PERSONAL OR PRIVATE INTEREST

1991-2013

13-38 – Private Interest—State Employee: [Supervisor] worked for the Department of Social Services (DSS) within the Division of Health and Social Services (DHSS). Her employee was a Social Worker. [Employee] determined eligibility for [a program]. [The] program encouraged parents to work by paying or subsidizing their childcare expenses. The daycare was selected by the parent based upon the geographic location of their home or work.

[Employee]'s mother owned a home daycare facility. The facility contracted with the State and received funds from DSS. According to one source, the daycare was originally in [employee]'s name and was later changed to her mother's name. [Employee] resided in the home where the daycare was operated and was the business' bookkeeper. [Employee] was submitting invoices to, and processing payments from, her own agency. Additionally, the childcare facility was monitored by DSS. [The monitor] provided PIC with copies of correspondence documenting [employee]'s active involvement with the childcare facility. Additionally, [the monitor] said [employee] had tried to correspond with her about attendance and regulatory issues. [The monitor] told her she could not talk to [the employee] about the issues because it was a conflict of interest for [employee].

[Supervisor] was concerned about the conflict of interest and sought an opinion on behalf of DSS from the Commission regarding the propriety of her employee's conflict of interest. The agency was concerned about the exchange of monies between the employee's agency and her mother's business.

The Commission considered the applicable law. First, State employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). Second, State employees may not represent or otherwise assist a private enterprise on matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). Third, State employees are not to deal with their own agency to insure decisions by their colleagues and coworkers are not unduly influenced by another employee's connection to the private enterprise. [Employee] had a private interest in the daycare by way of her familial relationship with her mother. As a matter of law, an interest which would tend to impair judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C.5805(a)(2). The definition of close relative includes parents. 29 Del. C. 5804(1). State employees are to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of the public trust and which will not reflect unfavorably upon the State. 29 Del. C. § 5806(a)**.**

[Employee] attended the hearing with her husband. Also in attendance were [the supervisor], [the monitor], and [a program administrator]. During the course of her official duties, [employee] met with clients, evaluated their income and determined their eligibility for aid. If eligible, [employee] provided the client with a list of childcare facilities (including her mother's facility) and asked them to choose one. The client told [employee] which childcare facility they had selected and [employee] entered the information into the computer. Thereafter, DSS directly reimbursed the childcare facility for the client's

childcare expenses. [Employee] denied working with clients whose children attended her mother's daycare. However, she did verify that most of the children at the daycare were [the program's] clients. She also confirmed she was the bookkeeper for the daycare. She billed DSS for attendance, sent out flyers, and served as a substitute daycare provider. [Employee] said her mother did not pay her. The facility was monitored by DSS, [employee]'s agency. If there was a discrepancy about attendance, fees, etc., [employee] was the contact person for the facility. She admitted to contacting other employees in her own agency to resolve billing issues and provide documentation. [Employee] claimed she accomplished those tasks on her lunch break. When asked if she would be willing to stop working for the daycare, [employee] said she could pass the duties to her husband. She was informed that would not cure the conflict of interest.

After considering the facts, the Commission found [employee] was reviewing and disposing of matters in which she had a private interest as well as representing her private interest before her own agency. Additionally, she was engaging in conduct which would raise suspicion she was violating the public trust. The Commission decided she may not be involved with the daycare in any way. If she continued to act on behalf of the daycare, she would be subject to a formal complaint. If the Commission made a formal finding of a violation, the Commission has the power to impose disciplinary sanctions up to, and including, termination.

13-33 - Personal or Private Interest—Nepotism—State Employee: PIC received information alleging an employee at [a State building] was in violation of the Code of Conduct. The reporting person would like to remain anonymous. [Employee] worked for Facilities Management within the Office of Management and Budget. The information alleged [employee] had direct supervisory power over his two [children]. One child, [X], was a full-time State employee. The other child, [Y], worked as a temporary State employee. According to the email, [employee] signed all of [X]'s timesheets. Counsel sent an email to [employee] to determine if he would like to seek the advice of the Commission. A response was sent by [employee]'s supervisor. The supervisor did confirm that two of [employee]'s children work in the same [building] as their father. After counsel discussed the potential issues with [the supervisor], he agreed to seek the Commission's advice on behalf of his agency. He also provided PIC with an organizational chart which documents the supervisory hierarchy.

In their official capacity, State employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. §5805(a)(1). State employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

[The supervisor] appeared at the hearing with [a representative of the agency]. [The supervisor] contested the fact [employee] was signing his [children's] timesheets and brought copies to verify the timesheets were being signed by another supervisor. [X] was transferred to the [building] two months ago so he could be directly supervised by [someone in the same specialized field]. [Y] was now under the direct supervision of [another employee]. Both [people supervising X and Y] were of equal rank to [employee]. When asked who [X and Y] would report to in the event their supervisor was ill or on vacation, [the supervisor] stated they would both report to [a manager higher in rank than employee].

In discussion, the Commission expressed concern the employees assigned to supervise [X and Y] shared equal rank with [employee]. It was reasonable to assume their supervision of [X and Y] would be affected by their co-worker status with [employee]. Each supervisor would know that any decision they made regarding [X and Y] would come to the attention of [employee]. Depending on their relationship with [employee], the decisions made about [X and Y] could be based upon like or dislike of their father. Neither is permitted under the Code of Conduct. Of additional concern was the fact other employees in the department were aware of the familial relationship. Routine job assignments would spark speculation about the reasons certain employees were given specific tasks. Aside from damaging the operating efficiency of the department, it was damaging to the morale of the other employees.

The Commission decided three family members working in the same facility created an appearance of impropriety. The Commission recommended two of the three employees be transferred to separate facilities. The Commission also stressed that failure to remedy the situation could result in a formal complaint being filed against the agency. If the Commission made a formal finding of a violation, the Commission could require the transfers.

13-19 Personal or Private Interest – Unpaid Consultant Work—State Officer: The applicant was a State Officer. He had a friend that was starting a business, which would create training programs for corporations and government agencies on leadership, management, employee development and crisis management. The Officer had been asked to write some of the curriculum, which he would do without pay. However, the new business wanted to credit the Officer in the marketing materials and include his current position. He said his initial reaction was to say “no.” The Officer emphasized that the marketing materials would list all of his prior employment and not just his current position. He stated he would not be part of any merchandising of the product and he would not be using State hours to do the consultant work. He also mentioned that the unpaid position may lead to employment with this company when he retired.

The Officer did not know if the product would be sold to any Delaware agencies, but it may be. He was aware that he could not be involved in decisions to buy the product if it were offered to State agencies because of the personal interest arising from his private association with the company owner and the potential for a future paying job. 29 Del. C. § 5805(a)(1). He also said that he would not solicit business from the State for the company, which is consistent with the restriction on State officers not representing or otherwise assisting a private enterprise before any State agency. 29 Del. C. § 5805(b)(1) and (b)(2). He did acknowledge that his validation of the training program was his “gift” to his friend’s new business. The Commission asked if he had considered only attributing the materials by name and omitting the Officer’s position. The Officer stated that he had, but was concerned that it would appear he was trying to hide something. The Commission advised that the use of the Officer’s name and State position would create an appearance of impropriety as it may appear to the public as an official endorsement of the company/product. 29 Del. C. § 5806(a); *Commission Op. Nos. 95-36; 96-62; and 98-30*. However, it would be permissible for the Officer to author the curriculum for the private company as long as his name and position was not used.

13-18 - Personal or Private Interest—Nepotism: Applicant was a municipal Councilman. He appeared before the Commission accompanied by his wife. As one of eight

Councilmen, applicant was elected for a two year term. He was Chairman of one specialty board and a member of another. Applicant's son worked for the municipality and had worked there for 25 years. Because of his son's employment with the municipality, applicant had recused himself from voting on any matter directly related to his son. (i.e. pay raises, promotions). However, the Commission received a letter that stated applicant continued to vote on the municipality's budget, which included funds for his son's department.

The Commission had jurisdiction over the applicant because the municipality had not adopted their own Code of Conduct. 29 Del. C. §5802(4). Applicant confirmed that he did, in fact, vote on the budget. He explained to the Commission that the budget was presented by the Finance Committee to the council for a vote. Applicant noted he did not have specific input regarding the budget for his son's department. However, members of the council did not vote on each component of the budget separately, the whole budget was voted upon as a package. Therefore, if applicant voted on the total budget, he voted on the budget for his son's department.

Applicant's relationship to his son constituted a personal interest. 29 Del. C. §5805(a)(1). "A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. §5805(a)(1). Through his votes, or even his influence, applicant had reviewed and disposed of matters in which he had a private interest. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center.* When asked if he could recuse from the budget vote, applicant said that if he did not vote on the budget, he would not be adequately representing his constituents. The Commission then inquired as to whether the budget could be voted on in separate components, allowing applicant to recuse from voting on the budget related to his son's department. Applicant did not know the answer to that question.

The Commission determined that if applicant recused himself from voting on the portion of the budget related to his son's department, he would no longer have a personal interest. He should also continue to recuse himself from any other matters involving his son's department. The Commission requested the opinion letter to applicant explain recusal not only required that he did not vote, but also that he did not remain in the room when any of the above described matters were being discussed. The Commission recommended that applicant follow-up with the municipality's attorney to determine if the budget could be voted on as individual components. If it cannot be voted upon separately, he could not vote on the budget at all.

13-12 and **13-13 Board Members Seek Full-Time State Position:** The Commission granted a waiver so they could remain Board members even though they had applied for the full-time position. The basis for the waiver is given in the opinion which by reference is incorporated into this synopsis. When waivers are granted they become public records. 29 Del. C. § 5807(a).

13-12 – Hiring an Honorary State Official in a Full-Time State Position
Hearing and Decision by: Wilma Mishoe[1], Chair; Andrew Gonser, Esq.,Vice Chair; Commissioners Lisa Lessner, Jeremy Anderson, Esq., and William Tobin

[1] The Chair abstained from voting.

Dear Ms. Wisnauskas:

The Public Integrity Commission reviewed your request for an opinion on whether you could apply for the full-time position of the Executive Director of the Professional Standards Board (PSB), when you are concurrently a member of that Board. Based on the following law and facts, a majority of the Commission concluded it would grant a waiver to allow you to remain a Board member while being considered for the full time position.

Under the Code of Conduct, appointees to State Boards and Commissions are "honorary State officials." 29 Del. C. § 5804(6). In their official capacity, Honorary State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing their official duties. 29 Del. C. § 5805(a)(1). You stated that you would recuse from any Board decisions pertaining to the hiring of the Executive Director. That recusal would resolve that conflict. As far as recusal, you should recuse "from the outset" and not make even "neutral" or "unbiased" statements about any applicant. *Beebe Medical Center v. Certificate of Need Appeals Board.*

In a prior decision, we held that while recusal by the applicant who was on the Board could cure their personal conflict, the difficulty with having a fellow Board member apply and remain on the Board, is that it could, at a minimum, raise suspicion among the public that the decision may not have been based on the merits, but rather on personal relationships arising from the collegial association of the other Board members; that as a fellow Board member, he could receive preferential treatment over other candidates; or that he was using his appointed position to secure a personal gain or benefit by parlaying the appointment into a full-time position. Commission Op. No. 97-34. It found that would be contrary to both the letter of the law which bars contact that may raise public suspicion, 29 Del. C. § 5806(a); that he used public office for personal benefit, 29 Del. C. § 5806(e). It also found it would be contrary to the spirit of the law—the purpose--which is to instill the public's respect and confidence in its government. 29 Del. C. § 5802(1) and (2). As a consequence, the Commission held it would create at least the appearance of impropriety if he remained on the Board while seeking the full-time job, and would not grant a waiver on the grounds that the literal application of the law was not necessary to serve the public purpose. *Commission Op. No. 97-34.*

However, that opinion also weighed the General Assembly's findings "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).

We weighed those two competing interests based on the particular facts of your case as they related to a waiver. 29 Del. C. § 5807(a). First, when a waiver is granted, it becomes a matter of public record. Thus, the public would know about your relationship to the Board, and other facts pertaining to your situation. It will also know that there are specific criteria for every applicant: 10 years experience as a professional educator in a public school system and 5 years experience as a classroom teacher in a public school. That lengthy term of experience helps insure a level of expertise related to the duties of the job which include educator licensure, certification and professional development with a goal of improving the educator

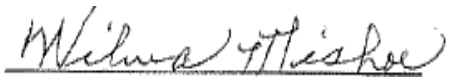
workforce and as a result, improve student achievement. That not only speaks to the merits of the candidates, but also narrows the field of who may apply. If Board members could not apply, it could further reduce the field. Moreover, it may unduly circumscribe their activities when they, by already serving voluntarily in a non-paid Board position that deals with educator's qualifications. have evidenced an interest in that field. We understand that all Board members apparently were encouraged to consider the job. That means you could be competing with other Board members, making it less likely that the remaining Board members would select you simply because you are a Board member because that single criteria would apply to any other applicant Board member. This helps insure the remaining Board members who make the decision would have to use some quality beyond being a Board member to distinguish between the candidates.

Finally, as a practical matter, you were recently re-nominated (March) for a 3-year term. In effect, if we dictated that you leave the Board to apply for the job, which has an expected starting date of May 22, 2013, if you were not selected, you could end up being reappointed again to fill your own open position and serving anyway. Conversely, if you are selected as the Executive Director, you would be on the Board anyway, because the statute provides that the Executive Director serves as a non-voting Board member.

II. Conclusion

Based on the above law and facts, we grant a waiver to allow you to continue to serve on the Professional Standards Board while applying for the position of Executive Director.

FOR THE PUBLIC INTEGRITY COMMISSION



Wilma Mishoe, Chair

13-13 – Hiring an Honorary State Official in a Full-Time State Position
Hearing and Decision by: Wilma Mishoe[2], Chair; Andrew Gonser, Esq.,Vice Chair; Commissioners Lisa Lessner, Jeremy Anderson, Esq., and William Tobin

Dear Mr. Kenton:

The Public Integrity Commission reviewed your request for an opinion on whether you could apply for the full-time position of the Executive Director of the Professional Standards Board (PSB), when you are concurrently a member of that Board. Based on the following law and facts, a majority of the Commission concluded it would grant a waiver to allow you to remain a Board member while being considered for the full time position.

[2] The Chair abstained from voting.

Under the Code of Conduct, appointees to State Boards and Commissions are "honorary State officials." 29 Del. C. § 5804(6). In their official capacity, Honorary State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing their official duties. 29 Del. C. § 5805(a)(1). You stated that you would recuse from any Board decisions pertaining to the hiring of the Executive Director. That recusal would resolve that conflict. As far as recusal, you should recuse "from the outset" and not make even "neutral" or "unbiased" statements about any applicant. *Beebe Medical Center v. Certificate of Need Appeals Board.*

In a prior decision, we held that while recusal by the applicant who was on the Board could cure their personal conflict, the difficulty with having a fellow Board member apply and remain on the Board, is that it could, at a minimum, raise suspicion among the public that the decision may not have been based on the merits, but rather on personal relationships arising from the collegial association of the other Board members; that as a fellow Board member, he could receive preferential treatment over other candidates; or that he was using his appointed position to secure a personal gain or benefit by parlaying the appointment into a full-time position. Commission Op. No. 97-34. It found that would be contrary to both the letter of the law which bars contact that may raise public suspicion, 29 Del. C. § 5806(a); that he used public office for personal benefit, 29 Del. C. § 5806(e). It also found it would be contrary to the spirit of the law—the purpose--which is to instill the public's respect and confidence in its government. 29 Del. C. § 5802(1) and (2). As a consequence, the Commission held it would create at least the appearance of impropriety if he remained on the Board while seeking the full-time job, and would not grant a waiver on the grounds that the literal application of the law was not necessary to serve the public purpose. *Commission Op. No. 97-34.*

However, that opinion also weighed the General Assembly's findings "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).

We weighed those two competing interests based on the particular facts of your case as they related to a waiver. 29 Del. C. § 5807(a). First, when a waiver is granted, it becomes a matter of public record. Thus, the public would know about your relationship to the Board, and other facts pertaining to your situation. It will also know that there are specific criteria for every applicant: 10 years experience as a professional educator in a public school system and 5 years experience as a classroom teacher in a public school. That lengthy term of experience helps insure a level of expertise related to the duties of the job which include educator licensure, certification and professional development with a goal of improving the educator workforce and as a result, improve student achievement. That not only speaks to the merits of the candidates, but also narrows the field of who may apply. If Board members could not apply, it could further reduce the field. Moreover, it may unduly circumscribe their activities when they, by already serving voluntarily in a non-paid Board position that deals with educator's qualifications. have evidenced an interest in that field. We understand that all Board members apparently were encouraged to consider the job. That means you could be competing with other Board members, making it less likely that the remaining Board members would select you simply because you are a Board member because that single criteria would apply to any other applicant Board member. This helps insure the remaining Board

members who make the decision would have to use some quality beyond being a Board member to distinguish between the candidates.

Finally, as a practical matter, you indicated your 3-year term has expired. In effect, if we dictated that you leave the Board to apply for the job, which has an expected starting date of May 22, 2013, if you were not selected, you could end up being reappointed again to fill your own open position and serving anyway. Conversely, if you are selected as the Executive Director, you would be on the Board anyway, because the statute provides that the Executive Director serves as a non-voting Board member.

II. Conclusion

Based on the above law and facts, we grant a waiver to allow you to continue to serve on the Professional Standards Board while applying for the position of Executive Director.

FOR THE PUBLIC INTEGRITY COMMISSION

Wilma Mishoe, Chair

13-10 - Personal or Private Interest—Nepotism: Applicant did not appear before the Commission, he was out-of-state. Rather than rescheduling, the Commission decided that the written emails submitted by applicant provided enough information from which to issue an opinion. The Commission may provide advice based on a written statement. 29 Del. C. § 5807(a). Applicant worked for the Division of Substance Abuse and Mental Health (DSAMH) within the Department of Health and Social Services (DHSS). DSAMH had an RFP for licensed professional staff, including the profession to which applicant belonged. Applicant was on the review panel for the RFP. Applicant's relative was a licensed professional and told applicant that he planned to apply for a position (or bidding for a contract) in response to the RFP. As soon as applicant received this information, he notified his supervisors. He told them that because of his relative's pending application, he would need to recuse himself from the review panel. His request was granted. Further, applicant stated if his relative was successful in his contract bid, applicant would not have anything to do with the management of his contract, his reimbursement or the volume of his work.

The Commission moved to adopt legal counsel's advice to applicant. Applicant was instructed that the Code of Conduct bars him, as a State employee, from "reviewing or disposing of matters" in which he has a personal or private interest. 29 Del. C. 5805(a)(1). Additionally, he is also barred from "representing or otherwise assisting" his relative in responding to the RFP. 29 Del. C. § 5805(b)(1). As far as "reviewing or disposing of matters," he was no longer on the selection committee for the RFP. Therefore, he would not be reviewing or disposing of a decision to contract with his relative. Assuming applicant's relative was hired, then he would not be able to "review or

dispose of matters" pertaining to him, e.g., supervision, etc. Applicant had already indicated he would not be involved in managing his relative's contract, work volume, etc.

12-40 – Contracting with State Agency: A State employee filed a disclosure because his private company contracted with a State Commission to provide services for an annual event. It is a condition of commencing and continuing employment with that State, that if a State employee has a financial interest in a private enterprise that does business with the State, they must file a full disclosure so it can be determined if there is a conflict. 29 Del. C. § 5806(d). The employee worked for a completely different Department from the Department under which the State Commission operated. Thus, he had no responsibility in his State job to review or dispose of the contract, or any other matters pertaining to that Commission. 29 Del. C. § 5805(a)(1). Also, because that Commission is under a totally separate department, he did not represent his private company before his own agency. 29 Del. C. § 5805(b)(1). The contract was for less than $2,000, so it did not require public notice and bidding. 29 Del. C. § 5805(c). The contract was for $700 and must reflect arms' length negotiations. *Id*.

Arms' length negotiations require that there be some distance between the contracting parties. The Code of Code aids in insuring arms' length negotiation by barring State employees from putting together a State contract and then awarding it to themselves (self-dealing) by barring them from reviewing and disposing of the matter. It creates further distance between the contracting parties by barring State employees from dealing with their own agency because their colleagues and co-workers may have their judgment impaired because of the State employee's affiliation with the contract. Finally, arms' length negotiations require that the contract reflect a fair market price. *Commission Op. No. 98-23 (citing Oberly v. Kirby*, 592 A.2d 445 (Del. 1991) (in finding arms' length negotiations, court noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions"). Normally, when there is no existing State contract to provide the services, and the contract is a small amount, the agency contacts at least 3 sources to determine the market value. The Commission found there was no conflict as the private contract was disconnected from the employee's State job and duties; was a limited event; he filed a disclosure as required; and the amount was only $700.

12-38 – Outside Employment with a Company Doing Business with a Different Agency: A teacher filed a disclosure on his part-time job with a private enterprise that contracted with a completely different State agency. 29 Del. C. § 5806(d). As the private employer did not do business with his agency, he did not review or dispose of matters pertaining to the company's contract in his State job. 29 Del. C. § 5805(a)(1). At the private company, he would be involved in working with children, but none of them were his students. Thus, he would not have occasion to represent or assist the private company on either its contract or its clients before his own agency. 29 Del. C. § 5805(b)(1). He said he would not use State time or resources to perform his private work. He is entitled to a strong legal presumption of honesty and integrity. *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)**.** The Commission found there was no conflict, but that if his circumstances changed he should seek further guidance.

12-37 – State Employee Request for Guidance on Recusing when Close Relative Works for Vendor: A State employee's duties included oversight of certain vendors who operated certain facilities. As a result of her State employment, she had known a particular vendor for more than a decade. Aside from that official connection, a close relative worked for the vendor in a second job that he held. The State employee approached him and had coffee to discuss a personal matter on which she was making a decision. The decision pertained to a matter unrelated to her oversight duties, but she thought he would be a good person to discuss the matter with because she was aware that he had some experience in that area. Later, she assigned one of her employees to oversee the review of his facility. She said she did so because there may be a perception of a conflict because of the close relative's affiliation with the vendor. Several of her employees reviewed the facility. An issue was raised that the vendor's facility would be approved because of her personal connection to it, not only because of her close relative's employment but because of the personal decision she had involved him in. He learned of that concern and they spoke about his license. She told him that in her review of her employee's evaluation of his facility that she saw no problems. She also contacted the person who had told him about the situation to discuss the matter. Later, he went to a senior level official and asked for a second review. The review was to be conducted under the supervision of the State employee's supervisor. The State employee said she was recusing. Subsequently, she was involved in discussions about when the 2nd review would occur; suggested a specific person who she supervised to assist her supervisor, etc., and engaged in other conversations about the matter. The agency directed her to obtain an opinion from the Commission regarding her involvement.

The Code bars State employees from reviewing or disposing of matters when they have a personal or private interest that may tend to impair their judgment in performing official duties. When a conflict exists, they are to recuse "from the outset." *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). The Commission decided there was a conflict because of the personal and private relationships and she did not properly recuse because she continued to discuss and intervene in the matter.

12-36 – Contract with a Different State Agency: A State employee in one Department wanted to contract with another Department. She filed the disclosure required when a State employee wants to seek a State contract. 29 Del. C. § 5806(d). State employees may not seek a State contract of more than $2,000, unless it publicly noticed and bid. 29 Del. C. § 5805(c). The contract was publicly noticed and bid. The State employee was a successful bidder, and the contracting agency was finalizing the agreement. The contract dealt with certain aspects related to federal funds. Her State work was not in any way connected to the State contract or the federal funds. Thus, she did not, and will not, review or dispose of matters related to the contract. 29 Del. C. § 5805(a)(1). Also, a representative from the contracting agency confirmed that neither the contract, nor its substance, involved the State employee's office, or even her Department. As there was no connection to her agency, she also would not represent or assist her private company before her own agency, 29 Del. C. § 5805(b)(1).

She said she would not use State time or resources to perform her private work. 29 Del. C. § 5806(e). Specifically, in her State job, she already worked a shortened workweek (e.g., flextime) and would use that time, and evenings and weekends, to perform the private work. She is entitled to a strong legal presumption of honesty and integrity. *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)**.** The Commission decided there was no conflict of interest.

12-31 – **Contracting with One's Own Agency:** The manager of an agency's grant program sought an opinion on whether the agency could use grant funds for the cost of rental of equipment from a State employee who worked for the Division that issued the grant. The agency and a local government entered an agreement requiring the local government to provide certain services, e.g., volunteer workers, and provide some matching funds, in order to be entitled to the grant funds. In return, the agency would reimburse some expenses, and provide equipment for the project if the State equipment was available. Later, the manager received a reimbursement request for the equipment rental. The local government had collaborated with a non-profit organization, and it rented the equipment from the State employee while working on the project. It sought reimbursement not only for the days the equipment was used, but also for everyday it was on the site, even if it were not used. In evaluating how much to reimburse, and to whom, the manager noted that the check issued by the non-profit for the rental was issued to a Division employee. The manager had refunded a portion before he realized the equipment was rented from an agency employee. The amount already paid was more than $2,000. The remainder also exceeded $2,000. The Code bars State employees from accepting State contracts if the contract is for more than $2,000 and is not publicly bid. 29 Del. C. § 5805(c). It was not publicly noticed and bid. The Code also bars State employees from representing or assisting a private enterprise on matters before their own agency. 29 Del. C. § 5805(b)(1). The manager did not want to make more payments until the Commission decided if it was a conflict for his Division to pay for the rental of equipment from one of its employees.

