said the limits of the statute must be put together. *Id.* The court pointed out that the triggering factors were whether the "matter" was the same "matter" and whether the former employee participated "personally and substantially." *Id.* It said that even where the subject was the same, the facts must overlap substantially. *Id.* Similarly, Delaware's law has triggering factors--the "matter" must be the same "matter" in which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. 29 Del. C. § 5805(d). The decision on whether the Delaware code factors are triggered is based on comparing the factual "matter" on which the employee worked, and the factual "matter" of the proposed post-employment and whether the two overlap.

In *Medico*, the facts overlapped substantially because the former employee represented a company before his former agency on a contract that was a mirror image of a previous agency contract that he negotiated. *Id.* at 842 and 844. The Court held the "matter" was the same and "nothing more was required." *Id.* at 844.

By way of contrast, the *Medico* court pointed to another federal case where the subject was the same but the facts did not substantially overlap. *Id.* at 843 *(citing CACI, Inc. v. United States,* Fed. Cir., 719 F.2d 1567 (1983)). In *CACI*, a federal Department of Justice (DOJ) employee was Chief of the computer section that provided services to a DOJ division. *Id.* at 1570. When the computer staff could not supply services, private contractors did so through noncompetitive contracts. *Id.* While employed by the DOJ, the Chief "contemplated" obtaining the services through competitive contracts. *Id*. at 1576. After he left government service, the DOJ issued a Request for Proposals (RFP) for the computer services. *Id*. at 1570. The Chief, now a former employee, helped prepare a company's response to the RFP and represented the company before his former agency. *Id.* An unsuccessful bidder challenged the contract award on the basis that, among other things, the post-employment provision had been violated. The lower court held that the prior data processing contracts and the current procurement contract were part of the same particular "matter." *Id*. at 1576. However, the Appellate Court reversed that decision, holding that they were not the same "matter" because the former employee had not developed the concept or formulated the RFP, and the contract was broader in scope, different in concept and incorporated different features than the prior contracts. *Id*. It noted that the new contract was to consolidate services, eliminate redundant services, improve management control, provide new services, include some services under the old contract and exclude some services provided under the old contract. *Id*. Thus, the *CACI* court, like the *Medico* court, looked at a specific, identifiable "matter."

Like the federal courts, the Delaware Superior Court looked to the particular matter on which a former State official was representing a private enterprise, rather than a process, to decide if the post-employment provision applied. *Beebe v. Certificate of Need Appeals Board*,

Del. Super., C.A. No. 94A- 01-004, Terry, J. (June 30, 1995). In *Beebe*, a former member of the Health Resources Management Council represented a company before the Council on a certificate of need (CON) request. *Id*. at 17. In his introductory remarks, he said that he had served on the Council for five years. *Id*. It was argued that his representation of the company violated the post-employment statute. *Id*. The Court found that while he was a Council member, he participated in reviewing CONs; however, the record showed that he did not take part in reviewing the two applications being considered by the Council. The Court held that "since he appeared before the Council in a matter for which he had no direct and material responsibility while on the Council, he did not violate the statute." *Id.* (emphasis added).

Here, the "matter[s]" on which the Delaware former employee wanted to represent a private enterprise were contracts to provide computer services to two agencies. Those contracts, like the ones in *CACI,* were not concepts or proposals he developed. The contracts required developing programs based on the specific agency needs to eliminate redundancy, improve control, provide new services, and integrate or exclude existing computer services as needed. Unlike the *Medico* contracts, they were not mirror images of each other, and no facts indicated that they mirrored any of his former agency's computer systems. Those systems were developed for his former agency's specific needs and the other two agencies had identified their own specific needs.

While the former employee was involved with his agency's computer system, it was not a technical requirement of his job. Moreover, the contracts were with other State agencies, not with his former agency. Thus, he was not even representing a private enterprise before his own agency as was done in *Medico* and *CACI*.

The first contract he sought was with a Board on which he served as his agency's representative. The Board met periodically and was charged with developing policies. His position with the Board was as a policy maker. He was not its computer specialist, nor was he responsible for the day-to-day operations of the agency over which the Board developed policy. While the Board discussed the need for a better information system, like the individual in *Beebe*, the former employee did not review, vote on or develop the concept or proposal.

As for the second contract, he did not work for the agency with which he wanted to contract; nor was he involved in developing its proposals. Thus, the contracts were not "matters" on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible for while employed by his State agency.

(B) Interpreting "Confidential Information"

The post-employment provision provides: "Nor shall any former state employee, state officer or honorary state official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit." 29 Del. C. § 5805(d).

Both agencies said: "The question presented by this set of circumstances is whether the former employee had access to confidential information through his employment with his agency and as a member of the Board which could conceivably give his company an unfair advantage over other contractors in developing these issues [developing computer programs]."

The Commission noted at the outset that:

(1) the Code does not define the term "confidential information";
(2) it was to decide if the former employee gained "confidential information," through his State employment;
(3) if so, he may not disclose such information following employment with the State nor may he otherwise use such information for personal gain or benefit.

The Commission noted in another decision that the Code does not define "confidential information." Thus, it followed the rules of statutory construction which require that words and phrases be read within their context and be construed according to the common and approved usage of the English language. *Commission Op. No. 95-05 (citing* 1 Del. C. § 303*)*. The ordinary usage of "confidential" means "containing information whose unauthorized disclosure could be prejudicial." *Id. (citing Merriam-Webster's Collegiate Dictionary,* p. 242 (10th ed. 1993)). The concern expressed was not that the government would be prejudiced if he got the contracts, but that a competitor for the contracts might be prejudiced.