The manager said the employee knew this was an operation between the local government and his Division because he works for the Division on these types of grant funded projects. Also, the agreement required a sign at the location of the project saying it was funded by the agency's grant. He explained that the State had the type of equipment rented; that the particular type of equipment was vital for this type of project, and gave some examples of why. The manager was not asked by the local government if it could use State equipment, or rent from a Division employee and be reimbursed. He did explain that because of the way the project had to be managed, it required duplicate equipment; that there was a lot of effort involved in getting the equipment back and forth and if they had returned the rental while not in use, and obtained it again later, it would have created more work. He also said the State's equipment was not always available. Other reasons for having the equipment on site rather than returning it, when not in use, were weather issues and availability of volunteers who could operate it. He said it would be complicated to return. They might return it thinking the weather would be too bad for use, but it might not rain and the equipment would have to be returned. Or, they might return it thinking no one was available to operate it, but end up with a volunteer who could, and again it would have to be returned. He also pointed out that the State's equipment was purchased with federal funds. The federal funds were contingent on use solely for State projects. Thus, the local government's use would have been an ineligible use. The manager did say the local government realized they were assuming a risk of out of pocket expenses for the rental, up to the level of the local match of contribution funds. He believed the State employee has used his equipment for other projects and the non-profit had worked on prior projects with him. He believed the non-profit thought it could save money because renting from other places could be higher. He said this way was easy; convenient; and it would be available every day to them. Also, the manager did not call other possible vendors under

after the equipment was rented and reimbursement sought, to ascertain if the equipment could be rented elsewhere, and at what price, to ascertain fair market value. *Id*. He said that of the calls he made, some did not have that type of equipment for rent.

The Commission found that there were insufficient details on such things as how the non-profit selected the State employee to rent his private equipment. The agency was given options to consider: (1) get more facts from the State employee and the non-profit that rented from him; so it can be determined if: (a) there was a violation; or (b) if a waiver should be granted if there was a violation; (2) regarding whether further payments should be made, even if the Commission found a conflict, the Code provides that the agency—not the Commission--makes that decision; 29 Del. C. § 5805(g) or (3) file a complaint against the employee.

12-31 – State Agency Request on Reimbursing one of its own State Employees on a Contract: An agency previously sought advice on whether it was a conflict for it to reimburse a vendor for the costs it paid to an agency employee for his private company's subcontract work. The agency also asked if a conflict existed, would the agency have pay because of the contract language. At that time, PIC found it lacked sufficient facts to render a final decision on the conflict issue, but did determine that if the contract had to be voided, PIC had no authority to do so. Rather, the statute specifies that only the agency can void the contract if it violates the Code, after it considers if innocent third parties would be injured by the decision to void the contract. *Commission Op. No. 12-31* (*citing* 29 Del. C. § 5805(g)). At this hearing, the agency representative, the State employee, and a representative from the private company involved, appeared before the Commission to discuss facts related to the possible conflict. The employee's agency contracted directly with a contractor, who could then use other companies on certain work. The agreement provided that the agency could, in some instances, assist the contractor by letting it use some of its equipment, and also reimburse certain costs incurred in performing the work, whether done by the immediate contractor or others. In return, the contractor was to provide such things as matching workforce, etc. The contractor then brought in persons from a private company for the work. That company subcontracted with the State employee for use of his private equipment.

State employees may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). The State employee worked in the section where he made decisions on whether certain State equipment could be used to perform the work under the contract. He stated that he privately contracted with the vendor because the State equipment was being used elsewhere. He said he does not make the final decisions on such matters. The law bars not only disposing of the matter, but reviewing the matter.

State employees may not represent or assist a private enterprise with respect to any matter before the agency with which the employee is associated by employment. 29 Del. C. § 5805(a)(1). "Private enterprise" means any activity conducted by any person, whether conducted for profit or not for profit. 29 Del. C. § 5804(9). The State employee said he knew his agency was involved in the funding of the work, but said he did not know how much. He submitted an invoice to the private company for reimbursement. That company then sought reimbursement from his agency through the contractor. By submitting his bill for reimbursement, even though it was through the private company not directly to his agency, he was representing/assisting his private enterprise before his own agency.

Even if a State employee could deal with his own agency, for a State employee to contract for State funds, if it is more than $2,000, it must be publicly noticed and bid. 29 Del. C. § 5805(c). It was not publicly noticed and bid. The contract was for more than $2,000. Also, if a State employee has a financial interest in a private enterprise that does business with the State, they are to file a full disclosure. 29 Del. C. § 5806(d). No disclosure was filed. The State employee said that previously, when he was offered an opportunity to subcontract for a contractor that was directly doing business with his agency, he thought it would be improper and declined to do so. He said in this case he did not think it would be a problem because he was not contracting directly with the contractor with whom his agency had the agreement.

The Commission decided there was a conflict of interest because he was subcontracting with his own agency and even if he could contract with his own agency, the contract was for more than $2,000 and was not publicly noticed and bid.

12-31 - Conflict of Interest—Penalty for State employee contracting with own agency: Pursuant to 29 Del. C. § 5807(c), an administrator for a State agency sought an opinion on behalf of the agency, he asked if it was a conflict of interest for an employee to lease his private company's equipment for use by his own State agency. The employee's private enterprise would then be reimbursed by his own State agency. The initial filing lacked sufficient details to establish "full disclosure" as required when seeking an advisory opinion. 29 Del. C. § 5807(c). *Commission Op. No. 12-31,* August 3, 2012. The administrator was given several options on ways he could proceed. Subsequently, the administrator and the employee, along with other parties involved in the project, appeared before the Commission to disclose the details of the employee's dealngs with the other parties. After the details were obtained, the Commission found that the employee would be reimbursed by his own agency and it was contrary to the Code of Conduct. *Commission Op. No. 12-31,* February 7, 2013. The Commission advised the agency and the employee that PIC could decide if it would impose a penalty on the employee personally. PIC asked that it be notified of any decision reached by the agency so that PIC could factor in the results in making the penalty decision. *Commission Op. No. 12-31,* April 23, 2013.

The agency's administrator, the employee, and the other parties involved in the project reached an agreement to which the Commission was not a party. However, the agreement incorporated a reference to the Commission's finding of a violation. As part of that agreement the employee's private enterprise would not be fully reimbursed for the equipment rental. The Commission accepted the penalty as a sufficient sanction and decided not to pursue any other action against the employee. 29 Del. C. § 5805(c).

12-30 – Personal or Private Interest – Dual Government Positions: A State employee asked if he could continue to serve on a State Board. As his State duties did not require him to be on the Board, he had a personal or private interest in continuing to serve. 29 Del. C. §5805(a)(1). He became a member while with one State agency, and was now employed full-time in the State agency that regulated that Board. That could raise issues in two ways: (1) it may appear that in making Board decisions, he might, even inadvertently, base them on what he believed his full-time employer would want to insure job security rather than basing decisions on the merits; and (2) other Board members and/or the public may think his "inside" connection to the regulatory authority could be used to obtain advantage over those similarly situated in a "beneficial way" in the regulatory process. *See,*

e.g., Commission Op. Nos. 03-29; 02-22 & 02-23. Also, appeals of certain decisions he would make as a Board member would be made to his full-time agency. That meant his full-time employer not only would regulate his conduct as a Board member; but his colleagues and co-workers would review his decisions on appeal. That could raise, at least, the appearance that his colleagues and co-workers might uphold decisions because of his connection to them, or they may lean too far in the opposite direction to avoid allegations of preferential treatment and thus fail to uphold a legitimate decision. Also, he gave an example where he had to recuse at a Board meeting because of his full-time State job. In describing that event, he said he was recusing and took a seat in the audience. He said he did not want to intimidate the Board members. However, he ended up telling the Board its plan of action was not legal, which was based on his knowledge from his State job.

First, Delaware Courts have held that where a Board member has a conflict, he should recuse from the outset and not make even neutral or unbiased comments. *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). Second, although no harm occurred from his action it illustrated the difficulty in ascertaining whether he was acting as a Board member, a State employee, or a private citizen. *See, e.g., Commission Op. No. 02-23.* Third, the Board members could have been intimated, or the public may think they were, or could be, intimidated because of his State position, and thus hesitate to be independent in their judgment. Aside from that, the Commission has ruled that where a State employee has State duties that conflict continuously with their Board duties, recusal would mean they either would be unable to perform their full-time State duties or their Board duties, meaning they were not giving their State duties precedence over their personal or private interest in serving on a Board. *See, e.g., Commission Op. Nos. 02-22; 02-23; 03-29.* The Commission is required to strive for consistency in its opinions. 29 Del. C. § 5809(5). The Commission found that he had a conflict that could not be cured by recusal.

12-29 – Personal or Private Interest – Nepotism - Spouses Working in Same Agency: A State employee worked in a senior level administrative position. Her spouse was on a State Board that regulated her agency. The Board made decisions about her salary, the budget for the office she headed, etc. In her State job, she routinely had other matters to handle that the Board became involved in, many of which occurred in executive sessions. She said if issues such as her salary arose, where she would have a direct financial interest, her husband would recuse. The Commission discussed the areas of her work that resulted in matters before the Board that were not direct financial interests because the Code restriction on reviewing or disposing of matters where there is a personal or private interest applies to situations other than a direct financial interest. *See, e.g.*, *Prison Health Services, Inc. v. State,,* C.A. No. 13,010 (Del. Ch. July 2, 1993). (State employee should not have participated in discussion where wife's employer would be affected by the decision, although the Court noted she was a "low-level employee"). Recusal could be appropriate when no financial interest exists. See, e.g., *Harvey v. Zoning Board of Adjustment of Odessa,* C.A. No. 00-04-007CG, J. Goldstein (Del. Super. November 27, 2000) *aff'd.,* 781 A.2d 697 (Del., 2001) (would be prudent for Town officials to recuse when decision made by their spouses, who were also Town officials, was under review, but it would be impossible to get a decision if all 3 recused). She said if she had matters for the Board, she took them to her Supervisor, who brought them before the Board. She also said another employee presented her office's budget to the Board. However, she worked on the budget before it was presented.

The Code provides that a State employee or official may not review or dispose of matters where they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). Although her Supervisor took matters to the Board, she had worked on those matters which her spouse was in a position to review, e.g., the budget for her office, etc. Either she would have to cease performing her State duties related to all the matters she had been giving to her Supervisor, which were numerous, or her spouse would have to recuse from reviewing or disposing of the matter, limiting his effectiveness as a Board member. She had already ceased fulfilling one of her State duties—acting in her Supervisor's absence--because she would have to deal directly with the Board. Additionally, the conflict with her spouse created a conflict for her Supervisor, who reports to the Board. The Board hires, fires, etc., the person in that position. In fact, one reason her spouse wanted to be on the Board was so he would be involved in hiring the new Supervisor. Now, that person was the only barrier between their conflict. Her supervisor, like her, had a personal or private interest in his full-time employment. The public and her colleagues and coworkers may believe he would be hesitant to make a negative comment in evaluating her performance to avoid a problem with her spouse, who had a vote on keeping him in his job; conversely, he may hesitate to recognize her good work for fear it would be interpreted as preferential treatment because of her relationship with a Board member.

Regarding confidential matters that arise in which she was involved and which are considered in Executive Session, they assured the Commission they do not "talk shop" at home on such things as confidential issues that her spouse might not be entitled to know about, or matters that the Board would have to act on. However, the public may suspect that such discussions would occur, and no one would ever know. The Commission decided they had a conflict of interest because of their duties which required them to review or dispose of matters where the other spouse was involved, and that the multiple conflicts could not be resolved by recusal.

12-29 Nepotism –Reconsideration: PIC previously advised a State employee, whose spouse served on a Board directly connected to her State agency, that it would be a conflict for either of them to review and dispose of matters on which the other was involved. It concluded that because of the potential for multiple conflicts, recusal would not be a sufficient means of resolving the problem. They sought reconsideration of that opinion. While the Code, nor PIC rules, require reconsideration of advisory opinions, the Commission has done so in the past. The standard for reconsideration is Superior Court Rule 59. Rule 59 motions are to give an opportunity to correct errors. It is not a device for raising new arguments. The motion will be denied unless a controlling precedent or legal principle was overlooked, or the law or facts that would change the outcome were misunderstood. *Beatty v. Smedley,* C.A. No. 00C-06-060 JRS, J. Slights III (Del. Super., March 12, 2004).

The only factual changes were that the agency was hiring an individual who would supervise the State employee, and that the Board member was now head of the Board. Neither fact changed the outcome: they both would be in multiple situations to review or dispose of each other's work. It was also argued that PIC had not held an evidentiary hearing, so it was alleged PIC lacked the facts to reach its conclusion. However, advisory opinion decisions, unlike complaints, do not require a full-trial hearing. Rather, the Commission can base its opinion on just a written statement. 29 Del. C. § 5807(c). However, it went beyond that. In addition to reviewing the State employee's written statement, minutes from Board meetings, and the agency's policy on conflicts, at the

hearing both were given the opportunity to speak on the issues, and respond to Commission questions. The law mandates that when an individual seeks an advisory opinion, they are to "fully disclose" the matter to the Commission. Thus, if facts were lacking, they needed to disclose those facts. As indicated above, the only new facts were that there was now a supervisor added to the mix, but the conduct regarding reviewing and disposing of matters still existed, as adding the supervisor only meant that the work performed by the State employee was still being done, only given to the Board through that extra layer. The result was the same. As far as the spouse now being head of the Board, that information was not raised by them but raised by Commission Counsel, and they then confirmed that was correct. They argued that having the spouse as the head of the Board did not mean more involvement than other members. They further argued that the State employee would *never* recuse because it was her State job to perform those duties. They believed if the head of the Board recused on certain issues, then the problem would be resolved.

They also disagreed with the Commission's interpretation of several Delaware cases. In one instance, it was argued that the Court had found there was not a sufficient conflict to overturn the State Contract. *Prison Health Services v. State*. However, PIC does not make decisions on whether a contract is to be voided, as under the Code of Conduct the State agency makes that decision. 29 Del. C. § 5805(c). It makes a decision on conflicts, and in Prison Health, the Court found that the State employee had a conflict because he participated in discussions pertaining to the contract when his spouse was employed by the company seeking the contract. The Court found that even though his participation was "indirect" and "unsubstantial" that it still was "undoubtedly improper" for him to have participated at all. In *Harvey*, the Court found that the marital partners reviewing each other's work did not have a financial interest in the matter, but still held that it would be "prudent" for them to recuse. However, as there was no means of having the decision made without their participation, the Court used the "rule of necessity" and concluded because the decision could not be made otherwise, their conduct was permitted. Here, the State employee had a direct financial interest in State employment, which included performing those duties, and the spouse would be rendering decisions based on the State employee's input. PIC asked if the submission of certain documents and the proceedings were sufficient factual evidence, their attorney responded: "I think it helps."

The Commission decided on the review of the motion for reconsideration and the presentation, including the additional facts submitted by affidavit, there was no mistake that would change the outcome of the original decision; that this was an advisory opinion and the applicant was required to fully disclose the details.

12-25 –Personal or Private Interest: A citizen filed a complaint against an official, alleging the official should not vote on certain land use variances because he owned property that complainant alleged created a conflict. Previously, the Commission dismissed the complaint on the basis that his property was not zoned like the one seeking a variance; that even if it were, when he reviewed and disposed of matters pertaining to such variances, those "matters" did not involve his own property; the variance pertained only to specified property held by another that was about 30 minutes away so his property was not even contiguous to the effected property; and that while she alleged he should recuse from *all* matters pertaining to such variances, complainant gave only that one particular example. She subsequently asked the Commission to consider the same facts but apply different legal definitions. The Commission decided that the facts did not establish that the legal definitions she wanted applied were correct as a matter of law

because the definitions were clearly and specifically related to a law that was not pertinent to these allegations. Moreover, even if they were applied, it would not change the outcome of the Commission's prior decision.

12-24 – **Conflict of Interest:** An appointee to a State Board asked under what circumstances she would be required to recuse from Board decisions if a matter pertaining to members belonging to her private company came before the Board. She had no particular circumstances on which the Commission could base an opinion. 29 Del. C. § 5807(c). She also indicated that when she did recuse, she still answered questions about areas with which her private company dealt. The Commission must base its opinions on a "particular fact situation," and there were no particular facts on which to base an opinion. 29 Del. C. § 5807(c). However, she should be advised that when she recused, she should follow what the Court said in *Beebe*: recuse "from the outset," and not make even "neutral" or "unbiased" statements. *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).

12-23 – Personal or Private Interest: A member of a State Professional Board asked if another Board member had a conflict because he had personally taken a position opposing a proposed change to the Board rules which the Board would have to consider. The Delaware Superior Court has upheld the process of allowing an official who is subject to the Code of Conduct, to seek advice on the conduct of another. *Post v. Public Integrity Commission*. The Commission has clarified that it will issue such advice if the applicant has sufficient information to allow for such decision. *Commission Op. No. 11-13.* The member was one of several members of the Board whose appointment required that they be, and remain, qualified in that particular profession. A change in the rule would impact on persons in that profession in one of Delaware's counties. He worked in that county. The other two counties already had to comply with the change proposed for the 3rd county. Here, the applicant had minutes from Board meetings and a personal letter written by the Board member to his clients. The letter, over his signature, as a corporate officer, said his company and others were committed to making sure the rule did not pass. The letter was also used to attempt to recruit opposition encouraging people to write, and enclosing a self-addressed stamped envelope. The Commission previously held that a local Board member who expressed his personal opinion on a zoning issue, and wrote to persons expressing his personal view, when he knew the matter would come before his Board, should recuse because he should not review or dispose of matters where he has a personal or private interest. 29 Del. C. § 5805(a)(1). *Commission Ops. Nos. 07-05 and 07-42. See, 2008 Annual Report, Appendix C.* The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5).

At one Board meeting, the member handed out letters from people writing in opposition to the rule. This was not the usual procedure for getting input on rules and regulations and changes. The Board had announced the proposed rule change in the Register of Publications and gave the Board's official mailing address as the place to respond. Nothing suggested they wrote to individual Board members. In light of his letter to his clients, it appeared they wrote the letters pursuant to his request in his letter. There were additional discussions on several other occasions where he expressed his personal opposition. State officials are not to represent or assist their private enterprise before the agency to which they are appointed. 29 Del. C. § 5805(b)(1). The proposed change did not move forward, but had come up again. The applicant asked if the Board member could

participate in decisions on that rule. According to the applicant, the Board's attorney, told the Board member that he did not have a conflict. However, this Commission is the only entity authorized by law to render advisory opinions. 29 Del. C. § 5807(c); *See, also Ethics Bulletin 009* ¶¶ *6-8.* The issue was whether his conduct reflected a personal or private interest that may tend to impair judgment in performing his official Board duties, 29 Del. C. § 5805(a)(1); whether his conduct before the Board constituted representing or assisting his private enterprise before his own agency, 29 Del. C. § 5805(b)(1), or creates the appearance thereof. 29 Del. C. § 5806(a). The Commission decided that the member should recuse based on his statements that were reflected in the records of the Board, including the letter he wrote to clients which was given to the Board, and that he be notified and given the opportunity to dispute the findings of fact, if necessary.

12-21 – Nepotism: A State employee was responsible for regulating a private enterprise. According to her written request, her official duties were to insure the private enterprise and its employees comply with applicable laws, rules and regulations. She was on-site all day observing the operation and the activities of employees. Her husband is privately employed by that private enterprise. He worked in an area that was heavily regulated by her State office. He worked the same hours as she did. She said she did not directly supervise him, but agreed he was involved in activities she regulated. Moreover, it was possible she could personally observe him acting contrary to the regulations. She said if she saw him engage in activities contrary to the rules and regulations, she would notify the supervisors/directors of the private enterprise. However, she also indicated that she and her staff do question employees on regulatory compliance, and conduct investigations regarding compliance.

A State employee may not review or dispose of matters where they have a personal or private interest that may tend to impair judgment. 29 Del. C. § 5805(a)(1). She said the private enterprise had 2 different departments that would react if she reported her husband. However, she also regulated those departments. She also said her State Office managers would have access to that information so she did not directly make a decision. The statute does not require that the employee be the final decision maker, as it even precludes "reviewing" the matter. *Id*. She said she could transfer to a different shift if necessary. However, even if she changed shifts, she supervised all the State employees who would be observing and reporting any improper conduct by her husband, and she had access to all reports they prepare on any incidents. The Commission has previously ruled that delegation to those who work for, and report to, the person with the conflict, is generally contrary to the Code because it creates a conflict for that employee. It places them in a position where they may: (1) be subject to retaliation if the supervisor is not pleased with their decision, or (2) receive preferential treatment from the supervisor if they act only as the supervisor desires. See, e.g., *Commission Op. Nos. 02-22 and 11-03.* The Commission is required to strive for consistency in its opinions. 29 Del. C. § 5809(5). The Commission found that it would be a conflict of interest even if she transferred to another shift because the only persons who would be making decisions about his conduct would be the employees who work for, and report to her, and that the only way to cure the conflict would be for one of them to work at a different location.

12-18 – Nepotism - A State employee had oversight of contractors in her State job. Her daughter had been hired by a company that contracted with her agency. Her daughter would perform work related to the State contract. She asked if she needed to recuse from contracts dealing with that company. Normally, she served on the contract selection panels, and this company had a bid pending. She removed herself from that panel

pending the Commission's decision. As far as contract oversight, she worked with the Division Director, and others, to implement decisions. For example, if there was a change to a contract, she would be notified by the Division Director, or other appropriate authority. She would communicate those changes to her staff to put together the language and send it back to the program reviewers before it was sent out to be executed. The same thing occurred with invoices. As the vendor sent in the invoices each month, her contract, and fiscal staff, reviewed them and then processed the payment. She normally was responsible for signing off on anything over $5,000. She was involved in making sure the contract and the payment match the program design. If she had to recuse, it be a little difficult because of her many years of experience with the contracts and the program design. She had oversight of the program, the contract, and the financial side, which made her experience unique in the agency. If she recused, there were 8 people on the panel, and they could decide without her. She understood that bids can become contentious, and a vendor might challenge her participation because of her daughter's employment. She agreed that if she participated she would see how that company was doing financially versus its competitors, etc. She said that if she had to recuse, it would be a minimal amount. She would delegate it to her staff who would communicate directly with the Division Director, if there were any problems. The Commission decided that she should recuse from all matters related to the company, as she should not review or dispose of matters where she has a personal or private interest. 29 Del. C. § 5805(a)(1).

12-16 – Personal or Private Interest: A State employee participated in decisions to award contracts. He also heard appeals on contract decisions. His daughter had accepted employment with a firm owned and operated by the wife of the owner of a company that contracted with his agency. Also, the contractor's wife and his wife previously worked for the same firm a number of years ago. He asked if he should recuse from decisions about the husband's company. He said the company does not have many contracts with his agency, and that on those rare occasions that an issue might arise, his supervisor could take over. As far as having access to information on any bids from the husband's competitors, that would not occur because they were sealed bids and no one knew the bid until it was announced at a public meeting. This was normally handled by a contract coordinator, who, if any issues arose, would report to the State employee's Supervisor.

State employees may not review or dispose of matters if they have a personal or private interest which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). They also may not improperly use or disclose confidential information. 29 Del. C. § 5806(f) and (g). The Commission decided that he should recuse from all matters pertaining to the husband's company, and not improperly use or disclose information pertaining to the bids of other contractors, and he was entitled to the strong legal presumption of honesty and integrity that he would not engage in such conduct. *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).

12-12 Personal or Private Interest: The head of a State agency asked if it would be a conflict for one of her employees to be involved in a Memorandum of Agreement (MOA) with a private enterprise, when the employee also had a part-time job that entity. The employee was not involved in putting together the MOA. The MOA had nothing to do with the employee's part-time job, and she would not in any way benefit from the MOA. Her duties were that pursuant to the MOA, she would issue checks to, or accept checks from, the entity based on an amount specified in the MOA for a specific event, involving a

specific number of people. Thus, she could not affect the amount received from, or paid to, her private employer. Because her official duties were assigned with certainty, with no room to deviate, it was a ministerial action, and a conflict could not arise because the official's judgment could not be impaired—a necessary element. A "matter" is "ministerial" when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Commission Op. No. 00-18 (citing Darby v. New Castle Gunning Bedford Education Assoc.,* 336 A.2d 209, 211(Del., 1975)). The Commission found that because she had no personal or private interest in the MOA, and as her duties were ministerial, she could perform the duties that pertained to the MOA.

12-07 – Personal or Private Interest: The Commission had previously ruled that an official should recuse from certain local government matters because of his personal interest due to property ownership and his personal involvement in certain actions to which local ordinances would pertain. The official sought clarification on whether he could participate in discussions pertaining to an ordinance that would apply across the board to the entire City, not just the areas where he had a personal or private interest. He said if the discussions should turn to a more narrow focus and specifically target areas where he had a personal or private interest, he would recuse or come back to the Commission. The Commission found that he could participate in the discussions as long as they did not target the area where he had a conflict.

12-06 – Personal or Private Interest: Prior Board Membership - A local official asked if another local official had a conflict in acting an ordinance because of a past position as a Board member of private enterprise that had taken positions on government issues. The official had not been a Board member for almost a year, meaning no fiduciary duty of loyalty had existed in all that time. No facts were presented indicating the official still had any personal or private interest in the organization, and no facts were presented that showed that as a Board member, the official participated in decisions related to taking any position on government issues. The Commission decided that no advisory opinion be issued, as there was not "full disclosure."

12-04 - Personal or Private Interest - Property Ownership: A local official asked for an opinion concerning the conduct of another official. Courts have upheld a decision where one local official sought an advisory opinion on the conduct of another. *Post v. Public Integrity Commission.* However, in a later decision, the Commission held that the requesting official had to be able to provide "full disclosure," as occurred in *Post* for it to issue advice. *Commission Op. 11-13 (citing* 29 Del. C. § 5807(c)*).* Here, the requestor knew the pertinent facts pertaining to one issue—that the other official owned properties that would be directly affected by an ordinance that was to be considered. Those facts were independently confirmed by Commission's Counsel. An official may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). It was also alleged that the official was a Board member of a private enterprise that had taken a position on certain government issues. Again, that information was independently confirmed. The requestor did not know if, as a Board member, the other official had participated in decisions pertaining to a corporate position on the government issues. The Commission decided that the requestor, and the official on whom he sought an opinion, be notified that the Commission has held that being a Board member creates a fiduciary duty that may raise a conflict of interest. S*ee, e.g., Commission Op. Nos. 02-22 and 02-23.* However, without

full disclosure on whether the official participated in Board decisions pertaining to positions on local government issues, advice cannot be provided on that issue*;* however, the local official can request his own opinion about that potential conflict. It was also moved that because of the financial interest in the properties that would be affected by the ordinance decision, that the requestor and the official/property owner be advised that the owner should recuse. Further, the official with the property should be advised that he may need to recuse on future discussions that could impact on his property, but he was free to seek advice from the Commission on those issues.

12-01 – Personal or Private Interest - Future-in-Law: State employees may not review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). A State employee was engaged and the future spouse's father was a 50% owner and silent partner in a private enterprise that did business with the State employee's agency. The fiancé had no interest in the company: did not work there; had no present investment interest; etc. It was one of a few companies that contracted with the agency for a particular service, and the State employee's duties included selecting which company will provide the service. Notice of the work to be done was sent to all companies and then they send in unsealed bids. In about a 3-year span, the State employee had selected a company twice. Other selections were made by other employees for about a total of 10 contracts. Those employees could make the decision if this employee must recuse. The contracts were very competitive and some contractors already ask to see the selectee's bid to see why they were not chosen. The employee asked if recusal was appropriate on those relatively few decisions. Additionally, the future in-law's company was one of more than 20 companies certified to perform certain work if the Agency found a problem when inspecting. The State employee was one of the inspectors. After a problem was identified, the company with the problem decided what certified vendor to use. The State employee was not involved in that decision. It was strictly up to the company needing the vendor. Her agency did have a list of certified vendors. Once the company had the problem corrected, the vendor notified the agency, and submitted any required paperwork. When the paperwork came in, the case was closed. No close out letter was sent. No inspection to see if the work was properly performed was conducted, as the vendors were certified. Thus, she did not in any way deal with the vendors. The issue was whether recusal was needed since the State employee did not select the vendor, did not follow up on their work, and merely closed the case. Where a State employee has a purely ministerial duty, it does not require judgment. *Commission Op. No. 00-18.* Another issue was whether any restrictions in these 2 work areas apply at present, or if they would not apply until after the marriage.

The Commission decided that the State employee needed to recuse on those few occasions where one of the few vendors was being selected to perform the work for the agency, and it was recommended that sealed bids be submitted, or other measures taken so the State employee did not have access to competitors' bids, to avoid even an appearance of impropriety, such as misuse of confidential information. 29 Del. C. § 5806(g). As far as the inspection work, if a list of certified contractors was provided, the State employee may not opine on it or give any recommendations, even if asked. The restrictions should be applied immediately, rather than after the marriage.

11-57 - Personal or Private Interest: 29 Del. C. § 5805(a)(1)**.** A local official sought an advisory opinion after it was publicly suggested he had a conflict. It was assumed he did business with an applicant appearing before him, and received a product at reduced rates.

The official said on two separate occasions, once about 20 years ago, and again about 2-3 years ago, he did buy a product from the individual, but he paid the full market value. Moreover, he had no financial interest in the work done by that individual under independent contracts. He said he bought products from that individual because he went through a State agency who gave him that name as a source, on both occasions. He said he is not close personal friends with the individual, e.g., socializing, etc. However, he did call him by his first name because it's not uncommon for an older man to call a younger one by their first name, and that they just do not stand on such formalities in the types of businesses that use those particular products.

The Commission dismissed the allegations for failure to establish facts sufficient to support a claim that the official had a close personal and/or business relationship with the applicant.

11-38 – Personal or Private Interest – Board Member – An appointee to a State Board was privately employed as a senior level employee for a corporation that had corporate clients. The corporate clients were subject to laws administered by her State Board. They paid dues to her private company, and its Board of Directors was comprised of persons from their corporate clients. A corporate entity, which was not a client of her company, appeared before her Board, on a regulated matter. Her private company had not taken a position, but one of its corporate clients was opposed to the matter. Advocates for the applicant corporation told her company that she should recuse. She did so, but subsequently asked for an opinion on whether she would have been required to recuse. She also asked if she must recuse if a corporate client of her private employer appears before the Board, when her employer had not taken a position. She, and the company CEO, did not believe she should have to recuse unless the company took a position. They pointed out that the Board's enabling statute required them to designate an appointee, subject to the Governor's appointment, and by law that appointee could not provide the types of services provided by entities regulated by her State Board.

The State employee did not have a personal or financial interest in the corporate client that opposed the applicant; would not financially benefit from the decision; was not an employee, or on the Board of Directors, of any of her company's corporate clients. 29 Del. C. § 5805(a)(1), (a)(2)(a) and (a)(2)(b). Her private company's Board had taken a position only once on a matter related to the State Board. Unanimous consent was required for it to take a position. The Commission found that she would not have been required to recuse from the application hearing because she had no personal or private interest in the application or in the corporate client that opposed it, as far as a personal or private interest arising from her employment, her employer is not subject to the State Board laws; did not take a position on the application; rarely took such a position; and the statutory structure worked to limit the possibility of a conflict based on the particular facts of this case.

11-33 – Personal or Private Interest: A local government official had issues raised about his participation in two matters and subsequently sought advisory opinions on both issues. In an unsworn complaint, it was alleged that he had a personal or private interest in the decision because complainant believed he owned properties that are zoned like the ones on which he voted. From that belief, complainant thought he had a conflict of interest in voting on *any* property so zoned. The statute requires sworn complaints. 29 Del. C. § 5810(a). The official said that although the complaint was not sworn he would like to address the issues and obtain an advisory opinion. He presented documents from the

local zoning office showing his property was never zoned like the property in the decision he voted on. They were not only zoned differently, but the sizes of lots, setbacks, etc., were different depending on that zoning. Also, as a matter of law, the local ordinances showed the zoning laws were different, with the properties treated differently. The County tax records showed his properties were zoned different from the matter considered.

Complainant pointed to a specific decision, he participated in. Again, the allegation was based on the belief that the properties were zoned the same. The tax records showed they were not. Beyond that, he had no financial interest in any properties zoned that way and no financial interest in the owner's company 29 Del. C. § 5805(a)(2)(b)**.** Further, what occurred on the re-zoned property did not impact the official's properties, so he would not experience a financial benefit or detriment because of the decision. 29 Del. C. § 5805(a)(2)(a). The properties were miles apart. The Commission dismissed the complaint pertaining to the allegations that the official owned property zoned like the properties in which he participated in the decisions, because as a matter of law, as a matter of law, and fact, they were not the same, and no facts showed he had any other personal or private interest.

11-27 Personal or Private Interest: State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). A State employee asked if he could rent a house to a State employee in his own agency. The requestor is not the direct supervisor, but he did supervise the employee's supervisor. The requestor had oversight over certain statewide aspects of enforcement and compliance, and the prospective renter had oversight of the enforcement and compliance in a more local area. Both would have a personal or private interest in the rental transaction. 29 Del. C. § 5805(a)(1). Both would be required to recuse from matters pertaining to each other. *Id*. However, as the requestor made all decisions about their area of enforcement and compliance, even if the requestor did not deal directly with the employee, his decisions would affect the employee's duties. Also, part of the requestor's duties involved dealing with complaints on how the local area operated, which could put him in direct contact with the employee. Other duties also could result in such contact. The Commission previously ruled where a State employee and someone she supervised wanted to go into business together, that there were many potential conflicts and ruled that they could not enter a business together, in part, because of their supervisor/employee positions in their State jobs. *Commission Op. No. 09-29.*

The requestor said he did not deal with the prospective renter outside of work. The prospective renter and his family lived around the corner from him. The employee learned about the fact the requestor was looking for a renter through a personal conversation with him at work. When asked if there were any shortage of other potential renters, the requestor said he had not yet advertised it. He said if the Commission found even an appearance of a conflict, he did not see a problem finding another renter. The Commission found that the situation could create, at least, an appearance of impropriety.

11-23 - Personal or Private Interest – Private Employment: A State employee asked if he could accept a paid position with a company that received grants from the Division he headed. He previously worked for them "gratis." He said he now understood a possible conflict could exist even if he were not paid. He said he recused on matters pertaining to any company he worked for and that his deputy made those decisions. However, he admitted he knows the contents of their grant applications. He explained the grant process

pointing to the fact that advisory panels have public hearings during part of the consideration of grant applications. However, the agency's rules on the process result in only advice to him as the Division Director. He was tasked with the final decision and the dispersing of funds. The Commission noted to him that it previously ruled that when a superior tasks a subordinate with performing duties the superior cannot perform because of a conflict, it creates another conflict because the subordinate may fear making a decision that the supervisor will not like because of a personal interest in keeping their job. *Appendix B, 2002 Annual Report, Commission Op. No. 02-23,.* Also, the supervisor was in a position to show preferential treatment to that employee. *Id*. The applicant said he could ask someone in another Division to act for him. However, if he recused, he would be giving up a critical part of his State duties. Delaware Courts have held that as between a personal or private interest and State duties, the State duties must command preceden**ce**. *In re Ridgely*, 106 A.2d 527 (Del. 1954).

He asked if a conflict existed that a waiver be considered. For a waiver to be granted, there must be an "undue hardship" on the State agency or State employee. 29 Del. C. § 5807(a). No information from the agency, which was aware of his request, suggested an "undue hardship" on the State agency. The Commission decided a conflict existed, or at least the appearance thereof, and the facts did not establish an "undue hardship" on the employee or the agency.

11-19 Complaint – Personal or Private Interest: The Commission previously issued an opinion advising an official to recuse from certain matters and inform the necessary persons in the organization of the Commission's advised restrictions. The Commission received information that recusal, and informing the agency of the restrictions, did not occur. The Commission notified the attorney assigned to the agency of the concerns and asked him to communicate with the official to obtain information that would indicate compliance and explain the failure to recuse. The letter provided 30 days to respond.

11-14 – Personal or Private Interest--Investment/Board Member: In her private capacity, requestor was a stockholder in, and Vice President of, a private company. The company sometimes dealt with clients who qualify for assistance under a federal program managed by her State agency. She was not sure if she was required to file a disclosure because she was not sure if the contact between the private company and her agency was sufficient to make it fall into the category of "doing business with the State." The private company did deal with another section of her agency on at least an annual basis as it pertained to a federal program that other sections of her State agency handled. She was not involved with those matters. However, it was possible that some of the company's clients may come to the section where she works regarding hearings on the federal program. Hearings are held each quarter. She never participated in those matters if it involved a company client. Thus, in her State job, she did not review or dispose of matters where she had a personal interest. 29 Del. C. § 5805(a)(1). Regarding the periodic interaction between other sections of her agency, and the private company, all day-to-day matters were handled by other employees in the company of which she is a Board member. She said the Board normally met once a year. She said it was possible that one of the employees might brief the Board on matters pertaining to the Federal program administered by her agency. However, she said she could recuse from participating as a Board member if anything pertaining to her State agency arose. Thus, she would not be representing or otherwise assisting the company before her own agency. 29 Del. C. § 5805(b)(1). The Commission recommended that to avoid a conflict, she should continue to

recuse in her State job on matters related to her company/its clients; and also recuse from Board meetings if an issue on the federal program arises.

11-05 – Prior Private Employment: A State employee was recently hired as a Division Director at a State agency where he had worked a little over 2 years ago before leaving the State for the private sector. In his new job, he heads the agency staff which normally provides a legal position and course of action to the regulatory body.

Prior to this position, in the private sector he worked for a regulated industry subsidiary outside the State of Delaware. His employer had contributed stock funds to his 401(k). He is disposing of that financial interest. While working for the company he never represented it or any of its subsidiaries before his current agency. He did appear before a similar regulatory body in another State. There would be no actual case proceedings that he dealt with in that position that would come before his agency. However, he did provide legal advice on one matter where a similar type issue is likely to come up before his agency. He will recuse. He also said he handled certain similar regulatory matters out-of-State but the out-of-State decisions were based on the laws, rules and regulations in that State and on the particular case, and any Delaware agency decision on the regulatory matters would be based on Delaware laws, rules, and regulations and the particular facts of the Delaware cases. He normally would hand matters over to his Deputy Director if he recused. However, he also said the agency has some Deputy Attorneys General (DAG) assigned to represent staff and advise the regulatory body. He also said he is aware of his obligations under the Delaware Lawyers' Rules of Professional Conduct regarding such matters as issues dealing with former clients, confidentiality, etc.

He said that a controversial matter regarding a subsidiary of his former company had recently come up, but he was not hired until after that matter was completed. As far as relationships with the company's personnel, he said he knew the attorney who represents it before his current agency. However, that is because he formerly worked for the agency before leaving for the private sector. It is only a professional relationship. He said while with the company, he did attend meetings where the attorney was present, but that was because they had the same supervisor, and they never actually worked together because they handled matters from different States.

The Commission decided he would be required to recuse until after he disposed of his 401(K) stock holdings in the company, and that when he needs to recuse, he should delegate to one of the DAGs.

11-03- Nepotism Deborah Wicks/ Patrik Williams: The Commission decided to grant a waiver in the below matter. Additionally, Ms. Wicks must recuse from all matters related to her son, and must leave the room if such matters are discussed. **NOTE: As a waiver was granted, this matter is no longer confidential. 29 Del. C. § 5807(a). The entire opinion is printed below.**

11-03 – Personal or Private Interest - Nepotism

Dear Superintendent Wicks:

The Public Integrity Commission reviewed your request for advice on the hiring of your son, George Wicks, as the Supervisor of Facilities Operations for the Smyrna School District. Based on the following, we find an appearance of impropriety because: (1) your presence at the Board's meeting when it approved hiring your son should not have occurred; and (2) you plan to delegate supervision of your son to your Assistant Superintendent. However, we grant a waiver for that delegation, and provide guidance for complying with the law.

I. Facts

Patrik Williams, Assistant Superintendent, is responsible for facilities operations, and the facilities supervisor reports to him. He explained why, and how, the job of Supervisor of Facilities Operations was created. He said the head of facilities retired in June. At that time, only one person supervised all facilities and their operations. At the time he retired, he had been working seven days a week; 12-16 hours daily. He thought the job needed another person. Mr. Williams, as part of his duties related to facilities, considered his input in the context of the District's expansion. Specifically, it has increased the size of Smyrna Middle School by 50%, built Sunnyside Elementary, doubled the size of Smyrna High School, built a central HVAC plant, and is now heavily involved in constructing Clayton Intermediate School. The existing and on-going expansion would continue the increased work load on a single person. He began to look at how other districts that were expanding were meeting their needs regarding supervision of facilities. He learned that districts with similar growth rates had expanded their team to have at least two "plant" supervisors. He obtained some job descriptions from those districts. He found that Appoquinmink offered two that most closely resembled your District's needs. He modified them to more closely match that need.

You knew he was working on this, and that he was going to the School Board to see if it would approve a change to split the existing "Supervisor of Buildings/Grounds" into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations. Mr. Williams sought your counsel during this time.

On November 17, 2010, Mr. Williams made his presentation to the Board. The plan was to keep the present HVAC Supervisor in the first position, and advertise the second position. You apparently were present as you a member of the School Board as the Board's Executive Secretary, but you cannot and did not vote. The Board told him to proceed, with a few minor modifications to the proposed posting.

He worked on the posting and discussed it with you. He said you and he sent the revised posting to the individual Board members. They did not have any suggested changes. On November 22, 2010, the new position was posted on the District's web page. You said that around the end of November, you told your son about the job. The job announcement closed on December 7, 2010.

Five people applied. Two applicants were not qualified. Mr. Williams scheduled appointments for applicants to meet the hiring panel. Mr. Williams said he did not know your son, and the first time he ever spoke to him was to set up the appointment. The hiring panel consisted of Mr. Williams; the principals of Smyrna and Clayton Elementary Schools, and Smyrna Middle School; the Chief Custodian of Smyrna Middle School because he would work for the person selected; and

Human Resources Specialist Todd Seelhorst. George Wicks was unanimously rated as the top candidate. His name was presented to the Board at its December 13, 2010 meeting, a meeting you attended. The Board approved his selection.

II. Application of Law to Facts – Financial Interest

State officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). A personal or private interest automatically exists if: "Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." 29 Del. C. § 5805(a)(2)(a).

No facts suggest your son received a financial benefit or detriment that others applying for the job would not have received.

However, that is not the end of our inquiry.

III. Application of Law to Facts – Personal Relationships

Independent of the automatic conflict if a close relative would receive a benefit or detriment greater than others, the law separately provides that State officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). This allows consideration of conflicts that do not necessarily entail a financial benefit, but encompass close personal relationships. *Shellburne, Inc. v. Roberts,* 238 A.2d 331 (1967) *(*alleging official had a conflict because of his personal relationships with applicants; they were not relatives, but Court found the allegation of close relationships sufficient to raise an issue of fact).

Delaware Courts have held that "the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Prison Health v. State,* C.A. No. 13,010, V.C. Hartnett (June 29, 1993) (*citing Van Itallie v. Borough of Franklin Lakes,* 28 N.J. 258, 146 A.2d 111, 116 (N.J. 1958).

In *Prison Health*, a State employee was not on the selection board that picked a contract applicant, but was at a meeting where the board's recommendation was discussed. He asked three questions, but did not vote. His wife was an employee of the company that was recommended and selected. The Court found his participation was indirect and unsubstantial, but said the conduct was improper. However, the Court did not find the conduct sufficient to set aside the decision.

Here, you did not write the job description as it was primarily adopted from existing descriptions of similar jobs in another district. You did not participate in the Board's decision to approve the split positions; or serve or participate at the hiring panel meetings; or participate in the Board's vote to approve hiring your son. However, you did discuss the position and reviewed the job description with Mr. Williams, and you were present where your son's hiring was approved.

Your participation appears to be less than that in *Prison Health*. However, we must still look at whether, at the time you discussed the position and reviewed the job description, you had a personal or private interest. The position description was worked on in November, and was posted November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong legal presumption of honesty and integrity. *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). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. We also note that State employees are not barred from telling people, even a close relative, a job is open, even if a conflict exists. That is because it would not constitute "reviewing and disposing of a matter" that would "tend to impair judgment." A "matter" is considered "ministerial" when nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc.,* Del. Supr., 336 A.2d 209, 211(1975). If a matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. *Id*. It was public knowledge that the Board had decided the jobs could be split; and that posting was to occur after some minor changes the Board requested on November 17, 2010. Telling him of an opening when it was public information is not reviewing or disposing of a matter in an official capacity, misusing confidential information, or giving him any preferential treatment.

Thus, we find no actual violation. However, the law is not limited to just actual violations. It also addresses appearances of impropriety.

IV. Application of Law to Facts - Appearance of Impropriety

State officials shall endeavor to pursue a course of conduct which will not raise suspicion among the public that the official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government. 29 Del. C. § 5806(a). In other words, the conduct is to "instill public confidence in its government." 29 Del. C. § 5802(1).

This is basically an appearance of impropriety standard. The test for appearances of impropriety is if a reasonable person, knowledgeable of all the facts, may still believe the employee could not perform their duties with honesty, integrity, and impartiality. *In re Williams,* 701 A.2d 825 (Del., 1997).

We have two concerns about the appearances raised in this particular case.

First, even assuming you did not know your son was interested in the job until late November, you did know at the time of the December Board meeting. While you did not participate in the approval vote, you were present. In interpreting a federal ethics provision, it was noted that when the purpose is to instill public confidence in the government, improper conduct may include even "passive action." *United States v. Schaltebrand,* 11th Cir., 922 F.2d 1565 (1991). The *Schaltebrand* Court said that "mere presence can possibly influence government colleagues." The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse. It does not specifically state that you are to leave the room. However, had advice been sought from this Commission prior to any action, we would have advised you to leave the room during any discussion and voting. That

would help assure the public that your Assistant Superintendent and the Board had the comfort and security of being able to speak freely.

Second, you want to delegate administrative responsibility over your son to Mr. Williams. We understand that the Assistant Superintendent has always handled the facilities aspect, making him the logical candidate for delegation. However, we noted in other decisions the concerns that may arise when an official has a conflict and the responsibility for the decision is handed down to someone working for the official. Those concerns were that if the employee does not perform as the supervisor desires, there may be retaliation or conversely, there may be preferential treatment with respect to working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto,* 549 A.2d 1267, 1274 (N.J. Super., 1988)).

The public might not understand why Mr. Williams, who works for you, is supervising your son. That is especially true because it might be read as contradicting some of our prior decisions. *See, e.g., Commission Op. No. 02-23* (holding that it would not be a sufficient cure for a conflict for a Cabinet Secretary to delegate her decisions to her Division Directors). That case may be factually distinguishable, but we will not attempt to do so at this point. Rather, we rely on a case decision where the Court first found that there was no "financial interest" under 29 Del. C. § 5805(a)(2)(a), just as occurred here. *Harvey v. Zoning Board of Adjustment of Odessa,* C.A. No. 00-04-007CG, J. Goldstein (Del. Super., November 27, 2000) *aff'd.,* 781 A.2d 697 (Del., 2001). The Court went on to find that although there was no financial interest, it would be "prudent" for the officials to recuse because close relatives were involved. Here, you are going to recuse. In *Harvey*, they could not recuse so the Court held that by "rule of necessity," they could participate. Here, only by applying the "rule of necessity," could we allow you to delegate the responsibility to Mr. Williams to supervise your son.

Because of that we discussed at length the School District's "chain of command." The bottom line was that anyone who would oversee your son has a direct connection to your position just like Mr. Williams. Moreover, that would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else selected. On the positive side, you cannot fire Mr. Williams as that must be done by the Board, so that type of retaliation if he did not do as you suggested appears remote. We combined that with the strong legal presumption that you would not engage in such conduct.

We also weighed the public concern against the Code's other purpose. It says: "It is both necessary and desirable 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 achieve that purpose, the law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them. 29 Del. C. § 5805(a)(1). Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.

V. Application of Law to Facts - Waiver

A waiver may be granted if there is an "undue hardship" on the applicant or the agency. 29 Del. C. § 5807(a). "Undue" means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290* (10th ed. 1992).

Here, nothing suggests any hardship on you. However, for the School District, the public purpose of encouraging individuals to seek employment with the government, in this particular case, would be nullified, if no waiver were granted. That is an extreme consequence when the actual conflict can be cured by recusal, and the only obstacle is in delegating because you are the person at the top of the chain of command. If a waiver were not granted, it could appear that this Commission is trying to graft onto the statute an exception that does not exist. The law requires recusal. 29 Del. C. § 5805(a)(1). It has no exception saying relatives of those at the top cannot seek State employment in an agency where their relative works. Where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law. *Goldstein v. Municipal Court,* Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991) (*citing State v. Rose,* 132 A. 864, 876 (Del. Super., 1926)). Creating law is not within our purview. The General Assembly would have to make that decision.

As a result, we decided the responsibility can be delegated to Mr. Williams. However, any issue he, or others in the District, may have with your son cannot go through you for any purpose. You must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. If a matter comes to your attention, you are to refer it to Mr. Williams without comment. If at a Board meeting, staff meeting, etc., any issue arises regarding your son, you are advised not only to recuse but to leave the room to avoid even "passive action." *Schaltebrand, supra*.

Mr. Williams is to address the matters without involving you in any way. He is to go directly to the Board, minus you, on any appropriate matters pertaining to Mr. Wicks.

Additionally, you are to insure that in addition to Mr. Williams, your staff and the Board are aware of these restrictions. This insures that Mr. Williams, or any other District employee, have the comfort and protection to speak freely.

Further, as a waiver is granted, this opinion becomes a matter of public record. 29 Del. C. § 5807(b)(4). This is an additional measure toward instilling the public's confidence. It gives further assurance of compliance as the public will know of the restrictions.

Finally, we note that this opinion is limited to the particular facts of this case. 29 Del. C. § 5807(a). It is not authority for an open season on waivers for senior level officials to hire and/or supervise relatives.

VI. Conclusion

We find that your peripheral involvement of being present when the Board decided to approve your son's hiring created an appearance of impropriety that

could have been avoided. We also find that delegating administration of your son's position to Mr. Williams would raise an appearance of impropriety because Mr. Williams reports to you. However, to serve the purpose of encouraging citizens to take government employment, the "rule of necessity" is applied, and we grant a waiver, allowing you to delegate to Mr. Williams the responsibility over your son, George Wicks, under the restrictions and procedures identified in this opinion.