In the prior decision, the Commission also looked at case law and statutes dealing with release of government information as relevant precedent in deciding if a specific matter was confidential under the Code of Conduct. *Id. (citing 2A Sutherland Stat.Constr. § 45.15* (5th ed. 1992) (decision on a point of statutory construction has relevance as precedence if the language of one statute has been incorporated in another or both statutes are such closely related subjects that consideration of one would naturally bring the other to mind). To insure consistency in its opinions, as required by 29 Del. C. § 5809(b), the Commission used the same approach in this instance, but dealt with the particular facts of the case. *See,* 29 Del. C. § 5807(c) (advisory opinions are to be based on particular facts). Therefore, the Commission noted that, in this case, provisions in Title 11 and in Title 29 might restrict disclosure of certain information which might be in the existing data systems.

First, to the extent the information in the existing data systems was protected from release as a matter of law, its disclosure would be unauthorized. The former employee stated that in developing the computer programs he would have no need to use any of the information contained in the existing programs. Thus, he would not be using non-disclosable contents of the systems for his personal gain or benefit. An agency representative said that any computer analyst could technically perform the job. As non-disclosable information in the data systems was not needed to write the programs, even assuming the former employee had that particular information, his competitors would not be prejudiced as they also would not need it to develop a program.

As to the activities of the Board, its Executive Director said the meetings were subject to the Freedom of Information Act (FOIA). FOIA provides that meetings are to be public unless they are closed based on specific statutory provisions. 29 Del. C. § 10004(b). Thus, open sessions would not be considered confidential proceedings. The statements at the Commission meeting were that all the meetings were open and that any member of the public could have attended the meetings and listened to the discourse. Thus, information at those meetings was information any citizen could have obtained. Again, it was admitted that any computer analyst could technically perform the job. Thus, the Board's discussions were available to competitors causing no prejudice. Furthermore, the job could be performed without that information, giving the former employee no edge over competitors. The Commission noted that information on developing computer systems was readily available to any person through, for example, classes offered at schools and universities. *See, e.g., Delaware Tech Spring 1997 Course Schedule,* p. 15. Public information also was available on how to create computer systems in a specialized environment. *See, e.g., Kinney, Litigation*

Support Systems (1985) which included sample government RFPs, etc. Also, information on how to contract with the State of Delaware was publicly available. *See, e.g.,* 29 Del. C. § 6901, *et. seq.* The Commission also gave weight to the statement of an agency representative that no privacy statute or freedom of information type of privilege or proprietary information was involved, especially as no facts to the contrary were revealed.

Rather, the expressed concern was that while the Board's contract was subject to notice and public bidding, the contract with the other agency was not. No evidence was offered to show that such a non-public bid contract involved any use of "confidential information." However, if the concern was based on awarding a contract under circumstances where the public was less likely to know about it because it was not subject to public bidding such concern had more to do with openness of government than with use of confidential information. There is no provision in the Code prohibiting former employees from bidding on contracts that are not subject to notice and public bidding. If the General Assembly believed it was a distinction that made a difference, it could have imposed a restriction on former employees as it has on current employees and officers. *See,* 29 Del. C. § 5805(c) (current employees and officers may not contract with the State on contracts of less than $2,000 unless there is notice and public bidding). Further, the State can award certain contracts without notice and public bidding. *See, e.g.,* 29 Del. C., Chapter 69. Thus, the Commission would not graft such a distinction onto the statute.

Another concern was that a data systems analysis program applicable to other State agencies was developed while the former employee was with his agency. Again, it is unclear how this connects to "confidential information," especially when any computer analyst could perform the contract. If it was being suggested that the former employee gained some special advantage because of his employment with his agency, contacts he may have made with other agencies, and through membership on the Board, the Commission failed to see how such activities could be classified as part of the "confidential information" rubric. The relationship or lack thereof did not impact on the ability to perform the service. Any computer analyst could perform the contract. Also, no evidence was submitted to suggest that the former employee used any relationship with such persons to obtain the contracts. In fact, the former employee's undisputed testimony was that he first learned that funding might be available for a computer contract with the Board when he read about it in the State's proposed budget, a public document. The Board's contract was subject to public notice and bidding and was open to anyone regardless of prior associations or friendships. Thus, the relationship or lack thereof does not impact on the ability to perform the service.

As to the other contract, the former employee did not know, nor did he have any involvement with persons within the agency.

No evidence was submitted to suggest that the former employee used his relationship to obtain any of the contracts. *See, CACI,* 719 F.2d at 1582 (to ascribe "evil motives" to State employees who make contractor selection or to the former employee for whom they had worked without factual basis is "clearly erroneous"); *See also, Brown v. District of Columbia Board of Zoning Adjustment,* D.C. App., 486 A.2d 37, 44, n. 7 (1984) (there must be, among other things, a showing of access substantially related to the subsequent representation before a Court infers that an individual actually gained confidential information); *See also, Medico,* 784 F.2d at 844 (fact that former employee did not use "inside information" was "irrelevant" to a determination of whether the post-employment provision was violated because the statute restricts representation on matters where the individual is personally and substantially responsible and "avoids any reference to such difficult-to-prove events").

The Commission concluded that there was no evidence that confidential information relative to the contracts was gained through the former employee's employment or his position on the Board. Therefore, he could not have used such information in connection with the contracts.

(C) Can the former employee use computer analysts from his partner's firm?