11-03 - Personal or Private Interest – Deborah Wicks: State employees may not review or dispose of matters if they have a personal or private interest in the matter which may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

The Commission previously granted a waiver to Ms. Wicks with certain restrictions as it pertained to her son working in the Smyrna School District where she is the Superintendent. As a waiver was granted, all proceedings related to the matter are public. *29 Del. C. § 5807(a).* The Commission received information that Ms. Wicks may not be complying with the restrictions and contacted the School District's Attorney to ask that Superintendent Wicks: (1) provide the Commission with information that the School Board and the staff were informed of the restrictions on her conduct; (2) explain why she was communicating with her son about his job; and (3) explain why she did not inform the Commission that her son had applied for essentially the same job in May 2010. When she appeared before the Commission, she said she did not discuss the maintenance job with him until after the job was posted in November 2010. Information provided to the Commission was that a nearly identical job was open in May 2010, and her son applied for that job but was not selected. The Commission asked, through the School District's Attorney, that she provide additional information within 30 days.

11-03 – Personal or Private Interest - D. Wicks – Nepotism: A citizen contacted the Commission about filing a complaint regarding Deborah Wicks' son being hired by the Smyrna School District, where she is the District's Superintendent. Ms. Wicks was offered an opportunity to request an advisory opinion before a complaint was filed because the citizen said she was interested more in seeing the matter resolved. Ms. Wicks sought an advisory opinion. She and the Asst. Superintendent, Patrik Williams, appeared before the Commission. The Commission issued an opinion stating that normally it would not approve having a subordinate take on the duties of the person recusing because that creates tensions between the employee' and the supervisor. However, Ms. Wicks and Mr. Williams indicated the Assistant Superintendent had always supervised the Facilities' Supervisors; that the structure of the school district resulted in basically anyone supervising her son would be someone who reports to her; etc. Based on their statements, the Commission concluded: (1) she must recuse from any issue pertaining to her son; (2) it granted a waiver so all matters related to him could go to Mr. Williams; and (3) Ms. Wicks was to inform the School Board and her staff of the restrictions.

Since then, the Commission learned: (1) Ms. Wicks was not recusing from all issues pertaining to her son; (2) the person in that position had not "always" reported to the Assistant Superintendent, but had reported to her; (3) her son applied in February 2010 for basically the same job but was not selected, but Ms. Wicks did not disclose that information; (4) Ms. Wicks did not inform her staff and the Board that she was barred from involvement in "any issue" pertaining to her son; (5) Ms. Wicks did not inform her staff of the restriction until the Commission notified her that it was aware she had not informed the

staff even though the opinion was issued 4 months earlier. The Commission requested she respond to those issues within 30 days. When she responded, she did not say why she delayed informing her staff that she was to recuse; she did not explain why she did not tell them she had to recuse from "any issue" pertaining to him, after finally informing them 4 months later but instead delineated some areas where she would not participate. The Commission decided that Ms. Wicks should be notified that at its September meeting it will review her case and vote on whether to rescind her waiver and recommend that she attend the meeting to explain her actions. As a waiver was granted, these proceedings are not confidential. 29 Del. C. § 5807(a).

11-03 – Superintendent of Smyrna School District Deborah Wicks – Nepotism – Update on Waiver: Ms. Wicks had a conflict due to a personal or private interest in her son's employment with the School District. 29 Del. C. § 5805(a)(1). The Commission previously granted a waiver so that the Assistant Superintendent could supervise Ms. Wicks' son. Ms. Wicks was to recuse from any issues pertaining to her son. She also was to advise the Board of Education and her employees of the restrictions. The Commission received information that she participated in a matter related to her son's work; had not informed her staff of the restrictions although she had had the opinion for about 4 months; and had not informed the Commission that her son previously applied for essentially the same job, just months before his present job was posted. The Commission gave her 30 days to respond to its concerns because it concluded she had not followed its advice regarding putting employees on notice of her restrictions; she had not restricted her conduct as directed; and had not "fully disclosed" the facts pertaining to her son's prior consideration for essentially the same job. Her response did not satisfy the Commission and she was notified that it would meet to decide if it would revoke the waiver. Ms. Wicks appeared with Assistant Superintendent Patrick Williams, and the School District's Attorney. She stated there was a misunderstanding on the limits of her restrictions; she did not think that it would be important to the Commission for her to tell them about a job her son <u>did not</u> get; and she was delayed in notifying her staff of the restrictions due to a family illness. Mr. Williams said it was Ms. Wicks' managing style to be directly involved in the work of all her employees. The Board requested that the waiver be extended to allow Ms. Wicks to work directly with her son.

The Commission reaffirmed its earlier findings of a conflict, with the additional details added; that it continued to be a conflict; that the Commission would not revoke the present waiver, but it would not grant a broader waiver that would allow her to work directly with her son as that would defeat the purpose; and that after the written opinion was issued, she would have 30 days to advise the Commission of whether there has been compliance.

11-03/11-19 - Personal or Private Interest - Nepotism – Wicks - 29 Del. C. § 5805(a)(1)**. As a waiver was granted, these decisions are not confidential.** 29 Del. C. § 5807(a). The Commission rescinded its prior opinion, 11-03, to the Superintendent of Smyrna School District, Deborah Wicks, and issued 11-19, with directives on areas where she was to provide the Commission with additional information. She responded to the directives, but 184 pages of material was received in PIC's office shortly before the meeting. PIC acknowledged receipt of the materials, which would be reviewed.

11-19 – **Nepotism –D. Wicks:** In Opinion No. 11-19, the Commission issued 5 directives with which Ms. Wicks needed to comply, to insure proper and full disclosure regarding her conflict which arose because her son was hired to work for the Smyrna School District, where she is the Superintendent. The determination at this meeting was whether she complied with the directives. Additionally, when the Commission issued its opinion, it received an e-mail from Patrik Williams, Assistant Superintendent, which raised concerns of whether he could exercise independent judgment in supervising Ms. Wicks' son because the correspondence indicated he was taking a personal and private interest in the Commission's decision pertaining to Ms. Wicks, which could tend to impair his judgment. 29 Del. C. § 5805(a)(1). Regarding compliance with the 5 directives, The Commission decided that there was minimal compliance with the directives for the reasons discussed. Additionally, Ms. Wicks' must notify all School District employees and the Board of the restrictions on her conduct on an annual basis, as was suggested by her response to that directive. The Commission also decided that Patrik Williams had a personal conflict that impaired his judgment, and so he should no longer supervise Ms. Wicks' son, and the duty should be assigned to Mr. Scott Holmes, who already was responsible for such matters if Mr. Williams was not available.

10-36 Personal or Private Interest Complaint: A citizen's complaint alleged a personal and private relationship between a State employee and a Supervisor. It alleged the supervisor was reviewing or disposing of matters pertaining to the employee, e.g., time off with pay, when they have a personal relationship contrary to 29 Del. C. § 5805(a)(1). The complaint also alleged matters over which PIC had no jurisdiction, even assuming all facts as true, as required by 29 Del. C. § 5808(A)(a)(5): They are: (a) whether the State employee is qualified for the job held; (b) if the hiring process was proper; and (c) if the State employee could engage in political activities, during State work hours. The Commission dismissed those 3 allegations for lack of jurisdiction and notified complainant. The complainant was asked to provide more specific information on the Code of Conduct issue (i.e. the supervisor reviewing and disposing of personnel matters related to the employee). Based upon the facts provided, the Commission did not have enough information to determine if the complaint was substantiated.

10-34 – Personal or Private Interest: A private citizen had a complaint against a local official, but said he would defer the complaint if the official sought an advisory opinion. The official did so. The concern was that he had participated in a decision when he had a personal or private interest that arose from his private involvement in a matter that involved the citizen and others. The official had a private complaint about the conduct of the citizens but went beyond merely filing a complaint with the appropriate local officials. Instead, he called a meeting of the officials; participate in the discussions; identified what he had concluded were violations of a local ordinance; and then after the Town took action based, at least in part, on his input, he then participated in another discussion about how the local laws might be changed to handle these types of situations. He said that there is a matter which would be coming before the Town dealing with this private citizen and he planned to recuse. The Commission decided that he should not have participated; that for the future, he should not participate in official matters if: (1) he, his spouse or tenants are the complainants; (2) it is a matter related to the property abutting his property; and/or (3) they are directly derivative from his personal actions related to this particular matter.

10-33 Personal or Private Interest: An individual was asked to serve as a Board member of a Charter School, but before accepting wanted to know if it would be a conflict because he had relatives working at the School. He said he would recuse from anything that would directly impact on his relatives differently than on other staff, teachers, etc. He believed all Board members, including the community member, voted on most things, but there may be some administrative duties performed by Board members that are not voted on. He believed the Charter School Board functions similar to a traditional school board. He said he spoke with his relatives before sending his resume to the Board Chair, to be sure they would be comfortable if he served on the Board. They told him they do not interact with the Board on a daily basis. He believed the Board would be acting on broader policies, and longer term issues, and the Board gives the head of the school a lot of authority to act regarding daily operations. His relatives suggested he seek out the Chair, or Principal, to see if it might be possible to serve on the Board. The applicant verified the Board leaves many of the decisions to the School Leader, but the Board signs for the building; often ratifies the School Leader's decisions; and would be ccountable. Additional information from the Charter School showed that Board members would have significant involvement in decisions regarding salary, bonuses, etc. The Commission found the conduct would raise public suspicion that the applicant was in a position to act in the best interest of his relatives, he could unduly influence other Board members, or his relatives could unduly influence him. Even if he recused from specific issues, there would still be suspicions of undue influence, and more importantly, he would be recusing in areas critical to the School, which would limit his ability to serve. The Commission determined that accepting the Board position would be a conflict.

10-31 Personal or Private Interest: A sworn complaint was filed against a local official alleging that due to a personal or private interest in an ordinance that the official should have recused. The complaint also alleged such matters as an unconstitutional act by the entire Council concerning the ordinance. The Commission dismissed the matters identified as issues over which the Commission had no jurisdiction and/or failed to state a claim. Regarding the alleged personal or private interest, assuming the facts as true, were sufficient to establish a reason to believe that a violation may have occurred.

10-31 - Personal or Private Interest: After a preliminary hearing on this matter, the Commission found probable cause to believe a violation may have occurred, and notified the official to respond to the preliminary hearing findings. A written response combined with a motion to dismiss was filed. The official also testified under oath, as did two witnesses. Beyond providing testimony on certain factual issues, Respondent moved to dismiss on several grounds: (1) public policy; (2) Constitutional protection; and (3) failure to state a claim.

The Commission denied her motion to dismiss; and decided she did have a personal or private interest conflict.

10-21 Personal or Private Interest: An appointee to a State Commission filed a full disclosure because her private business was regulated by another State Board. If an issue came before her agency dealing with the other State Board, she would recuse. Also, while unlikely, if an issue pertaining to her private employer came before her Commission, she would recuse. The Commission decided there would be no conflict as long as she recused if those circumstances arose.

10-20 Personal or Private Interest: A State employee's son started a business, and a company offered him certain products, at no charge, that he can recycle and sell. The employee's agency contracts with other companies that have that product. The company has contracted with the agency in the past, but does not presently have a State contract. The employee asked if his son may engage in that business venture. The Commission cannot make decisions about his son, as he is not a State employee. However, if the company starts doing business with his agency again, the State employee cannot participate in decisions about that company, such as reviewing the contract, or supervising their work. The State employee said he will not approach any of the State contractors who have similar products on his son's behalf to avoid any appearance of misuse of public office.

10-15 – Personal/Private Interest: Local Officials who are Board Members of a Private Enterprise. (As a violation was found, and as a waiver was given for some parts of the Code, the full opinion is a matter of public record. 29 Del. C. § 5807(b)(4) and § 5810(h)(1)(ii). Mr. Richard Kough, Mr. Kevin Phillips and Ms. Anna Robinson are all Bethel Councilmembers and also are all Board members of the Bethel Historical Museum. They are barred from reviewing or disposing of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Board membership on a private enterprise is a personal and private interest. *Commission Op. No. 02-22*. If they cannot recuse, they must file full disclosures explaining why. 29 Del. C. § 5805(a)(3). They also may not represent or assist a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). Ms. Robinson asked Town Council to consider getting federal stimulus funds for the Community House, which is a municipal building used for meetings, etc. An energy audit needed to be conducted before the application for the funds could be submitted. Mr. Phillips said he would look into the matter. He met with the energy auditors as the Town's Representative. However, he also is the President of the Historical Museum. When he returned to Council he had not only had the Community House audited, but also the Museum, and asked that the privately owned Museum be included in the request for funds. At that meeting, only three Councilmembers were present: Mr. Kough, Mr. Phillips, and Mr. John Parker. Three members constitute a quorum. Mr. Phillips said there was a deadline for submitting the applications for the funds, but there was no indication when the deadline would occur. No suggestion was made to table the matter until other Councilmembers were available. The motion to include the Museum was approved by the three Councilmembers, two of which are Museum Board members, with a fiduciary duty to act in its best interest.

No disclosure was filed until another Councilmember contacted this Commission about the possible conflict for them to vote on matters pertaining to the Museum. At that point, a disclosure was filed by Mr. Kough. Subsequently, Council met and acted on other matters pertaining to the Museum and these funds. All three Councilmembers who are also Museum Board members participated in those discussions and votes, meaning 3 of 5 Councilmembers were voting on a matter when they had a personal or private interest. Mr. Kough did not update his written disclosure of participating in the matter. Mr. Phillips and Ms. Robinson never filed the required written disclosure but asked that the Commission consider Mr. Kough's written statement, and facts from their attorney as their disclosure. The Commission decided that it was a conflict for them to participate in decisions where they had a personal or private interest. To resolve the conflict so Council decisions could be made about the Museum without having Museum Board members participate, the following approaches could be used: (1) all Councilmembers leave the Museum Board; or

(2) enough Councilmembers leave the Museum Board so that a quorum exists to decide Museum issues without a Museum Board member participating; or (3) leave public office.

09-50 Complaint against Local Official: To decide if there is "reason to believe" a violation occurred, all alleged facts must be assumed true. A private citizen wanted to re-zone his property. The matter first went to the Planning and Zoning Board, then the local government's legislative body. Complainant alleged that a legislative official attended the P&Z meeting on the issue. No facts suggested any comment, participation, etc., by the official. The record was then left open for public comment before it went to the legislative body. While the record was open for comments, it was alleged that the official corresponded with some constituents and an official from another local government, who opposed the re-zoning. The official said they needed to contact all the legislative members if they wanted to be effective. The official also forwarded the other local official's questions to another legislative member, saying the questions should be answered. The other legislator replied that the information would become part of the record. When the issue came to the legislative body, the official distributed some information before the hearing. Complainant's attorney alleged the official was trying to influence the vote by the distribution. During the process of the hearing, the attorney for the re-zoning said the official appeared to have already made up her mind.

(1) Attending the P&Z meeting: PIC has held that any person, including elected officials can go to a government's open meeting. Absent any Code of Conduct violation in doing so, the official has the right to attend. PIC did bar a local official from participating in a Town meeting in her official capacity when an ordinance that affected her private business was to be decided. That is because under the Code, an official may not review or dispose of matters if they have a "personal or private interest." Here, the official was not on the P&Z Board. Thus, the elements of "reviewing or disposing of the matter" were not met. Even assuming the official was on the board, no facts suggest a "personal or private interest" in the re-zoning issue, e.g., property ownership, etc. In the opinion mentioned above to a local official, PIC also told her that she could not actively participate in the public meeting in her private capacity because the Code barred her from "representing or otherwise assisting a private enterprise before her own agency." Here, the official was not at a meeting of her own agency. Even assuming that fact, no facts suggested any representation or assistance of a private enterprise.

(2) E-mail correspondence: No Code of Conduct provision dictates when a government entity will open or close the records for public comment, or bars constituents from commenting to their elected officials. As for the official responding to comments, absent any conflict (e.g., having a personal or private interest that would bar reviewing or disposing of matters affecting that interest—which are not even suggested by the facts), no provision bars the official from responding. Dismissed for lack of jurisdiction because PIC does not have jurisdiction over a determination of a public meeting/comment period.

(3) Distribution of the Printed Materials: PIC has no authority to decide a local government's hearing procedures and/or how they apply to distribution of such materials. Its jurisdiction is limited to the law in 29 Del. C., ch. 58. Again, the complaint, relative to this act, gives no facts establishing a personal or private interest in the matter or of any representation of, or assistance to, a private enterprise before the official's agency.

(4) Alleged bias: To state a claim under the Code of Conduct, the alleged bias must arise from a connection to a provision of the Code of Conduct. The Commission has

no jurisdiction over any other types of alleged bias. Here, no facts suggested the official's alleged bias arose from a "personal or private interest," or that it arose in the context of her "representing or otherwise assisting a private enterprise." For example, one type of bias Courts address that is not conflict of interest driven is pre-judgment, rather than hearing and acting on the merits. To the extent that is what complainant alleged, that issue was raised by his attorney at the hearing, and if there is a right to appeal could proceed by that route.

Commission dismissed the complaint as PIC had no jurisdiction and no facts substantiated a connection to a violation of the Code.

09-20 Appointment to Charter School Board: A State employee asked if it would be contrary to the Code if he served on a Charter School Board, concurrently while employed by the State, and after he terminated. He has no responsibilities for Charter Schools in his State job. While he is now employed by the State, he expects to retire in mid-2009. At that point the post-employment law would apply. It says for two years after leaving the State, former employees may not represent or assist an organization on matters where they were directly and materially responsible. 29 Del. C. § 5805(d). Again, he had no occasion to work on Charter matters in his State job, which means he would not have been directly and materially responsible for the matter. He said that it was very unlikely that a Charter School issue, for which he was responsible, would come up in his current job or in post-employment. If so, he would recuse. The Commission found no conflict.

09-12 – Personal or Private Interest—Local Government Conflict: Allegedly, a local government councilmember was participating in decisions where he had a personal or private interest, as it related to a Planning and Zoning (P&Z) issue. He had submitted an application more than a year ago, but P&Z had not acted. This meant that the matter had not come before Council, so he could not have reviewed or disposed of the subdivision matter in his official capacity. 29 Del. C. § 5805(a). It also was alleged that he used his public office to secure unwarranted privileges for personal gain because he knew the Town would be re-writing it's zoning ordinances and deliberately filed before that was completed. 29 Del. C. § 5806(e). The choice of when to file is not unique to him—anyone could have done so. It was public knowledge that the Town's comprehensive development plan might require some changes to the existing zoning laws. Also, he voted "no" on having a newspaper ad announce a public hearing, which allegedly benefitted his personal interests. 29 Del. C. § 5805(a). His vote was not on his subdivision application, so he still did not review or dispose of the application filed with P&Z. Moreover, PIC had no jurisdiction over laws that govern notices of public meetings.

It was alleged that he used his public office to force a consultant to quit assisting the Town on its comprehensive development plan. 29 Del. C. § 5806(e). Even assuming the allegation were true, again, this was not a decision on his application. It also was alleged that he said he might speak to State Representatives. Any private citizen has a right to contact elected representatives, and elected officials have the right additionally under the speech and debate clause. Nothing suggests he made the consultant quit. It was the consultant's decision. Also, whether the consultant left or stayed, their conversation was not about his application. Also, PIC has no jurisdiction over how, when or where any consultant should perform their duties. Another allegation was that he filed complaints against other council members and appointees to the P&Z committee. The record shows that he did not file a sworn complaint. Rather, he sought advice on his

conduct regarding recusal, but also asked if those persons should recuse in certain situations. By law, any official can request an advisory opinion, even if it pertains to another official. The statute permits that action, and it has been upheld by the Superior Court. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). It also is alleged that the P&Z could not do its job without the consultant because they lacked competency and lacked funds to hire another consultant. PIC has no jurisdiction over the competency of any appointee, and no jurisdiction over any agency funding. The Commission dismissed the complaint for failure to state a claim, and reminded the official, as previously indicated to him, that he should recuse from decisions on his application.

09-11 – Personal or Private Interest—Review of Spouse's Official Decisions: Several local government Council members previously came for opinions on whether it was a conflict for them to make decisions on: (1) work by their spouse as an appointee to a Town Board; and (2) work by a close personal friend as an appointee to a Town Board. The Code bars officials from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a). PIC said it would not be proper to review each other's work. One appointee expected the Town Board on which both persons served would be disbanded as it had completed its project. That would totally remove any possibility of a conflict. Thus, the possibility of such review was unlikely. However, at this meeting, the Commission was notified that the Board had not been disbanded. One appointee tendered her resignation but the Board would not accept it. The Commission notified the Board that their charter makes Council President the appointing authority with Council's approval. The Code of Conduct provides that with respect to an honorary state official, the Commission can recommend that appropriate action be taken to remove the official from office. 29 Del. C. § 5810(d)(3). However, if they have an "undue hardship," they can submit the facts.

09-10 – Personal or Private Interest—Spouse's Financial Interest: A State employee worked at a facility where her spouse's business had some dealings on certain applications and licensing. By law, if there is a financial interest in a private enterprise that does business with, or is regulated by the State, they must file a full disclosure. 29 Del. C. § 5806(d). Beyond the above facts, the State employee said her section had three separate offices, and her spouse would deal with one of the other offices. That was on rare occasions, and might not continue after this year as he is considering giving up his private business. If he came to her office, she would recuse, and pass it to her Supervisor, as she was aware that she could not review or dispose of matters related to him. 29 Del. C. § 5805(a). She also said that if the other office sent work related to his dealings because of a backlog, she would return the work to that office. The Commission found no conflict as long as she did not deal with her husband's business.

09-07 - Personal or Private Interest - Private Business Conflict if Promoted by Agency: A State employee was being considered for a promotion. Before the agency made any decision, the employee and the agency sought an opinion on whether her private business would create a conflict. Although some of the matters that pertained to her private business would go to her State agency, they would not come to her. Thus, she would not review or dispose of the matter. 29 Del. C. § 5805(a). In fact, her documents would be processed in a different County, thus, her immediate colleagues and coworkers would not review the documents, which were primarily administrative in nature. She also

was advised not to use State time and resources to perform her private work. 29 Del. C. § 5806(e).

09-06 – Personal or Private Interest - Sole Proprietor Dealing with Own Agency: A State employee was an accountant in her State agency. In her private capacity, she was the sole proprietor of a business. Some of the documents she prepared in her private business did go through her State agency, thus she filed a disclosure. 29 Del. C §5806(d). The documents would not go to her in the normal course of business. As she may not review or dispose of matters in which she has a personal or private interest, 29 Del. C. § 5805(a), if they did, she would recuse. The entries in the private documents were ministerial in nature, e.g., identification numbers, loaning institution, etc. She did not advocate for her business, or for the clients, with whom she had a subcontract on any administrative or legislative decisions. 29 Del. C. § 5805(b)(1). The entries could not assist them in effecting administrative or legislative changes. The Commission found no conflict.

08-39 – Personal or Private Interest—Local Officials' Private Memberships: PIC previously disposed of some non-jurisdictional issues on this matter. This opinion focuses on just potential conflicts for three local officials. One is a social member of a Volunteer Fire Department. Under State law, volunteer Fire Departments are considered State agencies. 16 Del. C., ch. 66. The official would normally review matters related to funding, which generally includes funding decisions on the fire department. The official has never participated in any Fire Department decision. The last decision was made before he became an official. If the Fire Department comes before his agency for any purpose, he can recuse. 29 Del. C. § 5805(a).

Another local official is a non-profit Board member. It also may seek funds. It uses a facility owned by the Town. The third official is a member of an organization that the local legislative body authorized the Chief of Police to create. It was solely at the Chief's discretion to create the organization and seek volunteers to participate. The group has its own duty office; it uses Town space; it seeks funding; and for other reasons comes before this third official. The official is also a very active volunteer in the organization. The Commission found that none of the 3 officials should, in their official capacity, review or dispose of matters pertaining to the organizations. *Id*. If they cannot delegate on such matters as the Town's budget, they must promptly file a full disclosure with the Commission explaining why they cannot recuse or delegate. 29 Del. C. § 5805(3). They also have the option to resign from the private organizations and avoid any possibility of a conflict. Approved by a majority with one Commissioner dissenting on 2 officials.

08-30 & 08-32 – Personal or Private Interest—Close Relative's Land Issues, Review of Decisions by Spouse and Close Personal Friend: A local Town official called PIC's Counsel for guidance on recusal if a decision on a close relative's properties came before him in his official capacity. He said he would recuse if that occurred, PIC's Counsel's duties are to give guidance, which was to recuse. He did so.

He also asked about potential conflicts of two other officials. Any official or agency may seek advice on other officials. 29 Del. C. § 5807(c). That process was upheld by the Superior Court. *Post v. Public Integrity Commission,* 07A-09-08, J. Witham (Del. Super. April 30, 2008). He asked if they should recuse on certain matters because of personal

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

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

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

(1) future work completed by the two officials should not be reviewed by their spouse and/or friend; or
(2) the two officials should recuse on matters that would be reviewed by their spouse or friend; or
(3) even the possibility of the appearance of a conflict could be resolved if the two who would be part of preparing matters to go to their spouse and/or friend elected to leave the agency to which they were appointed; and;
(4) In the future, if the officials cannot recuse when they have a conflict, full disclosure should be filed in advance (e.g., table the matter until PIC can review and give advice, protecting the official from complaints or disciplinary actions).

08-27 – Personal or Private Interest—Father's Interest in Ordinance: A local official asked if he could participate in a decision when the ordinance would apply to everyone in the Town. However, his father was the only citizen that approval would affect. The Code bars officials from reviewing or disposing of matters where they, or their immediate family members, would benefit to a great extent than others. 29 Del. C. § 5805(a)(1) and (a)(2). The official said he would not vote on his father's application, but asked if he could vote on the package of options as a whole. PIC concluded that if he voted on the entire package, he was still voting on what might appear to be "private legislation" for his father. The

Commission advised that the Councilman recuse. PIC specifically noted that this local government tabled decisions until PIC could give advice..