When he first requested an opinion from the Commission, the former employee said that one of the partners in his firm was also head of another firm which contracted with his former agency. He said he would not: work on those contracts; seek to recruit programmers to fulfill the other firm's obligations; or seek a contract with his former agency. Commission Op. No. 96-32.

One agency said that it understood that the two computer consultants who might be used by the former employee for this work had previously performed work for his partner's firm. It asked if the use of those consultants violated the prohibition against the disclosure or use of confidential information for personal gain or benefit. No facts suggested that the two consultants worked on the contracts with his former agency. However, assuming they did, no facts indicated that any confidential information they may have learned would be used on these contracts. The Commission noted again that fulfillment of these contracts requires technical skills that are within the public domain, and any computer analyst could technically perform the task. Assuming the computer analysts were familiar with his former agency's needs, they must use their skills to develop a specific program based on the specific needs of the contracting agencies. Even though the "process" of fulfilling the contracts may be the same "process" used for his former agency, the Commission had already addressed the "process" issue at length. The fact that two of the analysts had worked for another firm did not change the conclusion that the former employee was not disclosing or using confidential information for personal gain or benefit or that he was using it to the prejudice of competitors.

96-74 – Post Employment--Insufficient Facts: A State employee's duties entailed not only working on computer systems, but planning, designing, etc. He also wrote bid specifications, evaluated bids, gave opinions on the abilities of contractors to perform the contracts, participated in selecting vendors, etc. He was actively engaged in those activities until 1994. Later, his participation in contractual aspects was reduced. In 1996, two computer companies offered him employment. One company did not have a contract with his State agency, but it was expected to bid if the agency re-bid the contract. The other company had a State contract with his agency. However, he had not participated in that contract decision.

(A) The Company With a State Contract

The Commission found that there were insufficient facts to decide if his participation in the contract would violate the post-employment provision. Clearly, in the past, he had participated in decisions on contracts on which this company bid. However, in later years he did not participate in contract decisions. If the subsequent contracts were mirror images of the ones in which he participated, then it was possible the contract could be one on which he gave an opinion or was otherwise directly and materially responsible. But if the contract on which the company wished him to work was substantially different, it may not be one on which he gave an opinion or was otherwise directly and materially responsible. Without such specific facts, the Commission could not issue a final decision.

(B) The Company without A State Contract

While the other company did not have a State contract with his former agency, he anticipated that if the agency re-bid the contract the company might respond to the request for bidders. If it responded, it was possible that it might be selected. Conversely, it was possible that the agency might not re-bid the contract; the company might not respond if the contract were re-bid; and it might not be selected if it did respond to a re-bid. If the latter occurred, it was possible that he might go to work for the company but have no occasion to represent or assist it before the State within the two-year period.

If the contract were re-bid, the contract terms were not known at this time. Those terms could affect whether the contract would be a "matter" on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible. 29 Del. C. § 5805(d). The Commission pointed to a federal case where a former federal employee was working for a private enterprise on a contract which was a mirror image of a contract he drafted, negotiated, etc., while employed by the government. *See, United States v. Medico,* 7th Cir., 784 F.2d 840 (1986) (a mirror image contract was the same "matter" on which a federal employee worked on during his federal employment and therefore participation on behalf of a private enterprise violated the federal post-employment law). Participating in a mirror image contract might violate the Delaware post-employment provision. However, if the contract sufficiently differed from contracts worked on while employed by the State, it might be possible that the activity would not violate the Code. *See, CACI, Inc. v. United States,* Fed. Cir., 719 F.2d 1567(1983) (federal employee was chief of computer section and contracted with private vendors; as part of his post-employment activities, he represented a company which bid on a contract with his former agency; federal court held that the contract was not the same "matter" because the contract was broader in scope, different in concept and incorporated different features than contracts he worked on during his government employment).

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(C) Restrictions on Using Confidential Information

The post-employment restrictions also prohibit improper disclosure or use of confidential information gained while employed by the government. 29 Del. C. § 5805(d). The Commission noted that the State employee said proprietary systems were "out there," and that he had been involved in contract negotiations for the State with various computer companies. It pointed out that even where a contract is subject to public notice and bidding, some information may be confined to closed hearings. *See,* 29 Del. C. § 6919. Also, trade secrets, and commercial or financial information obtained which is of a privileged or confidential nature, is not to be disclosed. *See,* 29 Del. C. § 10002(d)(2). The Commission cautioned the employee that if he accepted either job, he was not to improperly disclose or use confidential information that he may have gained from his public position.

96-73 – Post Employment—Computer Consulting with Former Agency: A State agency contracted with a firm to provide computer services for a multi-year project. Later, the contractor defaulted and the agency needed to hire another contractor. The agency wanted to use a firm owned and operated by a former State employee. Also the firms' systems designer who would be assigned to the project was a former State employee. The agency wanted them to complete part of the multi-year project and then would publicly notice and bid the remainder of the project.

As neither the owner of the firm or the program designer had been terminated for more

than 2 years, the commission considered whether the agency contract was a matter on which either of them had: (1) given an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State, as provided the post-employment provision. 29 Del. C. § 5805(d).

Both former employees had worked for the same agency. However, neither had worked for the section that was seeking to contract; neither had participated in anyway in putting together the contract that the defaulting contractor had been awarded; and neither had been involved with the project which was the subject of the contract while employed by the State. The post-employment provision also prohibits disclosing or otherwise using confidential information gained while a State employee. 29 Del. C. § 5805(d). In designing the contract program, the type of information the employees worked with as State employees would not be used, nor would they disclose any confidential information.

96-71 – Post Employment—Company Contracts with Former Agency: A former State employee went to work for a company which had projects regulated by his former agency. While employed by the State, he had reviewed and approved some projects. If he worked on those projects for the private employer, he would be representing or assisting a private enterprise on matters in which he gave an opinion while employed by the State. Such activity would violate the post- employment restriction. However, the private company said it had other projects he could work on which the State did not regulate. Participation in those projects would not violate the post-employment provision. Additionally, the company had projects which he did not review and approve while employed by the State. On those projects, he was expected to have contact with his former agency. The Commission held that as he was not representing his employer on matters which he reviewed while in his official capacity, his participation would not be prohibited. I n reaching that decision, the Commission relied on *Beebe v. Certification of Need Appeals Board,* Del. Super., C.A. No. 94A-012-004, Terry, J. (June 30, 1995), *aff'd,* No. 304, Del Supr., Veasey, J.(January 29, 1996) (former member of Health Resources Management Council did not violate the post-employment restrictions when he represented a private company on an application before the Council as he had not reviewed the application while serving on the Council).

96-69 – Post Employment—Particular Facts Required: An individual who intended to leave State employment asked if his proposed post-employment activities would violate the Code of Conduct. He had not accepted any offer with any employer nor had he decided if he would pursue a consulting contract with the State. He said it was possible that he might work for a company that could have State contracts. The Commission must base its decisions on a "particular fact situation." 29 Del. C. § 5807(c). As he had no particular company in mind, nor was he aware of any particular State contract on which he might work, the Commission held that the facts were insufficient for a decision. It referred him to the Commission's synopses of post-employment opinions and advised that once he identified a specific post-employment position, he could return for a decision.

96-65 – Post Employment—Company Contracting with Agency for Which Former Employee Developed Guidelines: The Director of a State agency left his employment and accepted a fellowship position with a federal agency. At the end of the fellowship, he was offered a job by a computer firm which had won a competitive contract with Delaware to provide a tracking program for a case management system. The company also had a contract with

another State. The firm wanted him to manage the technicians who would be putting together programs for Delaware and the other State. The contract was not with his former agency. However, while employed by the State, the former employee served on a Committee which developed guidelines for the State agency which later contracted with the company. He said it was possible that the Committee discussed a computer tracking system, but he had no specific recollection of such discussion and was not aware of any specific Committee action regarding such systems. The former employee was not involved in any facet of the contract or in selecting the company, as he had left State employment and therefore was not serving on the Committee at the time of the contract.

As he was not in any manner involved in the specific contract while employed by the State and as the private employment would consist of managing computer technicians, which was not part of his responsibilities while employed by the State, the Commission found that he had not given an opinion, conducted an investigation and was not directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

96-60 – Post Employment—Limited Waiver: A State employee was a Training Administrator in the Division of Mental Retardation (DMR). In addition to other duties, she served in the lead capacity for the "Essential Lifestyle Planning" (ELP) project, which had a goal of restructuring the way DMR provides support and services to clients. She wanted to leave full-time employment because of injuries suffered in an accident. It was possible that the agency might need her expertise on the ELP project. An agency representative said he supported her waiver request due to the unusual circumstances of her accident, and because it would give the Division the option of contracting with her if it needed her expertise on the ELP program. He said the Division would follow all State guidelines on competitive bidding.

A former employee may not represent or assist a private enterprise on matters involving the State, for two years after leaving State employment, if the individual: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d). As her employment by the State included work on the ELP program and she wanted to seek a contract on that same matter, if the Division sought a contractor for the work, her participation in such contract would violate the post-employment provision.

The Commission may waive Code of Conduct restrictions if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the employee or the agency. 29 Del. C. § 5807(a). If a waiver is granted, the proceedings become a matter of public record. 29 Del. C. § 5807(a). The Commission granted a waiver for the limited purpose of allowing the agency to have the option of contracting with her, if it decided it needed her expertise in the limited area of the ELP process.

96-46 – Post Employment—Working for Company Contracting with Prior Agency: A computer company offered a former State social worker a job. The company had a contract with her former State agency.

The Commission held that her employment by the computer company would not violate the post-employment provision as she had not given an opinion; conducted an investigation; and was not directly and materially responsible for selecting the contractor or developing the contract requirements, while employed by the State. *See,* 29 Del. C. § 5805(d). She used the

computer system provided under the contract for the ministerial work of tracking clients. However, the type of activity for which she was directly and materially responsible was not the ministerial tracking of cases, but fulfilling the job requirements of a social worker. Those responsibilities were dissimilar to the employment with the private enterprise, as she would work in the systems end of the computer program. While her general knowledge of the agency's needs might help to develop computer requirements, the Commission found that such general background differed from the particular duties for which she was directly and materially responsible--evaluating the needs of a particular client and making decisions such as whether intervention was necessary. The Commission held that moving from the operational area of direct services to families into a computer systems position, with no contact with her former clients, would not violate the post-employment provision.

96-44 – Post Employment—Contracting with Former Agency but Different Section: A private company hired a former State employee 22 months after she left State employment. The private employer had a contract with the agency for which she had worked. She was not involved in the contract negotiations; did not work in the same section that entered the contract; and her State duties did not involve testing, which was the subject matter of the contract. Her private employment would require her to coordinate scheduling/testing with the same department for which she had worked. However, those activities were not done by the same section where she had worked and she would be at a different site location. Based on those facts, it did not appear that she gave an opinion, conducted an investigation, nor was she directly and materially responsible for either the contract with the company or the subject matter thereof, while employed by the State. *See,* 29 Del. C. § 5805(d).