08-13 – Personal or Private Interest—Brother's Financial Interest: Local Town official sought advice on another Town official's participation in Town matters that might impact on his or his brother's financial interests. One official may seek an opinion on the conduct of another, if there can be full disclosure. 29 Del. C.§ 5807(c). *See, Post v. Public Integrity Commission,* C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008) (subsequently upholding PIC decision where one official sought advice on the conduct of another). The official and his brother were found not to have any financial interests in the particular matter at this time, and recusal would be premature because too many events were speculative but would have to occur before recusal would be required. The official said he would recuse later if required. If he cannot recuse (e.g., lack of a quorum) he knows to file a disclosure on why he could not delegate. 29 Del. C. § 5805(3).

08-04, 08-05, and 08-06 – Personal or Private Interest - Local Officials' Employment Disclosures: The local officials waived their right to confidentiality pursuant to 29 Del. C.§ 5807(b)(1).

08-04, 08-05, and 08-06 – Disclosure of Interest in Private Enterprise

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

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

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

I. Law and Facts:

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

(a) Financial Interest: All three are employed by private firms.
(b) Who must file: "Employees," "officers" and "officials." Id. All three elected officials filed.
(c) Conditions: Disclosure is "a condition of commencing and continuing "employment" or "appointment." 29 Del. C. § 5806(d). Elected officials are "employees" or "appointees." This condition cannot apply to elected officials as PIC cannot impose conditions for office on elected officials; nor remove them. The public decides whom to elect and whom to remove. This does not mean they are exempt from the rest of the Code. For example, [financial] conflicts can require

recusal. 29 Del. C. § 5805(a)(2)(a).

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

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

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

(2) **Town Policy:** The Town has had a conflict policy since June 22, 2001. Recusal is required for conflicts. Those recusing must give a reason. Policies can be more stringent, but not less stringent, than the law. *Nardini v. Willin*, 245 A.2d 164 (Del., 1968). State law does not require a reason for recusal. 29 Del. C. § 5805(a)(1) and (2). To that extent, the officials followed a more stringent Town policy.

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

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

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

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

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

cannot be delegated. 29 Del. C. § 5805(3).

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

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

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

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

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

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

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

As no time frame is set, the Commission considers the particular facts of this case as they relate to the public purposes of the law. 29 Del. C. § 5807(a) and (c). Here, (1) they immediately responded once notified of the filing requirement; (2) nothing suggests they were "hiding" a financial interest that may be a potential conflict; (3) where appropriate, recusal occurred; (4) in some instances they more than complied with the Code; (5) they have not represented or assisted their private enterprise on Middletown matters; (6) their conduct is consistent with the purpose of the statute--to avoid conduct that would create a justifiable impression among the public that the public trust is being violated. 29 Del. C. § 5802(1); (7) they are entitled to a "strong legal presumption of honesty and integrity;" *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*., Del. Supr., No. 304 (January 29, 1996); and (7) to encourage citizens to assume public office and employment, the law "should not be unduly circumscribed." 29 Del. C. § 5802(3).

The question of an exact date of when they should have filed must encompass all the facts showing compliance with the letter and purposes of all other provisions. Even Courts, and the attorneys representing local governments, are not always aware that the Code of Conduct applies to local governments. *Harvey v. Zoning Board of Adjustment of Odessa,Del. Super.,* C.A. No. 00A-04-007, J. Goldstein (January 12, 2001) aff'd., 781 A.2d 697 (Del., 2001). When there

is more than substantial compliance, it would seem to be "unduly circumscribing the law," and would not be considering the "particular facts" of this case, if the filing date were the lone basis of a violation.

Original Signed by Chair Terry Massie

07-70 – Personal or Private Interest - Disclosure Not Mandated for Local Appointment: Lawrence Steele was being considered for appointment to the Town of Bethel's Zoning Commission. He was told by local authorities that he was required to file a financial disclosure. He is not required by law to file, as local officials are exempt from subchapter II disclosures, and only need to file under subchapter I if they have a financial interest in a private enterprise that does business with, or is regulated by, their government. He authorized release of the opinion. 29 Del. C. § 5807(d)(1). Thus, it is a public record.

07-70 - Appointment to Local Board and Outside Employment *Hearing and Decision by:* *Chairman Terry Massie, Vice Chairs Barbara Greenand Bernadette Winston; Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.*

Dear Mr. Steele:

The Public Integrity Commission (PIC) reviewed your disclosure on your appointment to the Town of Bethel's Zoning Commission and your private employment as an attorney. Based on the following law and facts, we find no conflict of interest.

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

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

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

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

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

(1) In your Town capacity: You may not review or dispose of matters if you have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a). If, for example, your firm and/or clients come

before your Commission, i.e., variance, as a general rule, you should recuse yourself. PIC understands that your firm and your private clients, including those who may be Town officials, have no matters before your Commission. However, if circumstances change you may seek advice on any "particular facts." 29 Del. C. § 5807(c).

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

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

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

Original signed by Chair Terry Massie

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

07-56 Personal or Private Interest - Financial Interest in Private Enterprise that Contracted with State: The Commission (PIC) reviewed a request for advice asking if the private firm of two State employees, a husband and wife, would violate the Code of Conduct. It found no violation if the facts did not change. A current State employee asked if he could contract with a State agency. State employees are barred from privately contracting with their own agency. 29 Del. C. § 5805(b)(1). The contract was not with his agency. State employees also may not review or dispose of a matter in which they have a personal or private interest. 29 Del. C. § 5805(a)(1). He was in no way involved in the contract as a State employee because it was not handled by his agency. The contract exceeded $2,000. It was publicly noticed and bid, as required. 29 Del. C. § 5805(c). His spouse was a State employee at the initiation of the request, but left State employment. As a former employee, for 2 years after leaving State employment, she may not represent or otherwise assist a private enterprise on State matters where she gave an opinion; conducted an investigation or was otherwise directly and materially responsible. 29 Del. C. § 5805(d). As a State employee, she was in no manner involved with the contract, which was not with her agency. The Commission found no conflict for either of them.

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

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

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

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

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

07-52 – Personal or Private Interest—Financial Interest as Spouse: A new State employee filed a disclosure of a financial interest in a private firm that does business with the State.

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

07-42 & 07-47 – Personal or Private Interest – Personal Bias in Decision Making: In the following opinions, the Commission advised a local official it would violate the Code of Conduct if he participated in decisions pertaining to a developer when he had issued statements against the developer and the development, and knew the matters would come before him on the Zoning Board. After the first opinion, he moved for reargument. The Commission again advised him it would be a violation. He then filed an appeal in Superior Court. It had already ruled that advisory opinions cannot be appealed. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). PIC moved to dismiss, and he withdrew his appeal. However, he apparently decided to act against the Commission's advice. Subsequently, he was personally sued in Federal Court by the developer for participating in the decisions when he had a conflict. *Dewey Beach Enterprises, Inc. v. Town of Dewey Beach; Dell Tush in her individual capacity;* ***David King in his individual capacity****; Diane Hanson, in her individual capacity****;*** *and Richard Hanewinckel, in his individual capacity;* C.A. No. 09-507- GMS, J. Sleet, (July 30, 2010).

That case was dismissed without prejudice after the Town and the developer reached an agreement. However, Town residents challenged it. *Murray v. Town of Dewey Beach*, C.A. No. 6785-VCN, V.C. Noble (Del. Ch., May 21, 2012). The Court dismissed the case. On reargument, it was again dismissed.

July 24, 2007

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

Advisory Op. 07-42 – Local Land Use Issue
Hearing and Decision by*: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey and Wayne Stultz*

Dear Mr. Brady:

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

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

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

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

Original Signed By Chairman Terry Massie

07-47 – Personal or Private Interest--Motion for Reconsideration:

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

Hearing and Decision By**:** Chairman Terry Massie; Vice Chairs Barbara Green and

Bernadette Winston; Commissioners William Dailey, Barbara Remus and Dennis Schrader

Dear Mr. Karsnitz:

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

I. Standard for Reconsideration

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

[NOTE TO READER: The Tabs referred to in this opinion are not included, but are public records. The footnotes in this opinion have been removed for ease of publication.]

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

II. Background

Dewey Beach's Town Council appointed the Ruddertowne Architectural Committee (RAC) to evaluate and negotiate development of the Ruddertowne property. *Tab E, RAC Chair Eisenhauer, e-mail filing (June 14, 2007); Tab F, Town Minutes, December 9, 2006.* As an appointee, Mr. Eisenhauer, may seek an advisory opinion*.* 29 Del. C. § 5807(c). He asked PIC if Mr. King's conduct in expressing a personal opinion on RAC's work and the development violated the Code since the Zoning Commission considers these matters. *Tab E, Eisenhauer email.* The Mayor appoints and Council confirms Zoning Commissioners, such as Mr. King. *Dewey Beach Code, ch. 185 § 33-2*. The Zoning Commission acts on developers' draft ordinances affecting their property; building height, site plans, etc. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.; Tab G, Transcript, PIC meeting, see, e.g., p. 20, line 272 (Zoning Commission makes recommendations to Council on "substantive matters"); pp. 39-40, lines 530- 546 (Zoning Commission reviews draft ordinances and the Ruddertowne developer has submitted a draft).*

III. Arguments and Responses

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

Mr. King gives no legal or factual understanding of why PIC has no jurisdiction. He

only gives the two Code sections without any reasoning on why they preclude PIC's jurisdiction. Accordingly, we will try to cover numerous legal principles as they relate to jurisdiction under those two provisions.

RESPONSE (A): Jurisdiction Under 29 Del. C. §5802(4)

The statute provides:

> "It is the desire of the General Assembly that all counties, municipalities and *towns* adopt Code of Conduct legislation at least as stringent as this act [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. *Subchapter I*, Chapter 58, of Title 29 shall apply to any county, municipality or *town and the employees and elected and appointed officials thereof* which has not enacted such legislation by January 23, 1993. *No* Code of Conduct legislation shall be deemed sufficient to *exempt* any county, municipality or *town* from the purview of *Subchapter I,* Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as *Subchapter I*, Chapter 58, Title 29. Any change to an approved Code of Conduct must similarly be approved by the State Ethics Commission *to continue the exemption from Subchapter I,*Chapter 58, Title 29." 67 Del. Laws, c. 417, §§ 1, 2; 68 Del. Laws, c. 433, § 1 (emphasis added).

To the extent it is argued that Subchapter I does not apply to local officials because Subchapter I defines "State agency" as exempting "political subdivisions," that is a definition, not the substantive law. 29 Del. C. § 5804(11). Substantive law is clear: "This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993...." 29 Del. C. § 5802(4). That law specifically tells local governments how they can be "exempt" and how to "continue that exemption." *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of Principle: The legislative history repeatedly reflects the manifest intent of

the General Assembly that local officials are subject to Subchapter I, absent a PIC approved Code, with changes also approved. It is the only means of "continuing exemption."

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

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

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

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

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

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

RESPONSE: 29 Del. C. § 5807(c) and 29 Del. C. § 5810(a).

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

Application of Law to Facts: Neither Mr. Eisenhauer, nor PIC, instigated a complaint. It

was a request for an advisory opinion which only requires a "written statement." 29 Del. C. § 5807(c). They may be filed by employees, officers, honorary officials, an agency or a public officer. *Id.* Mr. Eisenhauer was appointed to RAC, a Town Council created body. RAC acted on Council's behalf on Ruddertowne negotiations. Mr. Eisenhauer was authorized to seek an advisory opinion. *Id.* The law and procedures used were for advisory opinions, not complaints. *Id.; PIC Rules, (VI) "Requests for Advisory Opinions and Waivers," § (A)(1)-(5).* PIC treated the filing as an advisory request at the proceeding. The underlying opinion was captioned "Advisory Op. 07-42." *Tab A*. Mr. King's motion acknowledged it as such, and called it an "advisory opinion." *Tab C, Motion for Reargument, pp. 1 & 2.* The motion also acknowledges that *Rule IV(C)(p)* "applies to hearings and decisions on complaints and does not appear to apply to requests for Advisory Opinions." *Id. at p. 1*. The argument that it was a "complaint" was made at the reargument motion. PIC's deliberations covered the "complaint" versus "advisory opinion" issue. *Tab G-58 lines 778-817 and G-79 lines 1062-1064.* PIC again concluded it was an "advisory opinion."

Aside from the use of the word "complaint" in this argument and argument 4, the motion refers to a "complaint" one other time. It says: "it is believed" that "the true nature of this dispute is a complaint...." *Tab C-1 ¶ 1.* No facts are given to support that belief. Mere allegations, without supporting facts, are insufficient. *Del. Super. Ct. Procedural Rules 6(b) and 56*.

CONCLUSION: No law or facts change the underlying decision, not is it shown that any legal principle was ignored in treating the filing as an advisory opinion.

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

RESPONSE: Notice and Due Process

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

Attendance is at PIC's discretion:

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

Application of Law and Facts: It is undisputed that: (1) Mr. Eisenhauer had authority to make a request; (2) he filed a written request with pertinent knowledge of the facts, attaching Mr. King's e-mail; and (3) it is undisputed that Mr. King wrote the e-mail. Mr. King does not deny the contents, but says the email was: a "note;" "a draft;" "a brain dump,"

and/or a "scenario." No matter what it is called, the factual contents are not questioned. Those facts were used for the underlying decision. *Tab A, Commission Op. No. 07-42.* This argument does not identify the basis of any notice and due process denial. Assuming the basis of this argument is that he was entitled to notice and process under: (1) a Constitutional right; (2) the Code and Rules for complaints; or (3) the Code and

Rules for advisory opinions, we previously addressed those issues in Commission Op. No. 07-05. *Tab D-2 and D-3.* We also addressed Counsel's duty of notice. *Id.* To the extent those notice and due process requirements are the basis of this argument, the same laws and procedures apply.

Even the complaint provision, says "notice and the opportunity to be heard." That does not necessarily mean physical appearance. For example, a motion to dismiss may be filed by Counsel, and the subject of the motion need not physically appear. He is "heard" through Counsel. *Commission Op. No. 07-05.* Aside from notice and opportunity to be heard given prior to the first ruling, Mr. King had the opportunity to physically appear, and did so, to give facts at this motion.

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

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

RESPONSE: Use of term "complains."

Argument 5: The filing was not a "complaint." *See, above*.

Argument 6: There were no pending proceedings.

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

(a) June 3, 2006 –"Thoughts from the last RAC meeting." *Tab K*. He specifically identified the Ruddertowne developer selected by Highway One LLP, Harvey Hanna & Associates (HHA). He said the developer "had read the new Comprehensive Development Plan (CDP)...walked into this deal planning to build a mega mall and include a large hotel...with an understanding that they could build to a height that is more than twice the current height limit ...planned on an expanded structured parking which will require developing to a higher total square footage...a primarily residential along the Van Dyke side --image six or seven floors of new condos from SR-1 to the Bay...they want a major re- development statement and intend a convention hotel as the keystone to this project." He said three meetings were scheduled, June 15, 22 and 29...that "will build sequentially to a final design concept that will be launched into the Town's preliminary zoning approval process at the July Town meeting. *Id.*

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

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

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

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

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

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

> "It has been my intent in circulating the 'convention/resort hotel complex' scenario–now as throughout the entire comprehensive plan development process...."...Although I have not taken a position for or against any specific proposal or future zoning applicant, there is the possibility that convening/hosting a meeting that might lead to the formulation of a defensive plan of action against a potential future zoning applicant might be perceived as bias on my part against any such application. This would be improper and has not been/is not my intent."

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

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

(e) December 9, 2006–The Town minutes show he discussed the CDP. He was specifically asked how he about the recent site plan from Highway One would affect the

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

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

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

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

RESPONSE:

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

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

(c) In the e-mail he: expressed "disappointment that these developers:
(1) seemed so poorly informed/mis-informed about the needs and desires of the Town's residents and property owners, and;
(2) seemed into a massive redevelopment rather than something more in scale with the rest of Dewey Beach and more closely mated to the 'way of life' that brought us here." He called it a "white elephant."

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

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

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

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

RESPONSE: The Code of Conduct states that an official cannot review or dispose of official matters where he has a "personal or private" interest that tends to impair judgment in making official decisions. 29 Del. C. § 5805(a)(1). In *Jones*, a government official's "personal or private interest" was the result of a familial relationship with a teacher, when

he knew his official duties were to hear termination proceedings for that particular teacher. Before performing those duties he made negative statements about her. It was decided his statements showed pre-judgment and he should not have reviewed or disposed of that matter. Here also, Mr. King expressed his "personal and private interest" on a particular matter --the Ruddertowne development--when he knew, or should have known, his official duties were to participate in proceedings on that particular development. He made personal and negative statements about the particular development and developer. His "personal and private statements" were negative and showed prejudgment. Thus, *Jones* is not inapposite.

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

Delaware Courts have held under the common law that personal interests can arise from a relationship between an official and parties to planning and zoning matters. *Shellburne, Inc. v. Roberts,* 238 A.2d 331 (Del., 1967) (alleging "personal interest" or "conflict of interest" where church of decision maker would benefit from decision was sufficient to raise factual issue for Court). The common law has not been abrogated; it is codified in 29 Del. C. § 5805(a)(1)*. Tab L-and 2.*

Thus, it is an issue of fact of whether the relationship is sufficient to create a "personal interest" or "conflict." Recusal, when there is an interest that rises to the level of a conflict, is so that judgment will not even *tend to be impaired.* 29 Del. C. § 5805(a). No actual impairment is required; only the appearance thereof. *Commission Op. No. 92-11.* Recusal insures that the conduct will not "raise suspicion among the public" that the public trust is being violated. 29 Del. C. § 5802 and § 5806(a). Thus, in a re-zoning case, the Court found no actual violation of the requirement to recuse when close relatives and/or the official had no financial interests, but as a factual finding said the Board members would be "prudent" to recuse themselves, but because of the rule of necessity–recusal was not possible. *Harvey v. Zoning Board of Adjustment of Odessa,* Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001). As in *Harvey* and *Jones*, this case does not show Mr. King has any financial interest. PIC has never said he did. That does not mean he should not recuse. He still has a "personal or private interest" in a matter for which he would also have official authority, and, thus, should not "review or dispose of the matter." 29 Del. C. § 5805(a)(1).

In interpreting that very provision, Delaware Courts assumed a conflict because a Board appointee to an unpaid position said he might have a conflict. The Court said even though his statements were "neutral" and "unbiased, " and he did not participate in the final vote, he should have recused himself "at the outset." *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd.,* Del. Supr., No. 304, Veasey, C. (January 29, 1996). The Board member's participation was challenged by an applicant who was not successful with the Board, and alleged the Board member had a "personal or private interest" because his private employer had an indirect business relationship with the other applicant, and his failure to recuse rose to the level of a violating his due process rights before the Board. Thus, it does not matter if the official statements are unbiased, nor is actual bias required.

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

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

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

(a) "Matter" is the term used in the statute. 29 Del. C. § 5805(a)(1). "Matter" is defined in the statute. 29 Del. C. § 5804(7)). It means: "any application, petition, request, business dealing or transaction, of any sort."

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

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

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

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

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

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

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

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

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

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

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

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

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

(Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).

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

CONCLUSION: No law or facts were misunderstood.

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

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

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

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

D. Ms. Joan Claybrook's letter was incorporated into the motion for reconsideration.

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

(1) Right to Intervene:

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

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

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

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

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

(a) Letters of Good Will and Good Intentions: Ms. Claybrook's letter and letters from others, and phone callers spoke to the important role of Mr. King on the Zoning Commission, his value to the community, that he is honest, etc. *(e.g., Tab C-4 thru 7, Ms. Claybrook; Tab M, Mr. Cooke and Mayor Tesh)*. We have never suggested Mr. King's work is not of value to the Zoning Commission, the community, etc. However, the law does not distinguish between the "good" and the "bad," the "honest" and "dishonest. 29 Del. C. § 5805(a)(1). It applies to all officials--that is what insures the public's confidence in its government. 29 Del. C. §5802. Mr. King, and these persons, say he had no intent to violate the law. He is entitled to a strong legal presumption of honesty and integrity, as are all public officials. *Beebe*, *supra*. Mr. King was given that presumption, even though he apparently did, at a minimum, review the draft ordinance. He was given an advisory opinion, which requires no sworn statements, from Mr. King, or any others. 29

Del. C. § 5807(a). A violation of this law may be found during an advisory opinion request, and may then be referred for prosecution. 29 Del. C. § 5807(b)(3). The filing was not treated as a criminal prosecutorial matter. If so, the law would require "knowingly or willfully violating any provision," carrying up to a year in prison and/or up to a $10,000 fine. 29 Del. C. § 5805(f). Thus, he received the benefit that he did not intend to violate the law.

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

It is PIC's Counsel's statutory responsibility to "review information coming to the attention of the Commission relating to potential violations of this chapter." 29 Del. C. § 5808A(a)(3). Mr. Eisenhauer's request was already pending at the time of the "complaint" referred to above. Counsel, pursuant to those duties, brought the information to PIC's attention, to aid in "full disclosure" as required by 29 Del. C. § 5807(a).

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

Ms. Claybrook's other facts:

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

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

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

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

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

RESPONSE: This argument is factually and legally incorrect.

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

(b) As a matter of law, no Code provision or rule gives the number of voters as

a basis for the length of an opinion, or the basis to exempt officials from the law. *Commission Op. No. 01-20*. In that opinion, it was argued that a local official had been elected by a large number of voters, and so he should not have to recuse. PIC said: "No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would ever have to recuse themselves when they had a conflict of interest. The restrictions would then become meaningless." In essence, we would be putting an exemption in the law. Language cannot be grafted onto the law. *Goldstein, supra.*

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

(4) PIC cited only one case.

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

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

RESPONSE: Ms. Claybrook gives two opinions she believes support that fact. *Commission Op. No. 00-28 and 93-15.* Both were filed by private citizens, not officials or agencies. Advisory opinions are not given to private citizens. 29 Del. C. § 5807(a). Any person, including private citizens, can file complaints, but they must be sworn. 29 Del. C. § 5810(a). The private citizens did not file a sworn statement. They were told of the law and rules on the requirement. PIC also advised that "even assuming a complaint," the law gave PIC no jurisdiction over a school board member or General Assembly members. Ms. Claybrook is factually incorrect about the implications of those opinions. Aside from the law given in the opinion, as a factual matter, it would be a waste of the citizens' time to be told only about the need for a "sworn complaint," and not be told about the jurisdictional limits. They would then file a sworn complaint, only to have it dismissed for lack of jurisdiction.

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

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

extreme, start low and build up rather than start up and build low....") and *Tab K.* Ms. Claybrook refers to his e-mail as "the musing of a private citizen." That shows even a laypersons understanding of the "personal" or "private interest." A "personal and private interest" for Mr. King has been established, and he should not "review or dispose" of matters related to the Ruddertowne development. 29 Del. C. § 5805(a)(1).

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

RESPONSE:

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

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

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

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

Original signed **Terry Massie, Chair**

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

At the meeting, PIC discussed concerns about officials waiting until the last minute before a meeting to obtain guidance. Specifically, Mr. King was advised in the prior opinion that as his agency, the Zoning Commission, had to post notice of meetings at least 7 days in advance under the Freedom of Information Act, he should have at least that much of a lead-time to get guidance, or the matter, or it could be tabled until PIC would meet. Here, Mr. King said he was waiting for another Board to act on a matter. However, that matter was not something that was coming to his agency. PIC's discussion concluded the following:

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

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

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

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

07-32 – Personal or Private Interest - Local Government Officials' Disclosure: Two local officials filed their annual disclosures on contracts with their local government. 29 Del. C. § 5806(d). One official's contracts were: one for $151.00 and one for $155.00--totaling $306. Thus, public notice and bidding was not required. 29 Del. C. § 5805(c). He did not contract with his own agency, review, or dispose of the contract in his official capacity. 29 Del. C. § 5805(a)(1). The other official had eight contracts totaling $1,932 with individual contracts ranging from $10 to $638. Again, public notice and bidding was not required. 29 Del. C. § 5805(c). He did not contract with his own agency, review, or dispose of the contract in his official capacity. 29 Del. C. § 5805(a)(1). Neither represented or assisted their private enterprise before the agency with which they were associated by employment. 29 Del. C. § 5805(b)(1). The Commission found no violation for the reasons stated in a prior opinion to them. Commission Op. No. 06-29. The only difference: these contracts were for a lesser amount. The Commission is to strive for consistency in its opinion. 29 Del. C. § 5809(5).

07-05 – Personal or Private Interest—Appointing Brother to Local Government Board: On request for an advisory opinion from a local official, the Commission found the Conduct of another official violated the Code. In a motion for reconsideration, the Commission still found a violation. He was censured, as that is the only administrative penalty that can be imposed on an elected official. Tabs are not included, but are public records. He appealed to the Superior Court. The Court upheld PIC's process and decision. *Post v. Public Integrity Commission*, C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). (Footnotes have been omitted for ease of publication).

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Advisory Op. No. 07-05 – Nepotism

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

Dear Mr. Brady:

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

I. Jurisdiction:

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

II. Standard of Review

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

III. Application of Law to Facts:

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

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

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

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

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

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

Barring action if a personal interest exists insures fair decisions. Apparently, the Mayor's brother has some experience with historic land use. That may show some merit in the act. However, the letter of the law has no exemptions if the official's act has merit or is unbiased.

Again, Delaware law says "unbiased" participation is improper. *Beebe, supra*.

Here, the brother would have a public office which has significant community prestige because of land use issues. The benefit to the Mayor would be having a relative involved in historic preservation when his political platform includes "expanding and protecting the Town's historic district" and "preserving Milton's heritage." *Town of Milton, website.* While they may be good causes, the public may suspect the Mayor may be "stacking the deck," to advance his political programs, or may suspect the brother would act to benefit those platforms rather than decide on the merits.

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

V. Conclusion:

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

Original Signed by Vice Chair Bernadette Winston

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

(Note to reader Tabs are not included here but are part of the public record. Footnotes have been omitted for ease of publication).

07-05 – Motion for Reconsideration:

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

Dear Mr. Brady:

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

I. Standard for Reconsideration

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

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

II. Application of Legal Principles and Facts

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

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

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

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

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

(B) Process in this Particular Case.

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

(2) Advisory Process: Official's written filing. Marion Jones is a

Commissioner, Board of Adjustment-Historic District Commission, and on its Ordinance Review Committee. *Tab E, Minutes, pp. 2, 3*. She was present at the meeting. *Tab E, Minutes, pp. E-4.* She wrote the filing. *Tab D, Jones Filing*.

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

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

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

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

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

No facts or laws are cited requiring PIC's Counsel to ask questions about Mr. Post's appointment of his brother. If this seeks Counsel's work-product or thought processes, those are privileged. *Carlton Investments, v. TLC Beatrice International Holdings, Inc.*, C.A. No. 13950, Del. Ch., M.C. Parker (Sept. 17, 1996). Mr. Post's Counsel had the filing. *Tab G, Request to Dismiss*. The filing specifically refers to Mr. Post appointing his brother. *Tab D, Jones Filing¶ 2*. The Minutes were attached in support. *Tab E, Minutes pp. 2, 4*. These facts could have been challenge if desired. The motion to dismiss did not do so. *Tab G, Request to Dismiss*. PIC considered the facts in the filing, the minutes, Mr. Dickerson's statements, and the Request to Dismiss. It did not consider questions that PIC's Counsel did not ask.

Argument 3.

(A) Due to a required appearance of the Town Solicitor's other duty as the Recorder of Deeds for Sussex County, Counsel did not arrive in time for the hearing.
(B) The Town was represented by the Town Manager, George Dickerson, who is not a member of the Delaware Bar.
(C) No questions were asked about Mr. Post.

(A) *See*, (B)(4) above. PIC learned the morning of its meeting that the Solicitor would be late. *Tab H, PIC Transcript, p. 1*. The Solicitor authorized Mr. Dickerson to proceed. *Id*. *See discussion, Argument 1, ¶(B)(4)(b*) above.
(B) Mr. Dickerson was a fact witness. PIC had the legal position--a motion to dismiss.
(C) The transcript shows questions and discussions about Mr. Post. *Tab H, PIC Transcript, pp. 3, 6, 7, 8, 9*, and in general.

Argument 4.

(A) The opinion characterizes that Mayor Post "appointed" his brother. When in fact, Mayor Post who was reading a list of nominees, withheld his brother's name to seek a legal opinion.
(B) No appointment took place and Mayor Post's brother does not, nor has he held any position on a Board since Mayor Donald Postwas sworn into office in April of 2006.

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

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

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

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

(E) The Minutes do not show he withdrew his brother's name. *Tab E, Minutes,*

p. E-4. They say the vote was taken with no discussion before Ms. Jones raised the conflict issue. *Id.* The Mayor then said he wanted to see in writing what precluded his brother from serving. *Id*. At best, he tabled the appointment, as he did with Ms. Louise Frey, when a conflict was raised. Only after learning that another law barred him from appointing any alternates, did he cease to proceed.

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

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

Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor not the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General's office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).

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

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

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

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

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

III. Conclusion

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

Original Signed by Chair Terry Massie

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

06-74 – Personal or Private Interest—Political Activities: A State employee asked if it would be a conflict if he continued to participate in the review of a State matter when he knew the attorney who was representing one party, and the attorney's spouse, through his own heavy

involvement in a political party. Additionally, he was concerned that the other party's counsel may file a complaint against him with the State's professional board for his occupation. His supervisors were not so sure the political affiliation was sufficient, in and of itself, to create a conflict. The applicant's written request and correspondence between the applicant and his supervisor were reviewed by the Commission. The State employee, and a Deputy Attorney General for the agency, appeared before the Commission.

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

06-65 – Personal or Private Interest—Relationship of Roommates: A State agency asked if it would violate the Code if one of its employees input certain data into a State database for a large number of part-time employees. The data was given to her by another agency employee, and they were roommates. It was possible that if she entered the data, it could benefit that individual.

State employees may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. 29 Del. § 5805(a). Courts have held that close personal relationships can create conflicts. *Ford v. Dep't of Public Instruction*, C.A. #96A-01-009, J. Gebelein (Nov. 24 1997) (conflict for State employee to review and approve contracts for roommate); *State v. Ford and Thornton,* Cr. A. #s 951001830186 and 951001870191, J. Graves (Del. Super., March 26, 1996) (State employee prosecuted for awarding contract to fiancé).

The agency had the supervisor review all data before it was input by the employee, and then review it again after its input. However, regarding the roommate, the agency didn't know if the employee would be prohibited from entering all of the data or just the data related to the roommate. If the employee could not enter any of the data, the supervisor would have to make the entries. The agency said it would be a hardship for the supervisor to input the entries because of the small number of employees and the large number of entries for part-time employees. The supervisor could review the data to insure the employee did not change it.

The Commission found the Code was not violated as long as she did not review or dispose of the entries for her roommate. It said the restriction insures State employees do not show bias for or against an employee with whom they have a personal relationship. *Jones v. Board of Educ. of Indian River Sch. Dist.,* C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994) (bias imputed to School Board member in terminating teacher because he had a

negative personal experience with teacher). Regarding any appearance of bias, the supervisor's oversight was a check and balance against actual bias against others similarly situated to the roommate. Moreover, no facts suggest her personal interest in her roommate would make her alter records of others. In fact, her data was not relevant to that of the other persons.

06-61 – Personal or Private Interest - Representing Private Enterprise Before Different Agency: State employees must file a full disclosure with the Commission if they have a financial interest in a private enterprise which does business with, or is regulated by, a State agency. 29 Del. C. § 5806(d). The disclosure is confidential unless a violation is found, and it must be filed as a condition of commencing and continuing employment with the State. *Id.* A State employee filed a disclosure that his private company was seeking a contract with a Department other than the one which employed him. As he was not representing or otherwise assisting a private enterprise before the agency with which he was associated with by employment, that was not a bar to the contract. 29 Del. § 5805(b)(1). State employees also may not review or dispose of State matters if they have a personal or private interest in a matter that may tend to impair judgment in performing official duties. 29 Del. § 5805(a)(1). In his State job, he made no decisions on contracts created by another agency. He did not prepare the contract or serve on the selection board, etc. Further, State employees may not seek a State contract of more than $2,000 unless it is publicly notice and bid; if less than $2,000 it must reflect arms' length negotiations. 29 Del. § 5805(c). The contract was for less than $2,000, so arm's length negotiations were required. Arm's length insures distance between the contracting parties. Some distance is built into the Code of Conduct by prohibiting any self-dealings on a contract, 29 Del. C. § 5805(a)(1); and by not having other co-workers and colleagues make decisions about the contract. 29 Del. C. § 5805(b)(1). Also, it requires a fair market value. *Commission Op. No. 98-32*. The State employee filed the disclosure based on the Commission's prior advisory opinion telling him to file once a year, and if there were no substantial change, he need not appear in person. The disclosure was similar to a prior contract he had with another State agency, which included information on the price for the services by his company and others in that same type of endeavor. In that case, the Commission found no violation. The Commission is to strive for consistency in its opinions. 29 Del. C.§ 5809(5).

06-57 – Personal or Private Interest—Board Member: When a violation is found, the proceedings may become a matter of public record. 29 Del. C. § 5807(d)(2). (Footnotes have been omitted for ease of publication).

November 3, 2006

Alan Zaback, Director
DHSS
1901 N Dupont Highway
New Castle, DE 19720

Advisory Op. No. 06-57 – "Personal or Private Interest" Board Member

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

Dear Mr. Zaback:

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

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

I. Application of Law to Facts

The Code of Conduct provides that:

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

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

(A) staying current on HDM State and Federal rules governing program aspects;
(B) negotiating with, and selecting contractors to provide HDM;
(C) managing HDM State and Federal funds and contractors' administrative and meal costs;
(D) working with contractors to cut costs or find other funds if they exhaust State and Federal funds; and
(E) monitoring contract compliance, including use of MOWD funds

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

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

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

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

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

(1) Division Directors may not represent or otherwise assist a private enterprise on matters before any State agency. 29 Del. C. § 5805(b)(1).

You said that as a Board member, you give MOWD information on contractors; State and Federal funds; State and Federal rules; monitoring of contract compliance, etc. In effect, at MOWD you perform your State job. As a Board member, with a fiduciary duty, you are to know MOWD's finances. In fact, you raised funds for MOWD as a member of its "Kitchen Cabinet." *"Meals from the Masters,"* Cookbook, 2006, p. 17.

The Board listens to and evaluates your State performance as part of its decisions on fund raising, expenditures of funds, etc. For example, it seeks some funds through State grants-in-aid. In other words, you assist the private enterprise in deciding if it will seek a State grant. Further, your State program, in part, depends on MOWD. When you go through your State budget process and seek funds, you also, as a Board member, know about MOWD's finances. If the State is low on funds for your program, you know MOWD may have to pick up the costs of more unfunded meals. When you go to the State for funding, it is likely your Department head, the Budget office, and the General Assembly are (or should be aware of) MOWD funding assistance to your contractors. Questions about that funding would be directed to you in your official capacity. However, as you are a Board member, expected to know MOWD's finances, your response could be seen as an MOWD decision–which would be representing the private enterprise before the State.

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

(2) State officials may not engage in conduct that may raise suspicion among the public that they are engaging in conduct that may violate the public trust. 29 Del. C. § 5805(a). This is basically an appearance of impropriety test. *Commission Op. No. 92-11.*

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

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

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

II. Conclusion

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

command precedence, you are advised to resign from the MOWD Board.

Sincerely,

Chairman Terry Massie
Public Integrity Commission

cc: Arlene Littleton

06-52 – Personal or Private Interest—Prior Participation in a Lawsuit: [State officials may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)] - The requestor was an appointee to a State Board. The Board asked if its member may participate in an appeal. [State agencies may seek advisory opinions. 29 Del. C. § 5807(a)]. It stated that almost a year ago, the Board member acted in a private capacity in a law suit in opposition to an appellant in this action. The law suit had been resolved. The lawyers representing the appellant before the Board were not the same attorneys who represented the entity in the former action. Also, the Board member's private client was not involved in the appeal. The earlier action was about the entity's decision about the represented client only. The pending appeal related to matters between two entities on unrelated legal issues. The Board representative said the requestor had never expressed a bias for or against the entity; the appeal did not pertain to the prior litigation. Further, at the time, no parties to the appeal had objected to the Board member's participation. The Board member's subjective opinion was that there was no bias against the entity. The Board member also went to the Lawyers' Board of Professional Responsibility and was told there was no conflict under the Delaware Lawyers' Rules of Professional Responsibility. However, it advised that the Judicial Canon applies when a Board member acts in a quasi-judicial matter. The Commission found that due to the length of time between the two actions, the unrelated issues of the two actions; the unrelated attorneys; no involvement of the other party in the prior litigation, no special knowledge gained about the appealing entity in the prior litigation, and no facts indicating bias, that the Board member could participate in the appeal.

06-39 – Personal or Private Interest - Contracts with Local Government: Two local government officials filed their annual disclosure on contracts with their local government. 29 Del. C. § 5806(d). Enclosed with the disclosures was a letter from the local government's finance officer, explaining the process by which these individuals contracted with local government departments. They did not contract with their own agency. 29 Del. C. § 5805(b)(1). All contracts were less than $2,000 and so not required to be publicly noticed and bid. 29 Del. C. § 5805(c). Neither official drafted, wrote or approved the contracts, nor selected the contractors. 29 Del. C. § 5805(a)(1). The Commission found no conflict and the written record reflected full disclosure.

06-19 – Personal or Private Interest – Dual Government Positions: Waiver Granted; Agency Hardship. Opinion is public record. 29 Del. C. § 5807(b)(4).

Advisory Op. No. 06-19 - Waiver Request - Dual Government Jobs

Hearing and Decision by: *Chairman, P. David Brumbaugh, Commissioners Barbara Green, William Dailey, Barbara Remus, Dennis Schrader, and Bernadette Winston*

Dear Mr. Kernan:

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

Where there is a conflict, the Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or there is an "undue hardship" on the State agency. 29 Del. C. § 5807(a).

No waiver is granted on the basis that the "literal application of the law is not necessary to serve the public purpose." That is because the facts substantiate conflicts not only for the Fire Commissioner, but the employees who would evaluate him as an Instructor. Mr. Ricker said he will recuse himself appropriately and there is a strong legal presumption that he will act with honesty, integrity and impartiality. *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *affd,* Del. Supr., No. 304 (January 29, 1996).

Usually, recusal resolves a conflict and the public purpose is served. No actual violation is required; only that the conduct create an appearance of impropriety. *Commission Op. No. 92-11.* The test is: whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams,* Del. Supr., 701 A.2d 825 (1997).

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

While the public perception is not cured by recusal, it will help diminish the perception of impropriety, as long as he recuses himself on matters related to the dual employment.

That fact, combined with the agency's statements on its difficulties in finding instructors, leads us to grant a waiver on the basis of an "undue hardship."

Your correspondence and the comments of your Deputy, Steve Martin, who

appeared before the Commission, showed the Fire School suffers from a lack of qualified and certified instructors. It is especially limited in the area where Mr. Ricker would instruct firemen—Vehicle Rescue. Also, the courses require several instructors per session, which further limits the number of instructors available when up to six instructors could already be committed to giving training. Further, the training normally occurs over several weekends. Because of their work schedules in the private sector; their obligations as volunteers for independent fire companies; unavailability due to health reasons or being out of state, etc. , those certified in Vehicle Rescue training, are even further reduced. Commissioner Ricker has been involved in this training in the past; is currently still certified to teach; has years of experience not only in training Vehicle Rescue, but in performing Vehicle Rescue. His knowledge and experiences can be imparted to attendees, and may result in encouraging other firemen to become certified.

II. Conclusion

Accordingly, we grant a waiver on the basis of an "undue hardship" for the agency. When a waiver is granted, the proceedings become a matter of public record. This aids the entire public in understanding the factual basis for granting a waiver. That, like recusal, will serve to diminish any public perception that Commissioner Ricker is circumventing the law.

Original Signed by Chair Paul Brumbaugh

05-57 – Personal or Private Interest—Interest Arising from Litigation & Elections (Reconsideration): [Law: State employees may not review or dispose of matters if they have a personal or private interest which tend to impair judgment in performing official duties. 29 Del. C. 5805(a).]

The Commission was asked to reconsider its prior Advisory Opinion No. 05-57. In that opinion it concluded that an employee should recuse himself from matters related to inspections of properties within a local government's jurisdiction, as a result of litigation and other contentions raised during several elections in which he and the property owner participated. The Commission reviewed the written request and heard statements from various supervisors, etc. According to the statements, the official had been transferred to another location to avoid a conflict; and no complaints had been raised since the Commission's prior opinion. The Commission reaffirmed its earlier opinion that recusal was required; that the date of the prior opinion be corrected; the identity of the elective office referred to in the opinion be corrected; and the Commission has no basis to believe that a violation has occurred at this point.

05-27- Personal or Private Interest—Misuse of Public Office to Benefit Self and Friends: [Law: State employers may not use their public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e)].

An anonymous letter was sent to the Commission alleging that a State employee had used his public office to benefit himself and co-workers who were allegedly his friends. 29 Del. C. § 5806(e). Interviews were conducted by Commission Counsel of persons knowledgeable of the procedural processes in place on the particular matter within the agency to insure decisions were not based on preferential treatment for the employee or co-workers. Not only were the

procedures in place and used, but the interviewees had personal knowledge of the actions taken, and the procedures were properly followed by a committee, not the State employee, to make the decisions. Further, the interviewees had personally observed that the alleged friends were not in any manner receiving any type of benefit in this matter, and that the State employee was actually performing his duties in an appropriate manner. The Commission found no merit to the complaint, and pursuant to 29 Del. C. § 5809(3) dismissed for failure to state a claim.

01-47 – Personal or Private Interest—Board Member of Charter School: The State Public Integrity Commission reviewed a request for advice on whether it would violate the Code of Conduct if a State officer was a Board member of a Charter School, and concluded that such service would be improper.

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

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

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

Aside from the Board's need to deal with other State agencies on issues, policies, legislation, and funding, he indicated that while the Charter School would not seek monetary assistance from his agency, there would be occasions when it would request assistance with other services. Thus, in his official capacity, he could be placed in the position to make

decisions on whether the Charter School would receive such services. The problem there is that, again, the Charter School could be competing against other schools for the same services. As his fiduciary duty would require him to act primarily for the benefit of the Charter School, that duty could substantially conflict with his State duties to work equally with other schools that would compete for the same services.

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

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

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

The problem was that as a Board member, legal obligations to the School were imposed that were much broader than serving as an advisor. Because those obligations could raise suspicions of a substantial conflict in performing official duties, we concluded that it would be improper for him to serve as a Board member of the Charter School.

01-35 – Personal and Private Interest—Family and Financial Interest:

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

November 13, 2001

Gerard P. Kavanaugh, Jr., Esq.
Herlihy, Harker & Kavanaugh
1400 North Market Street
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Advisory Op. No. 01-35 – Family and Financial Interests

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

Dear Mr. Kavanaugh:

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

I. Facts

Christopher J. Castagno is President of the New Castle City Council. Council is considering sites for a new police station and municipal offices. One possibility is the Deemer property. Another is the Van Dyke Armory. The legal ownership of the Armory is vested in Douglas J. Salter, as a Trustee for the benefit of Dennis M. Salter's children. West End Civic Association members questioned whether President Castagno has a conflict of interest as Dennis and Douglas Salter are his first cousins, and the trust beneficiaries are his second cousins.

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

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

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

II. Application of Law to Facts

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

There are two situations where the law automatically imputes a personal or private interest to a government official that would tend to impair the official's judgment, and therefore

require the official to recuse himself from participating in those matters. They are:

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

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

Here, the official, President Castagno, will not receive a financial benefit, nor does he have a "financial interest" in the property. "Financial interest" means: (1) a legal or equitable ownership interest; (2) receiving income of more than $5,000 as an employee, officer, director, trustee, or contractor; and /or (3) being a creditor of the private enterprise. 29 Del. C. § 5804(5).

President Castagno does not have a legal or equitable interest in the property; nor is he a trustee or a beneficiary; nor is he a creditor. The property is part of a trust created by his first cousin, with another first cousin serving as trustee. His second cousins are the beneficiaries.

As a matter of law, his "close relatives" would not receive a financial benefit, because "close relative" is defined as "a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood." 29 Del. C. § 5804(1). Clearly, "cousins" are not within the definition. When the language is clear, a statute must be held to mean what is clearly expressed. *Commission Op. Nos. 97-10 & 97-12 (citing, inter alia, Norman v. Goldman,* Del. Super., 173 A.2d 607, 609(1961); *Labor's Educational and Political Club Independent v. Danforth*, Mo. Supr., 561 S.W. 2d 339, 345 (1977) ("it is a well-settled rule of law that the legislature's own construction of its language by means of definition of terms should be followed in interpreting the statute and is binding").

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

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

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

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

The Code of Conduct not only restricts officials from participating in decisions if they have the requisite "financial interest" or a "close relative" involved, but also restricts their participation if they have any "personal or private interest" that may tend to impair judgment in

performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1).

That provision is a codification of the common law which prohibited government officials from participating in decisions where they had a "personal interest." *Commission Op. Nos. 97-24 and 97-30.* In interpreting the common law, Delaware Courts recognized that a "personal interest" can arise even if no "close relative" or "financial interest" is involved. *See, e.g., Shellburne, Inc. v. Roberts,* Del. Super., 238 A.2d 333 (1967). After the common law was codified at 29 Del. C. § 5805(a)(1), Delaware Courts continued to interpret that provision to recognize that conflicts could arise absent the prerequisites of "financial interest" and "close relative." *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd,* Del. Supr., No. 304, Veasey, C.J. (January 29, 1996). *Prison Health Services v. State,* Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

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

Thus, we consider the relationship between President Castagno, his cousins, and the decision that needs to be made. We have noted that President Castagno will receive no financial benefit from the decision and has no financial interest in the decision. He asserts that he has no business relationship with the Trust or his cousins. Further, neither of his first cousins will financially benefit as the benefit would go to the trust if Council selects the Armory. Further, Dennis Salter, will not receive a financial benefit in the form of a sales commission as there is no listing agreement and he is not a licensed real estate agent. Any financial benefit would go to the President's second cousins. These are not "close relatives" as a matter of law under the Code of Conduct. Moreover, President Castagno asserts that they are not "close relatives" as a matter of fact. He states that the families do not have a social or business relationship; and socialize only at a few social events such as when they might attend an occasional family reunion, or during the Christmas season. The relationship is not such that they exchange gifts. He further states that occasionally he may see Douglas Salter as his children and Douglas' children attend the same school. In essence, he states that the relationship is too distant or remote to impair his independent judgment.

The Delaware Supreme Court has affirmed that in interpreting the State Code of Conduct, there must be a "strong legal presumption of honesty and integrity," in the public officer's conduct.. *Beebe, supra.* We combine his statements about the financial effect, and his relationship with his cousins, with the facts that independent studies will assess the police needs and ascertain the suitability of the site, and that there will be an independent fair market assessment of the property. The independent studies and assessments help to insure that the decision is made based on "hard facts," rather than a remote relationship with his cousins. The reason for not participating when there is a personal or private interest is to insure that decisions are based on the merits, rather than favoritism, conflict and the like. As the studies and assessments will be public records the public will also have an opportunity to know the "hard facts" about the property. Courts have noted how remote and nebulous alleged conflicts can be. *Commission Op. No. 00-18.* Delaware Courts have held that for the interest to be sufficient to require an official to recuse himself, the allegation of a conflict cannot be merely conclusory, without supporting facts. *Shellburne,* 238 A.2d at 331; *Camas v. Delaware Board of Medical Practice, Del. Super.,* C.A. No. 95A-05-008, Graves, J. (November 21, 1995). In *Camas,* the Delaware Superior Court held that the mere allegation of a familial relationship without additional facts to support a charge of a conflict of interest was insufficient to state a claim.

In *Camas,* the familial relationship was one of husband and wife. Here, the relationship is much more attenuated. Based on news articles and the information presented at the Commission's meeting, the allegation of a conflict appears to be based on the conclusory fact that President Castagno and the Salters are cousins. Conclusory allegations based on suspicion and innuendo cannot support a claim; rather, the claim must be based on hard facts. *Commission Op. No. 96-75 (citing CACI, Inc.-Federal v. United States,* Fed. Cir. 719 F.2d 1567 (1967)).

Here, we must start with the "strong legal presumption of honesty and integrity," and consider whether the facts overcome that presumption. The mere fact of a familial relationship is weighed against the fact that he states that he does not have a close relationship with those cousins. Moreover, the other "hard facts" are that independent studies will be considered when making the decision, and the public will have access to that information, giving it concrete data on the various facilities considered. Further, the fact that Council has contemplated the Armory as a possible site before Mr. Castagno even lived in the City or was a Council member serves to diminish the impression that the Armory is being considered merely out of favoritism for President Castagno's cousins.

Courts have noted that:

> "Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so, they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes said, "Universal distrust creates universal incompetency." *Van Itallie v. Borough of Franklin Lakes,* N.J. Supr., 146 A.2d 111, 116 (1958).

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

(B) Use or Disclosure of Confidential Information

The Code also prohibits improper use or disclosure of confidential information. 29 Del. C. § 5806(f) and (g). In considering the properties, Council is likely to go into executive session. By law, executive sessions are "non-public." 29 Del. C. § 10004(c). Thus, the information discussed would be considered confidential. The Code of Conduct places the responsibility on President Castagno not to improperly use or disclose that information. Delaware Courts have

held that where government officials are required by law not to disclose confidential information, and where no facts indicate that the official has violated that obligation, then an allegation of a conflict of interest cannot be sustained. *Camas*, *supra.* Here, no facts indicate that he has improperly used or disclosed any confidential information. He asserts that he will not engage in such conduct. Again, he is entitled to a "strong presumption of honesty and integrity." *Beebe, supra.* Further, he is aware of that obligation, and should he violate that provision, he could be subject to penalties under the Code of Conduct.

(C) Appearance of Impropriety

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

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

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

We have held that in deciding if there is an appearance of impropriety because of an alleged professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo. *Commission Op. No. 96-75 (citing CACI, Inc-Federal v. United States,* Fed. Cir., 719 F.2d 1567 (1967). We believe that holding is consistent with the Delaware Supreme Court decision which held that: Absent the existence of a conflict, it would not disqualify an individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware,* Del. Supr., 592 A.2d 436 (1991).

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

III. Conclusion

Based on the above law and facts, we find that the familial relationship between President Castagno and his cousins is too remote and speculative to raise to the level of an actual conflict or the appearance thereof.