She advised the Commission that her private employment would not be such that any confidential information she may have obtained while working for the State would be improperly disclosed or used for personal gain or benefit.

96-43 – Post Employment—Former Employee Selecting Replacement: When a State employee decided to leave State service, his agency announced an opening for the position. No replacement was found before he left State service, and his job was re-announced. The agency wanted to contract with him to be part of a three-person panel which would review and rank the applications of persons applying for his prior position. State employees who applied for the job had not been under the supervision of the former employee. The agency expected the task to take two days, and wanted him as part of the panel because of his expertise in both computer and finance systems. He and the panel would review and rank the applications, but would not interview candidates, as a separate panel would conduct the interviews.

The Commission found that he had not: (1) given an opinion; (2) conducted an investigation; or (3) been directly and materially responsible for the "matter" [reviewing job applications] while employed by the State, except the single occasion when he had decided to leave State service and reviewed the applications after the first announcement of the job opening. He had not reviewed and ranked job applicants while employed by the State; had not evaluated the State applicants who applied for the job while employed by the State; would not interview candidates; and would use his expertise to evaluate applications.

96-32 – Post Employment—Computer Services Contract: A former State employee asked if it would create a conflict for him to form his own company and seek State contracts. He would

not seek contracts with his former agency, but wanted to seek contracts with other State agencies, including a Board on which he had served.

The post-employment provision restricts State employees from representing a private enterprise on matters involving the State, for 2 years after leaving State employment, 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).

Here, he intended to represent a private enterprise (his company) on a contract to provide computer services to various agencies. While employed by the State, he was not involved in any decision concerning the contracts. Thus, while employed by the State, he did not give an opinion, conduct an investigation, and was not otherwise directly and materially responsible for the particular contracts he wanted to seek. On a broader level, his primary State duties included various administrative and operational decisions for his agency, which included implementing operational aspects in areas of personnel, finance, payroll, etc., that resulted in computer programs to facilitate and expedite access to the data for his agency. Computer systems were not a technical requirement of his employment, but an area of interest to him and he used that interest to develop and improve operations in his agency. However, as he was not seeking to contract with his former agency, his activities did not violate the Code of Conduct.

As a secondary aspect of his State employment, he served on the Board of Managers of an agency. At its periodic meetings, the Board had discussions, over a course of twenty years, about computer systems as a means of enhancing the flow of information. However, the Board never took formal action and he never voted on any proposal to develop such a system. He subsequently learned, by reading the Budget bill, that the agency was seeking proposed funding for a computer system. He was not involved in the budget proposal and, in fact, was not even aware until he read the proposed budget that funding was being sought. If the funding became available, the contract would fall within the range of contracts which must be publicly noticed and bid under the State procurement law. As he did not have any involvement, or even knowledge of the proposed funding, it was determined that he had not given an opinion, conducted an investigation, and was not directly and materially responsible for the funding for the contract. Thus, it would not violate the Code for him to seek the contract if it were funded.

The former employee also stated that one of his business partners had a contract with his former agency as an independent contractor. The former employee's firm would not be working on any aspect of his partner's contract, nor would he seek to recruit programmers to fulfill the contractual obligations. As the former employee would not contract with his former agency, and would not be involved in the agency's contract work with his business partner, the Commission found no violation.

96-01 – Post Employment—Soliciting Former State Clients: Just before leaving her State job, an employee wrote to the clients assigned to her by the State and told them she was going to work for a private enterprise. She also told them that the private enterprise could be selected as a service provider by the client. Federal law required that clients be offered a choice of providers. It was the agency's intention to notify clients of their right of choice, and it planned to identify private enterprises which had contracted with the State as providers, such as the one where the employee was going to work. No facts indicated that a substantial number of her clients selected the provider for which she was going to work, as a result of her letter. Additionally, she did not participate in any decision to select the private enterprise as a service provider for the State. Further, she had sought an advisory opinion from the Commission for a

determination of whether she could accept employment with the contractor. *Commission Op. No. 95-17.* At that time, she said she was not using the list of her State clients to encourage them to switch to the private contractor. Rather, she sought to inform them of their rights. Agency representatives and the former employee met with the Commission to discuss this situation, and review the letter. There apparently was some confusion between the agency and the employee regarding whether who should notify clients of her change in status and of their ability to select her new employer, who had contracted with the State, as a service provider.

The agency did not seek a decision on whether, in this particular instance, the former state employee violated the Code. Rather, it sought guidance on avoiding possible confusion in the future. The Commission may "provide assistance to state agencies, employees and officials in administering the provisions of this law." 29 Del. C. § 5809(10). The Commission noted that the Code prohibits disclosure of confidential information beyond the scope of the employee's position or the use of such information for personal gain or benefit. 29 Del. C. § 5806(g).

While the Commission believed it was of service to notify clients when a person handling their case leaves State service, it noted that the clients are clients of the State, not of the individual. To the extent that client names could be considered proprietary or confidential, the Commission suggested that the agency could avoid future questions regarding such use of the information, by establishing the type of notice to clients that would best suit the agency, its clients, and employees. For example, the agency may wish to develop a policy on notifying clients of an employee's departure, rather than having the employee send such notice.