01-33 – Personal or Private Interest—State Officer Participating in State Contract Written By Spouse: A State officer's spouse was counsel for, and drafted contracts for, an agency over which the State officer had decision making authority. The Commission, based on the following law and facts, concluded the State officer should not review or dispose of the contract matter.

The State officer was authorized to enter into agency contracts. Prior to assuming that State position, the agency had contracted with an organization, and the contract was up for renewal. Normally, a contract extension would be routine. However, the organization enacted a new fee structure for the contract services. A competitor for government contracts for the same services was challenging the fee structure in Court. The State officer's spouse, who wrote the proposed contract extension, which included the new fee structure, was involved in the Court action. The contract terms were identical to the fee structure language. The contract was not publicly notice and bid, and by law did not need to be bid. That meant no competition against a contract written by the officer's spouse. The Court action showed that the competition for the contract was more than willing to challenge the status quo. The officer's agency was not a party to the challenge, but the fee structure that constituted the contract was being challenged.

Applicable Law

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

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

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

3. Application of Law to Facts

Obviously, the officer's spouse was within the definition of "close relative." Further, the spouse received a financial benefit from representing the contracting organization. However, no facts indicated any direct benefit from the contract over which the officer had authority. Thus,

there may not have been a technical violation of 29 Del. C. § 5805(a)(2). However, Delaware Courts have held that even if the close relative has no direct financial interest, it would be "prudent" for the official to recuse themselves, if possible. *Harvey v. Zoning Board of Adjustment,* Del. Super., C.A. No. 00A-04-007, J. Goldstein (Nov. 27, 2000). More significantly, the Delaware Supreme Court has affirmed a decision interpreting 29 Del. C. § 5805(a)(1) which held that conflicts can arise even if the official or a close relative would not receive a direct financial benefit. Rather, the close business or personal relationship alone was sufficient to require recusal. *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), ***aff'd***, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996); see also, Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).

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

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

If a State official has a statutory responsibility that cannot be delegated, then the official may proceed in the face of the conflict if there is full disclosure to the Commission. 29 Del. C. § 5805(a)(3). Here, the officer had statutory authority to delegate the contractual powers, duties or functions to a Division Director. *(Citation omitted).* The officer was aware of that provision, but was concerned that delegating the responsibilities to a Division Director would not serve much purpose as that individual works for the officer, so it could still raise appearance of impropriety issues. The officer's assessment was correct. Delegating the responsibility to someone who works for the officer is not a cure-all for the "appearance of impropriety" issue. However, the test for an appearance of impropriety is if the conduct would create in reasonable minds, **with knowledge of all the relevant circumstances** that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *Commission Op. No. 00-03 (citing In re Williams,* Del. Super., 701 A.2d 825 (1997) (emphasis added)).

Here, the relevant circumstances were that there was no other person at a higher level to whom the matter could be delegated; and the subordinate had been dealing with the contract prior to the officer assuming the current position. There was no way to eliminate all possible appearances of impropriety short of either the State officer leaving public office or the spouse's firm withdrawing from its long-standing contractual representation of the organization. The Code does not require such remedies. Rather, it states that the official who has the personal or private interest may not review or dispose of the matter. By delegating the "full power and responsibilities," there was no technical violation of the law. While the Division Director did work for the officer, that individual would have full authority to act without consulting the officer. The officer was aware that the power was relinquished and would not be involved with the contract.

Under the Code of Conduct, there is a presumption of honesty and integrity. *Beebe, supra.* Thus, there is a legal presumption that when the full power and authority is given to that individual, the officer will not interfere or assert powers over that contract. To do so would subject the officer to disciplinary action, which is the incentive for complying with the law.

(D) Conclusion

Delegating the matter to a Division Director may not be the ideal solution. However, based on all the relevant circumstances, it was the best solution under these particular facts.

01-23 – Personal or Private Interest—Promotion of a Relative: It would not violate the Code of Conduct if a State officer's close relative was considered for a promotion in the same agency if the officer were completely removed from reviewing or disposing of any matters related to the close relative's application, consideration for selection, etc. Further, if the close relative were promoted, any subsequent matters related to that relative could not be reviewed or disposed of by the officer.

(A) Applicable Law

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

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

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

(B) Application of Facts to Law

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

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

the promotion panel; or participating in the final selection. With those restrictions, 29 Del. C. § 5805(a)(2) would not be violated.

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

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

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

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

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

If the close relative was promoted, the position was at least two levels removed from the officer's position. Thus, it was not expected that the close relative would work with the officer on matters relative to his job. Regarding decisions to be made about him, if the Division Director needed to go to a higher level, the matter would be taken to a Senior level executive in another Department. Additionally, the two were not physically located in the same building. Thus, the

officer could not observe or comment on the relative's day-to-day work, nor be in a position to have the knowledge to agree or disagree with any performance evaluation, disciplinary action, etc., and would not participate in such matters.

We were very aware of how sensitive State employees and members of the public are to the issue of nepotism. However, the law does not preclude relatives from working for the same State agency. Rather, it prohibits relatives from participating in decisions about their own relatives. This would not occur. Further, the officer and Division Director were aware of the need not only to insure that the officer did not participate, but also had taken affirmative steps to insure procedures were in place if issues regarding the close relative arose.

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

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

(C) Conclusion

With that warning, and having considered all the relevant circumstances that a reasonable inquiry would disclose, at least with the facts known at this time, we found that as long as the officer did not participate and the precautions described above were taken by the officer and Division Director, there was not a perception that the officer's ability to carry out official duties with integrity, impartiality and competence was impaired. However, the officer, nor the Division Director, nor the Commission, could possibly foresee all circumstances that may arise regarding the close relative. Accordingly, if any issues arose where the officer or the Division Director needed further guidance, they were advised to return to the Commission with the particular facts of that situation.

01-20 – Personal or Private Interest—Board Official Who Sued Board Cannot Review Similar Lawsuit: A local government official was elected to a Board which must go into executive sessions to discuss a complaint filed against it. A complaint had been filed against the Board by a former State employee. The local elected official was also a former employee, and had filed a similar complaint against the Board. The Board intended to have executive

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

(A) Applicable Law

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

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

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

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

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

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

(B) Facts

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

The first issue was whether the complaints were similar.

While the specific facts differed, the allegations that were the foundation of the complaint were essentially the same--misuse of State funds and resources. Each complaint was further similar in that both: (1) were suing the same Board;(2) were suing identical board members individually, except for one named defendant; (3) alleged misuse of government funds; (4) alleged their performance reports were unfairly rated; (5) alleged their contracts were not renewed and no reasons were given; and (6) alleged the reason for the low performance reports and non-renewal of the contracts was retaliation for observing, reporting and discussing conduct

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

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

(C) Application of Law

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

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

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

The official's legal counsel appeared to suggest that the legal parameters of the above provision, § 5805(a)(1), were defined by § 5805(a)(2). Reading the law in that manner, he concluded that for the law to apply, the "personal or private interest" must result in a financial benefit or detriment to the State official or a close relative or that the official or close relative have a financial interest in a private enterprise which would be affected by action or inaction on the matter to a lesser or greater extent than others similarly situated as provided by § 5805(a)(2)(a) and (b). He said the financial benefit must be a "direct, substantial, pecuniary interest in the subject matter" and it could not be said the official would gain directly from any knowledge acquired in discussing the other complaint.

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

Under the common law, the restriction on government officials participating when there was a "conflict of interest" or a "personal or private interest," was not limited to close relatives and/or a direct financial interest. *(See* cases cited in *Commission Op. Nos. 97- 24; 97-30;* and

00-04). Those Delaware cases show that conflicts can arise from more than just a familial relationship or from a direct financial benefit. Subsequently, the General Assembly codified the restriction on Executive Branch officials participating if they have a "personal or private interest" in 29 Del. C. § 5805(a)(1).

The Delaware Supreme Court affirmed an interpretation of § 5805(a)(1), where the alleged "personal or private interest" of a State official did not involve a "close relative" or a direct pecuniary interest. *Beebe, supra; See also, Prison Health Services v. State,* Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993)(no direct pecuniary interest). Neither *Beebe* or *Prison Health* considered the statutory terms of § 5805(a)(2). *Harvey v. Zoning Board of Adjustment of Odessa,* Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001), cited by the official, is a decision by the Superior Court (not by the Delaware Supreme Court) and is distinguishable. For example, "close relatives" were involved so 29 Del. C. § 5805(a)(2) would be the logical starting point for the Court's inquiry. The Court found no violation of that provision, but went on to note that while the Board members were not required to recuse themselves due to any financial interest, it may have been "prudent" for them to do so, "had it been possible." Under *Beebe* and *Prison Health*, we must consider 29 Del. C. §5805(a)(1) and make a factual determination of whether the official's "personal or private interest" is sufficient to require his recusal. We also considered other Code of Conduct restrictions.

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

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

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

Here, if the official participated in legal strategy sessions where the other complaint was discussed, he would gain insight into what strategy may be used in defending against his complaint, which we found raised similar issues, identical legal theories, and was against the same defendants, with one exception. In discussing the strategy, the Board's attorney, who represents the Board and identical named defendants (except one), in both suits, could certainly discuss the same defenses, same applicable case law, and same applicable statutes. Further, in discussing if the Board should consider settlement, the amount of settlement, or whether to press forward to trial, counsel would have to reveal what he saw as the likelihood of success under various scenarios, reveal what figures might be used in settlement discussions, etc.

The official posited that because the cases were not factually similar, he would not gain any benefit from participating in those discussions. We disagreed. First, some strategy discussions are not based on the facts. For example, the Board's attorney may have wished to discuss with the defendants whether, regardless of any facts, it wanted to further expend government funds by going to trial or strive for a settlement to resolve the matter without further

expense. Alternatively, the Board's attorney may have wanted to discuss with the defendants the federal Court's recent ruling in the other case and how that may affect the Board's decision on its next course of action. That particular ruling was decided as a matter of law, not of fact. The Board's attorney may have also wished to discuss the implications of the Court's decisions on dealing with the official's similar suit. As the Board members were defendants in both suits they would certainly see the parallels and may wish to discuss the implications. Further, as both complainants raised a 42 U.S.C. § 1983 claim, decisions on one could affect the other because §1983 recognizes that civil rights claims can sometimes be established by proving a pattern of misconduct by government officials.

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

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

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

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

By contrast, the official's legal counsel was not involved in the other complaint. Thus, he was not as intimately conversant with both complaints. By hearing what defense theories the

Board would use and identifying the law it would argue, the official would be in a position to pass the confidential information to his legal counsel which could gain for him an advantage that no other person with an adverse interest against the government would be entitled to hear. Also, a discussion on what figures may be available or appropriate for a similar case, could assist the official in negotiations he might subsequently have with the same defendants in his similar complaint.

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

(4) There was No Exemption from the Code of Conduct for Elected Officials

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

Finally, no facts indicated that other elected Board members, who were not named defendants, and did not have a personal or private interest, could not fulfill the "public obligation," to the extent there was one. Thus, this was not a situation as in *Harvey, supra*, where, although the recusal would have been prudent, it was impossible for others to perform the function. We also noted that the official was not a named defendant in the other complaint. Thus, his presence was not required to participate in his own defense.

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

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

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

(D) Conclusion

Based on the above law and facts, the official has a "personal or private interest"--both pecuniary and non-pecuniary--in his complaint against the Board and the named

defendants that prohibited him from participating in executive sessions of the School Board where legal strategy on a similar complaint was discussed with counsel.

01-14 – Personal or Private Interest—Decision's About Uncle's Organization: If a State officer has a "personal or private interest" in a matter, but has no authority to delegate the decision to another, he must promptly file a full written disclosure on becoming aware of a conflict. 29 Del. C. § 5805(a)(3). We held in a prior opinion that this officer had no authority to delegate his statutory responsibilities. *Commission Op. No. 01-05.* Thus, we do not address that issue again. Here, as his disclosure was "promptly" filed, his conduct fully comported with the law.

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

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

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

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

At common law and since its codification, Courts and this Commission have recognized that the provision covers various relationships that may create a "personal or private interest," that are not enumerated as they are in the other section. *See*, cases cited in *Commission Op. Nos. 00-04 and 00-18.* Delaware Courts have held that under the common law, which has been codified, the issue of whether the "personal or private interest" is sufficient to "tend to impair judgment" is an issue of **fact**, not of law as in § 5805(a)(2). *See, e.g.*, *Shellburne, Inc. v. Roberts,* Del. Ch., 238 A.2d 331 (1967) (under common law, where complainant alleged government official had "personal interest," and "conflict of interest" because of friendship and

social relationships, and used public office in furtherance of such personal interest, court held determination was issue of fact); *Prison Health Services v. State,* Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (Court held that whether there was a sufficient personal interest to require recusal under the State Code of Conduct was an issue of fact). Thus, at common law and as codified, this section permitted consideration of whether a particular relationship was either sufficient to create a conflict or too attenuated to create a conflict. *See, Commission Op. No. 96-42* (improper for State employee to participate where brother-in-law would be affected by decision); but *see, e.g., Commission Op. No. 00-18* (allegation of "personal or private interest" that State officer would financially benefit from decision was too remote and speculative).

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

Aside from the § 5805(a)(1) restriction, the Code prohibits State employees from engaging in conduct that may "raise suspicion" among the public that he is acting in violation of the public trust and his actions will not reflect favorably upon the State and its government. 29 Del. C. § 5806(a). This is basically an "appearance of impropriety" test. *Commission Op. No. 91-02.* The Commission has held that:

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

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

Based on those facts, the majority of the Commission concluded that, at a minimum, there was an appearance of a conflict. This is not to say that his judgment was, in fact, impaired, only that it could raise suspicions among the public that it was. However, we also noted that when he encountered the situation, he promptly and fully complied with filing the full disclosure mandated by law. That is all the law required, and it provides that such full disclosures are confidential. 29 Del. C. § 5805(3). However, he elected to more fully disclose the situation by making it a matter of record at the application hearing. Moreover, his decision could be appealed. Accordingly, while concluding that a conflict existed, the law permits him to act after filing a disclosure, and he fully comported with the law, as required by 29 Del. C. §

5805(a)(3).

01-05 – Personal or Private Interest—Inability to Delegate Conflict: A State officer notified the Commission of a possible conflict of interest because as a private attorney he had assisted some clients in purchasing real estate. At that time his clients discussed the possibility of applying for a certain type of State license. However, they planned to pursue that on their own. Thus, he was not involved in any matters related to their license application. At the time of the purchase, he was not aware that he would be considered for the position of the State official who was responsible for issuing this type of license.

After he accepted the State job, his former clients' application was scheduled for a hearing. By statute, he was required to decide if the application would be approved. State officials may not review or dispose of matters if they have a personal or private interest that would tend to impair independent judgment in performing their official duties. 29 Del. C. § 5805(a)(1). However, there is an exception which provides that, if there is a statutory authority that cannot be delegated, the State employee may exercise responsibility with respect to the matter, if promptly after becoming aware of the conflict he files a written statement with the Commission disclosing the personal or private interest and explains why the responsibility could not be delegated. 29 Del. C. § 5805(a)(3). After a review of his statutory duties, the Commission concluded that, as a matter of law, there was no one to whom he could delegate his statutory duty to rule on the application.

Here, he immediately contacted the Commission's office and prepared a written statement and faxed it to the Commission to comply with the prompt disclosure requirement. While the Code states that such disclosure is confidential, 29 Del. C. § 5805(a)(3), he chose to disclose the situation to the participants at the application hearing and make it part of the record.

00-32 – Personal or Private Interest—Representing Private Enterprise Before Own Agency: WAIVER GRANTED. NOTE: When a waiver is granted, proceedings before the Commission become a matter of public record. 29 Del. C. § 5807(a).

Dear Mr. Carter:

The State Public Integrity Commission, based on the following law and facts, grants a waiver for you to accept a grant from the Delaware Heritage Commission (DHC), of which you are a member, to update a history you wrote in 1984 on former Governor John Townsend. When a State employee, officer or honorary official does business with the State, they must submit a "full disclosure" to the Commission. 29 Del. C. § 5806(d). "Full disclosure" means sufficient information to decide if the conduct violates the Code. Here, you and the agency acknowledged that accepting the grant would result in a violation, and asked for a waiver. The prohibitions requiring a waiver are: (1) the restriction on contracting with the agency to which you are appointed, 29 Del. C. § 5805(b)(1);and (2) the requirement for public notice and bidding, 29 Del. C. § 5805(c). The Commission may grant a waiver if the literal application of the prohibition is not necessary to achieve the public purposes of the statute or would result in an undue hardship on the employee or the agency. 29 Del. C. § 5807(a).

The public purpose served by prohibiting contracting with one's own agency was noted in a 1971 Court opinion. *W. Paynter Sharp & Son v. Heller*, Del. Ch. 280 A.2d

748, 752 (1971). In *Heller*, the Court upheld an agency's decision not to contract with one of its appointees, saying that when State officials contract with their own agency the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." The Court noted that, at that time, the State had no conflicts of interest law. Subsequently, the Code of Conduct was passed, and restricted State officials from dealing with their own agency. 29 Del. C. § 5805(b)(1). This insures that State officials do not use their influence within their own agency to affect the decisions of their colleagues or employees or use their access to information or influence within their own agency to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. Commission Op. No. 98-23.

As the public purpose is to insure the contract does not result from favoritism, undue influence, etc., we looked at why DHC wants to contract with you. DHC selected you to update the history of former Governor Townsend because in 1984, many years before you were a DHC appointee, you wrote a lengthy history on Governor Townsend. In writing that book, you obtained historical documents, conducted interviews, established a trusting relationship with the family, etc. DHC is now publishing histories on all of Delaware's former Governors as part of a series. Thus, you are the person most familiar with the history of the former Governor, and have the information and expertise to update the book. Further, other authors have been selected to write histories of other former Governors. Thus, this is not a unique opportunity created solely for you. The histories will be completed in a consistent format and made available for purchase at $5. You will not receive any portion of those sales. In updating your 1984 book, you will accomplish such things as adding footnotes to make it more scholarly, adding information that was not included in the initial writing, etc. Also, you will scan the existing book into a desktop publishing program to reformat it so it will be consistent in appearance with the other histories in the series. An additional step you will take that other authors are not taking is to make the book camera ready.

Based on those facts we conclude that the public purpose--insuring that the contract was not based on favoritism, undue influence, etc.--has been served. Thus, the literal application of the restriction against contracting with one's own agency is not necessary to serve the public purpose and a waiver is granted.

Regarding the requirement for public notice and bidding, Delaware Courts have held that: "Statutes dealing with bidding on public work are to be construed in the light of their primary purpose--to protect the public against the wasting of its money. These statutes seek to prevent waste through favoritism and yet permit proper supervision over the qualifications of the bidders. Thus, there is the desire to see that public officials have public work done as cheaply as possible." *Fetters v. Mayor and Council of Wilmington*, Del. Ch., 72 A.2d 626(1950); *Heller*, supra; and *Delaware Technical and Community College v. C&D Contractors*, Inc., Del. Supr., 338 A.2d 568 (1975). The Code of Conduct includes two methods by which the Commission can address the issue of expenditure of funds on a State contract: (1) public notice and bidding or (2) insuring that there is arms' length negotiation. 29 Del. C. 5805(c). Public notice and bidding aids in avoiding favoritism by creating a public record that insures such things as qualifications of bidders and fairness in prices. Here, public notice and bidding would be merely perfunctory because of the reasons given above concerning why your qualifications resulted in your selection. Thus, to insure the public purpose is served we review your situation under the arms' length negotiations standard.

Delaware Courts, in ruling on arms' length negotiations, have noted that the "most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." Commission Op. Nos. 98-23; 99-17 (*citing Oberly v. Kirby*, Del. Super., 92 A.2d 445(1991)). Here, DHC plans to contract with you for $4,000. It said that authors of history books on other former governors are being paid $3,000, but the additional money is because you will make your book camera ready, while the other authors will not. DHC will undertake the tasks and associated costs to make the other authors' books camera ready. Thus, the actual costs to the agency is essentially the same for all authors. Accordingly, your contract appears to be no more favorable than what is being paid as the market price to other authors writing histories of former governors. We also note that when a contract is publicly noticed and bid, the results become a public record so that the public has access to information on the contract. Access to this information instills public confidence that the contract was not issued out of favoritism, etc. While public notice and bidding will not occur in this case, by law, when we grant a waiver the proceedings become a public record. 29 Del. C. § 5807(b)(4). Thus, the public will know that its concerns, such as the potential for favoritism, use of public office for an unfair advantage or gain, etc., were addressed. Therefore, the literal application of the requirement for public notice and bidding is not necessary to serve the public purpose, and a waiver of that prohibition is granted.

00-19 – Personal or Private Interest—Self-Employed as a Licensed Professional:

I. Facts

A State employee was a licensed professional in his capacity as a State employee. He also had a private professional practice. As a result of his private practice, he had, on occasion, been hired to conduct certain evaluations on persons who were prosecuted by the State, and been asked to serve as the defendant's expert witness. In a case where he was to serve as the defendant's expert witness, the State represented a Division of his Department in bringing the prosecution. The question was raised about whether his private representation created a conflict of interest. As a result, he did not see the client or testify in that case. In his private practice, he also evaluated minors who may have been involved in criminal matters who may concurrently be active with other Divisions in his Department. Although he also evaluated minors in his State practice, the private clients were not State clients in his Division. In those cases, he was hired by the minors' public defender or private attorney to conduct certain evaluations. He gave his written evaluations to the attorneys. He may have to testify concerning the evaluations in criminal litigation prosecuted by the State, but not by, or for his Division. The request indicated that he also may be hired as a defense expert when the State represented agencies other than his own. No further facts were given regarding those cases.

II. Background to Decision

The State employee and his agency sought as much guidance as possible, not only for him, but for other licensed professionals in the agency. This Commission must base its opinions on the particular facts of each case. 29 Del. C. § 5807(c). However, the purpose for issuing synopses of advisory opinions is to be used as guidance. 29 Del. C. § 5809(9). For example, the Commission has issued decisions on a State employee seeking outside

employment as an expert witness and to a State employee who might be called as a fact witness. Commission Op. Nos. 91-19 and 99-53. Also, this opinion may assist in guiding other licensed professionals in the agency.

III. Applicable Law

(A) Requirement for a Full Disclosure if Regulated by, or Doing Business with, the State

Any State employee who has a financial interest in a private enterprise which does business with, or is regulated by the State, must file a written statement with the Commission fully disclosing the same. 29 Del. C. § 5806(d). The filing of such disclosure is condition of commencing and continuing employment or appointed status with the State. Id.

As a licensed professional, this individual's private practice was regulated by the State. (Citation omitted). Thus, a full written disclosure was required. "Full disclosure" means sufficient information for the Commission to decide if there is compliance with the Code of Conduct. *See, e.g*., *Commission Op. No. 98-23*. As noted above, some details of his outside employment had not been fully disclosed. Further, nothing indicated if his private practice was limited only to being an expert witness against the State and/or its agencies, or if his practice was broader, e.g., fact witness, representation before State entities other than the Court, etc., such that the Commission would need to consider those factors. Thus, no attempt was made to decide if those situations created a conflict of interest.

(B) Restrictions on Holding Other Employment

There is case law interpreting government restrictions on its employees who have outside employment. *See, Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 671. However, there are few cases interpreting outside employment restrictions based on the particular fact situation of a government employee who, in his outside employment, testified against the government as an expert witness for a private party. See, *Hoover v. Morales*, 5th Cir., 164 F.3d 221 (1998); *FDIC v. Jefferson Bank and Trust*, D. Colo., 46 F. Supp. 2d 1109 (1999); *Young v. United States*, W. D. Texas, 181 F.R.D. 344 (1997); and *Dean v. Veteran's Administration*, N. D. Ohio, 151 F.R.D. 83 (1993); *Conrad v. United Instruments, Inc*., W.D. Wisc., 988 F. Supp. 1223 (1997); and *EEOC v. Exon Corp. v. United States Department of Justice*, 5th Cir., 202 F. 3d 755 (2000).

As guidance to the agency, we noted that in *Morales*, a State statute and policy imposing a complete ban on outside employment as an expert witness, without applying any criteria other than the fact that the expert witness would take a position contrary to the State, were found unconstitutional because they were based solely on speech content (State employees would testify opposite to the State). However, the Court said restrictions based on factual justifications such as ethics laws on outside employment dealing with conflicts of interest did not pose the same problem. *Id*. That statement was confirmed by cases in which various States and the United States Supreme Court have upheld restrictions on outside employment by government employees which deal with conflicts of interest. *See, 62 ALR 5th 671; See, Sector Enterprises Inc. v. DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991) (dealing with 1st Amendment issue and citing a line of Supreme Court cases).

Unlike the statute in *Morales*, Delaware's Code of Conduct does not ban outside employment based solely on speech content. Rather, it prohibits a State employee from having

any interest in any private enterprise or incurring any obligation which is in substantial conflict with the proper performance of his duties in the public interests. 29 Del. C. § 5806(b). It specifically restricts accepting other employment if it may result in:

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

In a New York case, the Court addressed the concerns raised when State employees had a private business which offered the same type of services privately, as they did on their State job. *Sector Enterprises, Inc. v DiPalermo*, N.D. NY, 779 F. Supp. 236 (1991). The Court said that "multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture." First, it noted that: "the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of private practices." The Court added that there was an "inevitable conflict created by the limited time and resources for the employee to perform two jobs." *Id*. at 246. Likewise, this Commission considered the time involved to hold a second job and considered when the employee will perform the private activities in deciding if the other employment creates an interest which is in "substantial conflict" with performing official duties, which is prohibited by 29 Del. C. § 5806(b). *See, e.g*., *Commission Op. No. 98-14*.