95-32 – Post Employment—Nursing Home: A State employee asked if it was proper to accept employment with a nursing home after they left State employment. The employee's State duties did not include referring clients to nursing homes, nor did the employee, or any person supervised by the employee, determine the facility to which clients were admitted as that decision was made by the individual or their family. The employee had no direct dealings with any of the agency's clients. The employee supervised people who evaluated clients for certain benefits. The employee reviewed the evaluations for determination of benefits to ascertain if proper procedure was followed. The State agency had no contract with the nursing home which wanted to hire the employee. The duties with the nursing home would require little, if any, contact with the State agency, as the nursing home clients were primarily clients that would not seek the type of benefits offered by the agency. The only anticipated contact with the agency was that it might inquire about the number of beds available in the facility and/or seek confirmation of admissions or discharges. Such information would be purely objective in nature, with no relationship to eligibility for State benefits. The skills required at the nursing home related more to the employee's professional educational training than to the specific skills used at the agency. The Commission found no conflict of interest based on thosese facts and directed that any confidential information learned as a State employee could not be used during employment with the nursing home.

95-18 – Post Employment—Grant Program: A State employee developed a technical proposal for a federal grant program which was later approved by his State agency and by a federal agency. Contractual arrangements were made and various private enterprises were selected to start the project. As part of his official duties, the State employee worked with one of the companies selected. When he left State employment, the employee began a consulting firm and was offered a consulting opportunity with a subsidiary of that company. The subsidiary's

project was unrelated to the agency project; the subsidiary was not involved with the agency project in any manner; nor was it seeking any State assistance or contract relative to the program he was to consult on; the consulting work was in the marketing area, not the technical area in which he worked for the State; no proprietary or confidential information from the agency was to be used in developing the marketing program; and the client base was not the same. Based on those facts, the Commission found no violation of the post-employment provision.

95-17 – Post Employment—Counselor: A former State employee sought a decision on whether employment as a counselor, which was part of her responsibility as a State employee, violated the post-employment provision. The Commission concluded there was no violation of the Code of Conduct because although the private enterprise had a contract with the State, the employee was not involved in the decision resulting in that contract. Further, while her former State clients might elect to receive treatment from the private enterprise because of the contract with the State, the contract was the result of a federal law requiring that clients be given a choice of provider, and it was the clients' choice, not a decision that could be made by the former employee. The Commission also was advised that the individual was not using the list of her clients from the State to encourage them to switch to the program offered by the private enterprise.

95-11 – Post Employment—Medical Professional: A State agency wanted to contract with a medical professional after he retired from the State. The individual would perform some of the functions he was responsible for during his State employment. The Commission found that because he would perform the same functions as while employed by the State, the contract would violate the 2-year post-employment restriction against employees representing or assisting a private enterprise on matters they were directly and materially responsible for during State employment. 29 Del. C. § 5805(d). (The Commission, in a previous decision, ruled that a private personal contract with the State constituted a "private enterprise," making former State employees with such contracts subject to the post-employment restrictions. *Comm. Op. No. 94-10*). The Commission advised that the 2-year prohibition was a measure to assure the public that former State employees could not use information acquired during their employment or their former position as a means to "get a leg up" on other private enterprises that have dealings with the State. The Commission noted that despite these restrictions, the Legislature recognized that a total ban against a former State employee working for a private enterprise was not realistic and thus limited the prohibition to instances where the individual was directly and materially responsible for the matter during State employment. Further, it granted the Commission authority to grant a waiver where "the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee, officer, official or State agency." 29 Del. C. § 5807(a).

There was testimony that the agency would incur a hardship if it could not contract with the individual as his services were "unique" because of his extensive professional background in the area where he would be working; he had established a rapport with hospitals and doctors that was needed to ensure success of the agency's programs; his particular medical training and experience were not easily found; despite a search no one qualified to assume the duties was available at the time; his skills were needed to complete programs already implemented; and he was familiar with the data system being used on programs that were "pretty well on their way" to conclusion. The Commission granted a five-month waiver to the post-employment restriction with the opportunity for the agency to seek an extension of the period with supporting

evidence showing good cause.

95-06 – Post Employment: An individual who was preparing to leave State employment asked whether accepting a position with a private enterprise would violate the post-employment restriction. The Commission found that accepting the position would not violate the post-employment restriction because: (1) the nature of the two positions was dissimilar as the State position was primarily administrative and the private position was operational; (2) the employee's State responsibilities did not involve preparing Requests for Proposals (RFPs) in the specific area in which the employee worked; (3) the State's contractual process in that area was administered by a person not within the supervision of the person leaving State government; and (4) the State responsibilities did not encompass review of responses to RFPs submitted by the private enterprise for which he wished to work. While not finding a technical violation, the Commission found that because the private enterprise was seeking or might seek a State contract with the agency, any direct participation in writing or presenting RFPs to the agency on such matters might appear improper, and directed the individual not to be involved in writing or presenting RFP responses from the private enterprise for 2 years after termination.

95-02 – Post Employment: A State agency asked if contracting with a private enterprise, which employed an individual formerly employed by the agency, would violate the post-employment provision. That provision prohibits State employees, officers or honorary officials from representing a private enterprise on matters involving the State, for 2 years after terminating State employment, if the individual gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties while with the State. 29 Del. C. § 5805(d). It also prohibits disclosure of confidential information gained by reason of public position and otherwise using such information for personal gain or benefit. *Id.*

As a State employee, part of the individual's duties included administrative assistance to a task force which developed findings/recommendations in a particular subject area. About six years before the task force was formed, the individual worked in that area for the State. However, the work for the task force required no special knowledge of the subject as the responsibilities were purely administrative, such as locating filed materials, providing them to the task force, editing the task force's report, etc. The report covered the findings/recommendations voted on by the task force. The substance could not be altered from that vote. The employee was not asked for any personal or professional opinion on the subject. The employee also assisted in preparing a presentation of the report to the Governor, but the presentation was given by the agency director, who did not deviate from the findings and facts voted on and adopted by the task force. Once the task force's recommendations were adopted, it was determined that contracts would be issued after public notice and bidding. An outside vendor was selected to develop the Request for Proposals (RFPs). The employee had no input in selecting the vendor and gave no input to the vendor in developing the RFP. The vendor established extensive and detailed guidelines for responding to the RFP, which were provided to all bidders.

The Commission found that the employee gave no opinion on the work of the task force or the vendor, and had no input to either the findings/recommendations of the task force or the development of the RFP. It concluded she was not directly and materially responsible for the subject matter of the contract while employed by the State, and therefore, found no violation of the post-employment restriction. However, after leaving State employment, the individual

worked with several non-profit agencies in drafting her new employer's response. The Commission found that such action raised a close question as to whether such involvement created an improper appearance, as one purpose of the Code of Conduct is to avoid any improper public perception. 29 Del. C. § 5802 and 5806(a).

To determine if such action created an improper appearance, the Commission noted that it had already found that the employee's duties as they related to the task force did not violate the post-employment restrictions. It also found that: (1) the employee had a background in the subject of the contract in terms of education and work experience prior to working for the State which would give her familiarity with and knowledge of the substance to be addressed in the RFP response; (2) the response was not the sole work of the former State employee as other employees of the private enterprise and four non-profit agencies provided input; and (3) the development of the response was overseen by the private enterprise through its grant and research office. The Commission found that those actions, to a certain degree, limited her control over the response. Further, as she had no control of the findings/recommendations of the task force or the vendor, again, her control over what would be in the response was limited. The Commission also found that while the employee was present at task force meetings, sworn statements from the employee and persons within the State agency were that she gained no superior knowledge as a result of her administrative work. The Commission also noted that the detailed guidelines and specific, objective scoring criteria, rated by a multi-agency committee, tended to place all bidders on an even field, and that the private enterprise for which the former State employee worked was found, by the multi-agency committee, to have a "clearly superior" response. The Commission also noted that another bidder had an executive director who was a voting member on the task force. As there were only three bidders, if the former employee's private enterprise and the private enterprise which had a voting member on the task force were not permitted to bid, then the agency would have only one bid, which was determined to be inferior. The Commission also found that if that bidder were selected, the agency would have to devote time and resources to that bidder, putting a strain on the agency.

The Commission's final conclusion was that: there was no technical violation of the post-employment restriction; the findings eliminated any possible improper public perception, although it was a close call; and that even if there were an improper public perception, the Commission would grant a waiver because if the agency could not offer the contract to the selected company, it would create an undue hardship as the agency would not be able to offer the contract to the superior bidder and would have to devote time and resources to any other bidder.

94-10 – Post Employment: A waiver of post-employment restrictions was granted to a Department of Health and Social Services (DHSS) employee, who was the lead person with the Delaware Health Care Commission in developing policy for the managed care program, and was assigned the lead responsibility within DHSS to oversee implementing the program. She subsequently retired and the Department sought a waiver to the post-employment restriction, which prohibits former employees from representing or assisting private enterprises in matters before the State for two-years after leaving employment, in order to award her a contract to continue carrying out the assignment. 29 Del. C. § 5805(d). "Private enterprise" means any activity conducted by any person, whether conducted for profit or not for profit. 29 Del. C. § 5804(8). The Commission found that the broad definition of "private enterprise" encompassed such contract and that her actions, while an employee, made her "materially responsible" for the matters upon which she would continue to work.

The Commission granted a waiver to the post-employment prohibitions because if she was not permitted to continue the work after retirement, it would cause an undue hardship upon the Department in carrying out its mandated time limitations in implementing the program. *See,* 29 Del. C. § 5807(a) (waivers may be granted if a literal application of the prohibition in a particular case is not necessary to achieve the public purposes or would result in an undue hardship on any employee, officer, honorary official or State agency). The Commission also noted that the post-employment contract would not be an increase in her hourly rate and she would not be working full-time.

94-05 Post Employment: A State agency requested an advisory opinion on the post-employment restriction. Advisory opinions may be issued on the written request of a State employee, officer, honorary official or a State agency. 29 Del. C. § 5807(c). The restriction provides that former employees cannot represent or assist a private enterprise on any matter involving the State, for a period of two years after termination of employment or appointed status with the State, if they gave an opinion, conducted an investigation or otherwise were directly and materially responsible for such matter in the course of official duties. 29 Del. C. § 5805(d). In this instance, while employed by the State, the employee conducted a technical evaluation that was part of the selection process which led to the award of a contract. Less than a year after the evaluation, the employee left State employment and after working in private employment in other areas, accepted a position with the private enterprise that was selected to perform the State contract. The Commission found that the employee gave an opinion when he conducted the technical evaluation, and therefore was prohibited from working on that specific contract for the private enterprise for a period of two years after his State employment terminated.

93-13 – Post Employment – Grant: A State employee submitted an application for a research grant to a national agency. It was prepared on his own time, including a week of annual leave. He subsequently left State employment to work in another State. The grant was later approved and once awarded would be performed by a company which contracted with the State agency for which he had worked. The research would involve a study of clients which the contractor obtained through its contract with the State. The former employee would be a principal investigator for the grant. The agency where he had worked would not receive funds from the proposed grant, but had entered an agreement endorsing the grant application and agreeing to work with the contractor on certain aspects of the research, such as providing a point of contact for information sharing, attending research team meetings, insuring the research did not affect another contract the agency already had with the contractor, referring eligible consumers to the research program, etc.

The Commission found that the employee's participation in the research program would not violate the post-employment restriction which prohibits former employees from representing a private enterprise on matters pending before the State for 2 years after terminating employment if the individual gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for the matter in the course of official duties while employed by the State. 29 Del. C. § 5805(d).

93-02 – Post Employment – Contract with Former Agency: A State employee, who retired under the Early Retirement Option, asked if he could contract as an individual or as a consultant with his State agency. Employees cannot represent a private enterprise on matters before the

State where they gave an opinion, conducted an investigation or were directly and materially responsible during State employment for two years after they leave State employment. 29 Del. C. § 5805(d). At the time of this request, the General Assembly had passed legislation providing that persons who retired under the Early Retirement Option could not work for the State for five (5) years, except that in special cases the Early Retirement Committee could allow the individual to contract with the State for a period of up to one year. 29 Del. C. § 5301(d)(4). The Commission held that the employee's situation fell under the ERO Act and should be pursued with the Early Retirement Option Committee.

91-18 – Post Employment - Professional Services: A State employee, who served in a professional capacity, due to personal circumstances moved out of State. The agency requested that it be permitted to contract with the individual for professional services on a part-time basis. The agency anticipated the contract might last from six months to possibly a year.

The Code prohibits employees, officers or honorary State officials from representing or assisting a private enterprise on matters involving the State for 2 years after terminating employment if the person gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of official duties. 29 Del. C. § 5805(d).

The Commission heard testimony that the employee had played a central role within the agency. The testimony also indicated the employee would work on a part-time basis; the rates would be well below the hourly contractual rates for such professional services; the employee had established trust with the staff and its clients and continuation on a part-time basis would assure continuity that would benefit the clients; the services could not be readily provided by anyone else in the community as there was a shortage of such professionals; and the agency had pursued recruitment for the position, but without success. Based on these facts, the Commission concluded the contract would violate the post-employment restrictions; however, it held that the literal application of the Code was not necessary to achieve the public purposes of the statute and would result in an undue hardship to the agency. It therefore granted a waiver as permitted by 29 Del. C. § 5807(a).

91-11 – Post Employment - Representing Private Enterprise: A former State employee sought a waiver from the restriction prohibiting State employees from assisting a private enterprise on matters involving the State for two years after leaving State employment, if the individual gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of official State duties. 29 Del. C. § 5805 (d).

While employed by DNREC, an employee received applications submitted to the Air Resources Section. He decided if the applications complied with regulations. His decisions were reviewed by two levels of supervision above him. His employer, after he left State service, was a private enterprise regulated by his former agency. He sought a waiver so he could discuss options of emission control equipment with his new employer. He believed it was possible and probable he would represent the private enterprise on matters that he had dealt with while with the State agency.

The Commission may grant a waiver to specific prohibitions in the Code of Conduct if the Commission determines the literal application of the prohibition in a particular case is not necessary to achieve the public purpose of the Code or would result in an undue hardship on an employee or agency. 29 Del. C. 5807(a). The Commission found that: the private enterprise

had a strong history of compliance before hiring the State employee; there was no discretion by individual business managers regarding obedience to the law; EPA oversaw DNREC's actions in issuing major permits; no confidential information gained from employment at DNREC would be compromised as the regulations and any interpretations were public information; and all cases on which the employee worked had been resolved. This reduced the possibility of the former State employee influencing DNREC to bend regulatory requirements. The Commission also found that DNREC encouraged the use of such expertise in the private sector as it could help assure compliance by the private enterprise with public laws and environmental regulations. The employee testified that an undue hardship would result if the private enterprise placed him in an area where his expertise was not used as both he and the company would be at a disadvantage.

The Commission distinguished this opinion from *Commission Op. 91-10*, (below) where a former State employee sought to contract with the State after retiring. The Commission noted that the former DNREC employee's activities, unlike those proposed by the other former State employee, would not result in compensation from the State.

91-10 – Post Employment - Professional Services/Early Retirement Option: Post employment restrictions prohibit State employees from representing or otherwise assisting a private enterprise on matters involving the State for two years after leaving State employment if the employee gave an opinion, conducted an investigation, or otherwise was directly and materially responsible for such matter in the course of official State duties. 29 Del. C. § 5805(d).

A State employee, who was retiring, requested determination of whether he could offer professional services to firms which contracted with his State agency. At the time of the request, the legislature had passed a one-time early retirement option (ERO) preventing employees from coming back to work for the State for five years, except that in special cases the ERO Committee could allow an individual to contract with the State for a period of up to one year. 29 Del. C. § 5301(d)(4). The Commission concluded that if the employee or any entity controlled by him intended to contract with the State to provide personal services, then he should apply to the ERO Committee for a determination of whether such contractual arrangement was permissible. Apart from such determination by the ERO Committee, the Commission found that the employee's statutorily imposed duties encompassed a broad range of control over the agency's functions, including supervisory duties, contractual duties, and coordination, development and planning responsibilities for agency programs. Accordingly, the Commission held that <u>any</u> dealings with that agency would violate the Code, unless the former employee submitted information on specific projects to rebut the assumption that he was "directly and materially responsible" for that specific matter while employed by the State.