Here, no facts were given to indicate that the employee was operating his private enterprise during the hours when he should be performing his official public duties. However, because his private practice involved litigation, the Commission noted that the inherent nature of preparing for litigation may result in the attorneys/clients who hire him from his private practice seeking him out during State duty hours. While this raised some concern, by law, public officials are entitled to a presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). Thus, we assumed that he was not conducting his private business during State duty hours. However, even assuming that was true, it did not cure the other concerns raised below.

One concern is that his professional expertise was in an area where there were few other licensed professionals. Thus, if his own agency needed access to his expertise, and he already had a client/case in his private practice in that matter, he would not be available to his own agency. That could result in his having an obligation that could preclude him from performing his public duties. The other concerns arose in the context of the specific restrictions on outside employment if "it may result in" (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b) (emphasis added).

First, we emphasized that 29 Del. C. § 5806(b) only requires a showing that a course of conduct "may result in" a violation of the Code provisions. *Commission Op. Nos. 92-11; 99-34*. Second, the restriction prohibiting conduct that may result in "any adverse effect on the public's confidence in the integrity of its government," is basically an "appearance of impropriety" test, as

is the restriction, found in 29 Del. C. § 5806(a), against engaging in any conduct that may "raise suspicion" that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31*. Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. It only requires that it "may result in an adverse effect on the public's confidence" or that it may "raise suspicion "that the dual employment holder is acting in violation of the public trust. *Id; See also*, 29 Del. C. § 5811(2) (public officers and employees should avoid even the appearance of impropriety where they have a financial interest); *See also, Commission Op. No. 99-35 (citing* 63C Am. Jur. 2d *Public Officers and Employees* § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)). To decide if there was an appearance of impropriety, the Commission weighed the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78.* We weighed the following facts and law to conclude that the totality of the circumstances creates, at a minimum, the appearance of a conflict if this State employee served as an expert witness for a private client against another Division in his own Department.

(1) Impaired judgment in performing official duties. In his State capacity, no facts indicated he reviewed or disposed of any matters related to the adult client who was prosecuted. That was because his official responsibilities within his Division entailed evaluating minor children, not adults. It also did not appear that in his State capacity his judgment involved making decisions about the private adult client's minor child because the request for the advisory opinion stated that he had no contact with the client or the client's family previously. Rather, it appeared that the official decisions on this particular case were made by a separate Division within his Department, which is statutorily tasked with bringing these types of cases. Additionally, since the matter was to be prosecuted by the Attorney General's office, that agency also would be responsible for State decisions regarding the case. No facts indicated that he was involved in those State decisions. Those facts diminished the possibility that his judgment would tend to be impaired, which is prohibited by 29 Del. C. § 5805(a)(1) and 29 Del. C. § 5806(b)(1).

(2) Preferential treatment to any person: As noted, he had no official decision-making authority over the adult private client, or the private client's minor child in this particular case. Those facts diminished the possibility that he could have given preferential treatment to his private client, (e.g., used information from or about the minor child obtained in his official capacity to aid the private client). Further, in this case, he decided not to testify after a question of a conflict was raised. Thus, any interest in insuring preferential treatment for his private client apparently became moot. However, had he proceeded to serve as the expert in this action brought by another Division within his Department and prosecuted by the Attorney General, it would raise a number of possibilities that may have resulted in preferential treatment for the private client, and raised the appearance of, or actual possibility of, violations of other Code provisions. Specifically, had he proceeded as the defense's expert in this case, it may have resulted in his representing or otherwise assisting his private enterprise before his own agency, which is prohibited by 29 Del. C. § 5805(b)(1). That is because the agency and the Attorney General's office, in deciding whether to proceed with a prosecution may have wanted to consider such things as information from the defense's expert witness. That could mean that he would have to represent his expert opinions to his own agency in order for it to evaluate his expertise in making their decision on whether to proceed with a prosecution. The purpose for prohibiting State employees from representing or otherwise assisting a private enterprise before one's own agency, is to insure that one's connection to the agency does not result in the use of undue influence, preferential treatment, and the like. *Commission Op. No. 98-23.* Because his own colleagues would evaluate his private expertise as an aid to deciding if they would proceed,

it could raise the specter that he had used undue influence on his colleagues or that their judgment was impaired in their decision making, raising the appearance that his client would receive preferential treatment because of his status within his agency. Similarly, if he testified at trial, his own agency's expert would have to evaluate his testimony, expertise, etc., for such purposes as cross-examination, etc. Again, it would have raised an appearance of impropriety concerning the validity and fairness of such evaluations by a representative for his own agency.

(3) Official decisions outside official channels: No facts indicated that this provision may have been violated in this particular case. However, when a private client of his had a connection to another Division within his own agency, it placed him in a position where it may raise the appearance that because of that connection, he could circumvent official channels to obtain a benefit for his private client.

(4) Other Adverse Effects on the Public's Confidence in its Government: Additionally, serving as an outside expert in cases against his own agency may result in an adverse effect on the public's confidence in its government, because it may appear that he was acting in violation of other provisions of the State Code of Conduct. As noted by the agency, it had an electronic database with confidential information on agency clients. The Code of Conduct prohibits the improper use or improper disclosure of confidential information gained as a result of one's public position. 29 Del. C. § 5806(f) and (g). This is not to say that he had, or would, use confidential information from his agency's database to assist him in preparing as an expert, or deciding whether to undertake representation. Moreover, the agency said that there were restrictive measures used to limit access to the information. However, because of the possibility of accessibility to data from another Division within his agency that could assist him in preparing as an expert in his private cases, it may result in at least an appearance of improper use of confidential information which would benefit his private client, and his private practice. While he stated that any expert hired by the defense would have been able to obtain that information through discovery, we noted that the rules of discovery do not necessarily require that all information held by one party be given to the other party. Thus, he might have the benefit of information that would not have been discoverable. Further, other experts would not have personal access to the database in advance of discovery, while the State employee would be in a position to have access to the data which might aid him in deciding if he wanted to consider taking a case.

In *Sector*, the Court noted that where State employees hold outside employment in the same field as their State work, it "creates an appearance of impropriety" because of the perception that the State employees have an unfair advantage. The Court specifically noted that the State employees in *Sector* had access to the State's computer system, which could be an aid to them in their private business. Here, the agency also raised the issue of loyalty to his agency if he testified against his own agency. The Delaware Supreme Court has specifically addressed some issues that arose when a licensed professional, as a result of outside employment, represented an opposing interest in a matter involving the State. *In Re Ridgley*, Del. Supr., 106 A. 2d 527 (1954). While *Ridgely*, was a common law decision, the Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30.* In *Ridgely*, the Court held that where the licensed professional (a lawyer) held outside employment that "his private interest (outside employment) must yield to the public one." *Id*. at 4 and 7. The Court said because the private employment must yield to the public one, it need not decide if his dual employment resulted in a violation of the professional code of ethics for lawyers. The Court held that it was "manifestly improper" for him to accept private employment in State matters and "engage in litigation or the

prosecution of claims against a fellow member" of his agency's (Attorney General) staff. *Id*. at 7. The Court also said that when Ridgley represented the opposing side against an administrative board which he represented in his State position, "the result was the unseemly appearance in the court of two State's attorneys, one endeavoring to uphold the State's case and the other to overthrow it." *Id*.

Since that common law decision, the General Assembly enacted a provision which requires that: "Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government." 29 Del. C. § 5805(a). Here, the State employee, like the attorney in *Ridgley*, was a licensed professional. Similarly, if he were to serve as an expert witness in a case against his own Department, it may result in "the unseemly appearance in Court" of him contesting his own Department's case, while an official representative of his agency attempted to uphold the Department's decision to prosecute. Moreover, had he and his agency's representative both testified in this matter, it would have placed him in the position of evaluating the testimony and expertise of colleagues of his own agency.

IV. Conclusion

Based on the foregoing facts and law, we concluded that his outside employment as an expert witness in cases being prosecuted by or brought on behalf of another Division within his own agency, may result in, at least an appearance of a conflict, if not an actual conflict.

00-18 – Personal or Private Interest—Ownership in Business: NOTE: Generally, advisory opinions or complaints are confidential. 29 Del. C. § 5807(d) & § 5810 (h)(1). However, applicants for advisory opinions, or the person charged in a complaint, can give the Commission written authorization to release the information. 29 Del. C. § 5807(d)(1) & § 5810(h)(1)(I). In the next case, such authority was given.

I. INTRODUCTION

The State Public Integrity Commission issued a ruling on March 31, 2000 holding that Dale R. Dukes, a Sussex County Council member, and the other Sussex County Council members did not have conflicts of interest which would disqualify them from participating in a re-zoning matter scheduled for presentation at the April 4, 2000, meeting of Sussex County Council. That ruling stated that an opinion providing a more detailed discussion of the law would be forth coming. What follows is that further discussion of the law.

II. JURISDICTION AND FACTS

On March 7, 2000, a complaint was filed with the Public Integrity Commission alleging that Mr. Dukes (hereinafter “Respondent”), a Sussex County Council member, may have a conflict of interest and should not participate in a vote on a re-zoning matter on April 4, 2000, or thereafter. The matter to be considered was Carl M. Freeman Communities’ (hereinafter “Freeman”) proposal to develop approximately 887 acres near Fenwick Island into a 2,895-home development. The Freeman proposal needed County Council’s approval to re-zone the acreage from its status as Farm and Agriculture to a high-density zone. It was alleged that if Mr. Dukes’ participated, his private company, Dukes’ Lumber Co., might profit if the development

was approved, and if Freeman or his subcontractors then decided to buy building supplies from his company. By statute, when a complaint is filed, the Respondent has statutory rights to such things as personal service of the complaint, a specific time to answer, an opportunity to be heard, and the right to subpoena witnesses, etc. See, 29 Del. C. § 5810. Mr. Dukes waived such rights so the Commission could expedite its proceedings and render a decision before the April 4, 2000, Sussex County Council meeting. Mr. Dukes did, however, request an advisory opinion under 29 Del. C. § 5807(c) concerning the issue.

Because other County Council members had private business interests which could allegedly profit, the County's legal counsel, Richard Berl, also asked for an advisory opinion on their situations. The other Council members and their private enterprises were: (1) Lynn J. Rogers, President, Rogers Sign Company, Inc., a commercial sign and outdoor advertising company; (2) Finley B. Jones, Jr., President, M.A. Willey & Sons, a steel material supply company; (3) George B. Cole, Realtor, Sea Coast Realtor (Eastern Sussex County) and owner, Beach Plum Antiques; and (4) Vance C. Phillips, president, Vance Phillip, Inc., Woodrow W. Phillips Spray Co., V.P. Produce, and Realtor, Laurel Realty (Western Sussex County). The only Council member who had a contract or an account with Freeman was Mr. Rogers, who did approximately $1,000 worth of sign work as a subcontractor for a company which contracted with Freeman on an earlier and different project. All Council members denied that they had: (1) an agreement with Freeman for future contracts; (2) sold any real property to Freeman; or (3) own or had an interest in any land in the vicinity of the development which would benefit from this project if it was approved.

III. APPLICABLE LAW

Complainant alleged that common law decisions prior to the enactment of the State Code of Conduct were not applicable. We decided that issue in 1997. *See*, e.g., Commission Op. Nos. 97-24 and 97-30. We held that the Code of Conduct provision which restricts government officials from reviewing or disposing of matters before their government entity if they have a personal or private interest which tends to impair their independent judgment in performing official duties is a codification of the common law. Conflict of interest statutes do not generally abrogate the common law unless expressly so provided. *Id*. (*citing* 63 Am. Jr. 2d *Public Officers and Employees* § 253). The General Assembly did not expressly abrogate the common law. Nor did it impliedly repeal the common law restricting officials from participating when a conflict of interest was alleged in a zoning situation. Delaware courts have recognized that there must be order, certainty, and stability in land use laws. *See*, e.g., *Stafursky v. County Council of Sussex, Del*. Ch., C.A. No. 1242, C. Allen (August 12, 1987); *Acierno v. Folsom*, Del. Supr., 337 A.2d 309 (1975). To hold that the common law did not apply could result in the Commission de-stabilizing long-standing Delaware decisions on zoning and conflict of interest restrictions.

At common law, when government officials acted on zoning matters and a conflict of interest or personal interest was alleged, the standard to be applied depended on whether the government officials were acting in a: legislative, ministerial, or quasi-judicial capacity. (*See* cases cited herein). The decision on which standard to apply turns on the particular facts--e.g., what is the alleged "personal or private interest"; how would such an alleged interest affect the official's judgment; what type of zoning interest is being considered; and what is the official's capacity (role) in deciding the zoning issue. Having concluded that common law decisions apply in this situation, we next addressed the facts in the context of the three common law standards which Courts have applied when an alleged conflict results from a zoning matter.

IV. BACKGROUND TO THE DECISION

(A) Zoning Decisions in General

Council Member Dukes' authority to vote on the zoning issue was being challenged because he had a private business which might allegedly benefit from a favorable decision on the matter. When Delaware Courts review challenges to zoning decisions, a threshold issue is whether the decision maker was participating in: (1) a "legislative" capacity; (2) "judicial" capacity; or (3) a "ministerial" capacity. This is true regardless of the basis of the zoning challenge, e.g., due process, Freedom of Information (FOIA) violation, or conflict of interest. *See, e.g, Lawson v. Sussex County Council*, Del. Ch., C.A. No. 1615-S, C. Allen (August 6, 1995) p. 8 (zoning is a "legislative action," but some aspects are "quasi-judicial"); *Conner v. Shellburne*, Inc., Del. Supr., 281 A.2d 608 (1971) (zoning hearings of Levy Court were quasi-judicial in nature); Green v. *Sussex County Planning and Zoning Commission*, Del. Ch., 340 A.2d 852(1974) (zoning hearing of County Council is basically similar to the law making process of any legislative body); *East Lake Partners v. City of Dover Planning Commission*, Del. Super., 655 A.2d 821(1974)); *See also*, other cases cited herein).

If the capacity in which the official acts is legislative, then substantial deference is given and courts will decline to question the motives of the official who participated in the zoning decision, even if a possible presence of a conflict of interest is alleged. *See generally, Zoning: Proof of Bias or Conflict of Interest in Zoning Decision*, 32 Am. Jur. Proof of Facts 3d § 5 (hereinafter "Zoning: Proof of Bias or Conflict"); *See, e.g., Lawson* at 8-10 (when zoning is viewed as a legislative action, the court will not substitute its judgment for the legislative body, absent fraud or bad faith); *Krahmer v. McClafferty*, Del. Super, 288 A.2d 678 (1972) (when government body acts in legislative capacity, courts will not inquire into the motives of, or inducements to, the officials as to what may have influenced them in passing the act or resolution, absent fraud or bad faith).

A more probing standard is used if the act is characterized as quasi-judicial. *Id; See*, *e.g., Shellburne, Inc. v. Roberts*, Del. Supr., 238 A.2d 331(1967) (when quasi-judicial body acts, there is a presumption of honesty and integrity and court will look at motive if complainant establishes a prima facie case to overcome the presumption). 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). Where government officials are bound by zoning regulations, there is no discretion of choice involved. *State ex rel. Rappa v. Buck*, Del. Super., 275 A.2d 795 (1971). Thus, if the matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. Since Mr. Dukes and the other Council members do exercise discretion and judgment in ruling on zoning matters, we held that the "ministerial" standard did not apply.

(B) Identifying the Capacity in Which the Council Members are Acting

Having disposed of the "ministerial standard," the threshold issue was whether the County officials would be acting in a legislative or judicial capacity. Delaware Courts decided if an official is acting on a zoning matter in a legislative or quasi-judicial capacity; or a combination thereof by looking at the specific structure of the land-use laws. There is no Delaware case dealing directly with which test would be applied to Sussex County Council members in a re-zoning situation. However, Delaware Courts have decided the standard to be applied under the specific zoning laws of other counties and cities. *See, Lawson*, C.A. No. 1615-S (zoning is a "legislative function," but some aspects are "quasi-judicial"); *Conner*, 281 A.2d 608 (zoning

hearings of Levy Court are quasi-judicial); *East Lake*, 655 A.2d 821 (comparing site development decision to subdivision decision, Court recognized that the City's Planning Board could act, in part, in all three capacities). From those decisions it is clear that the capacity in which an official acts turns on the complexities of the particular area's zoning laws. As this Commission found no authority interpreting which capacity would apply to Sussex County Council members based on the structure of the Sussex County Zoning laws, we tested the issues under both the legislative and quasi-judicial standards.

(1) LEGISLATIVE CAPACITY STANDARD

Delaware Courts will not inquire into the motives of public officials who act in a legislative capacity on zoning actions if they act within the scope of their admitted powers, unless the complaining party proves bad faith or fraud on the part of the official. *Campbell v. Commissioners of Bethany Beach*, Del. Supr., 139 A.2d 493 (1958). In *Campbell*, it was alleged that zoning Commissioners approved the zoning of a new state highway through Bethany Beach, because it would increase their individual property values. *Id*. at 496-497. The Delaware Supreme Court said there was "absolutely no evidence of capriciousness or bad faith or fraud." *Id*. at 496. It noted that as a matter of law, the Commissioners had complete power to act on the matter. *Id*. Regarding the allegation that they were motivated to approve the request because of their desire for personal gain, the Court said "[T]he short answer is:" most of the property lying east of Delaware Avenue would presumably benefit from any increase in value as a result of a new highway. *Id*. at 497. "The mere fact of possible enhancement" of their personal properties did not preclude their participation, because as a practical matter, no Board of Commissioners could then be obtained to validly consent to a new highway since, by law, all Commissioners were property owners. *Id*.

As in *Campbell*, it is "possible" that all Council members could personally gain if the ordinance was passed. For example, Freeman "might" decide he wants: Mr. Dukes' building supplies; Mr. Findley's steel materials; Mr. Cole and Mr. Phillip's real estate sales expertise; Mr. Cole's antiques to dress up the developer's show home; or Mr. Rogers signs to announce the coming of the new development or identifying the location, etc. But Mr. Dukes and the other Council members each represented that they: (1) had no agreement with Freeman for future contracts; (2) had not sold any real property to Freeman; and (3) did not own or have an interest in any land in the vicinity of the development which would benefit from the project if it was approved. Under the statute, and at common law, to prove that an official has a "personal interest," sufficient to impair his judgment, complainant must overcome "a strong presumption of honesty and integrity." *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); *See also, Shellburne*, 238 A.2d 331(when acting within scope of authority, there is a rebuttable presumption of good faith and propriety of conduct that inures to all public officers); *Mack v. Kent County Vocational-Tech Sch. Dist*., Del. Super., C.A. No. 86AAU-2, J. Bush (May 20, 1987). However, the complaint recited "the mere fact" that if the ordinance was passed, then Mr. Dukes "might" profit. All well-pleaded allegations must be accepted as true. *Kershaw Excavating v. City Systems*, Inc., Del. Supr., 581 A.2d 1111 (1990). However, inferences and speculative facts are not to be assumed as true without specific allegations of fact to support such inferences or conclusions. *Bergstein v. Texas Int'l Co*., Del. Ch., 453 A.2d 467 (1982), *appeal den*., Del. Supr., 461 A.2d 695 (1983) (alleged Board member's private enterprise would benefit from decision). Here, it was merely alleged that the officials "might" profit if the ordinance was passed and if the developer then decided to do business with one or all of those officials. This allegation was more tenuous than in *Campbell*, where the Court ruled that there was no evidence of fraud or bad faith. *Id*. at 139 A.2d 493. Where there is no showing of bad

faith or fraud, Courts will dismiss the complaint. *Klaw v. Pau-Mar Construction Co*., Del. Supr., 135 A.2d 123 (1957). Accordingly, we dismissed the complaint against Council Member Dukes, and advise Mr. Dukes, and all Council members, that to the extent any action on the re-zoning matter would be in their legislative capacity, they were not precluded from participating.

(2) JUDICIAL CAPACITY STANDARD

We found that even under the stricter judicial/quasi-judicial standard there was no violation of the State Code of Conduct. When the judicial standard is applied, complainant must again overcome "a strong presumption of honesty and integrity." *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). Delaware Courts have noted how remote and nebulous alleged conflicts can be. Thus, for the interest to be sufficient to require an official to recuse himself, the claim cannot be merely conclusory. *Shellburne*, 238 A.2d 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995). We have held that claims cannot be based on suspicion and innuendo. There must be hard facts. Commission Op. No. 96-75 (*citing CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567(1967)). Here, the hard facts supported the presumption of honesty and integrity.

(C) There is no evidence of a violation of 29 Del. C. § 5805 (a)(2)(b) or (a)(1).

Officials may not review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 Del. C. § 5805 (a)(1). By law, an official's judgment would tend to be impaired if their financial interest would benefit to a lesser or greater extent than other private enterprises similarly situated. 29 Del. C. § 5805 (a)(2)(b). Here, the allegations merely said that Mr. Dukes' private business "might" profit "if" the ordinance was passed, and "if" Freeman or his subcontractors then decided to do business with Mr. Dukes. The allegations required several assumptions before any interest would exist: (1) the ordinance would pass; (2) the developer or his subcontractors would use Mr. Dukes' company or the companies of other Council members; and (3) their companies would benefit to a greater or lesser extent than other similar private enterprises. Such assumptions were too indefinite and speculative to support a finding of a disqualifying conflict of interest, particularly in light of each member of Council's denial of the existence of any agreements related to the planned project.

Even assuming the first two speculative requirements were met, no facts supported the allegation that their private enterprises would benefit more than other private enterprises which offered similar products or services. For example, the developer could deal with a building supply company other than Mr. Dukes' from the same local area, such as Masten Lumber and Building Supply. Similarly, he could select companies other than those of the remaining Council members for the other goods and services he needed. As no facts indicated that the Council Members' businesses would benefit to a lesser or greater extent than other similarly situated private enterprises, the allegations failed to meet the element required by law--that their financial interests would benefit to a greater extent than others similarly situated.

The next question was whether the speculative, prospective interests would be sufficient to create any associational relationship "personal or private interest" between the Council members and Freeman which would tend to impair judgment under 29 Del. C. § 5805 (a)(1). "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Prison Health Services Inc. v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993) (*citing Van Itallie v. Borough of*

Franklin Lakes, N.J. Supr., 146 A.2d 111, 116 (1958)). In *Van Itallie*, it was alleged that an official who participated in a zoning decision had a personal interest because his brother-in-law held a low-level position with the company seeking the zoning action. The Court held that the official's familial relationship with an employee of the company which was seeking the decision was not an interest sufficient to require recusal. Similarly, Delaware Courts have held that the mere allegation of a relationship without additional facts to support a charge of a conflict of interest is insufficient to state a claim. *Camas v. Delaware Board of Medical Practice*, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995) (no facts were given to support an allegation that a State officer's marital relationship created a conflict of interest where her spouse investigated a claim of improper medical practice for his employer, a private hospital, against a doctor of that hospital, and the same matter came before her State board). Here, all Council members denied that they had any agreement with Freeman for future contracts, etc. No facts indicated any personal or private ties to Freeman. Thus, the allegations of a personal or private relationship were speculative and conclusory, without facts to support the type of relationship between the officials and Freeman that was sufficient to create the type of interest which Courts deem to be sufficient.

(D) The Facts Do Not Support the Claim of an Appearance of Impropriety

As the conclusory and speculative allegations were insufficient to establish that the officials had the requisite "personal or private interest," the question became whether the facts were sufficient to support the allegation of an appearance of impropriety. In deciding if there was an appearance of impropriety, we considered the totality of the circumstances. *Commission Op. No. 96-78*. However, those circumstances must be contained within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. § 5802(1) and 5802(3). To achieve that balance, we must start with the strong legal presumption of honesty and integrity to which public officials are entitled. *Beebe*. Added to that presumption were the following legally significant facts:

(1) Capable Citizens Would be Discouraged from Holding Public Office if Remote and Speculative Interests were Enough to defeat the Purpose of the Code of Conduct. The balance that must be struck when public officials are alleged to have remote and speculative interests was well expressed by the Court in a New Jersey zoning decision. The statute, similar to Delaware's, restricted local planning officials from acting "on any matter in which he has either directly or indirectly any personal or financial interest." The Court said:

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes said, "Universal distrust creates universal incompetency." Van Itallie at 269.

Similarly, we have held that in deciding if there is an appearance of impropriety because of an alleged prior professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo; not on hard facts. *Commission Op. No. 96-75* (*citing CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567(1967)). That conclusion is consistent with a Delaware decision where it was alleged that there was an appearance of impropriety under a provision of the Lawyer's Rules of Professional Conduct because of the business relationship created by the individual's State role and his private employment. The Court said: Absent the existence of a conflict, it would not disqualify the individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436 (1991).

As in *Seth*, here, the public position and private employment created the alleged appearance problem, but there were no articulated, specific facts to support the claim. Just as the rules of conduct for lawyers are not to be used for tactical purposes to disqualify officials when there is no conflict, so too the State Code of Conduct should not be used for tactical purposes to disqualify public officials when there is, in fact, no conflict. Here, based solely on appearances without any supporting facts, it is alleged that Mr. Dukes should be disqualified because he "might" profit--if the developer's proposal is approved; and if the developer or if his subcontractor decides to buy supplies from Mr. Dukes' company. Apparently no other Council members were questioned about the possibility that their private businesses might be enhanced. The only complaint filed was against Mr. Dukes. After he was charged, the Town attorney, understanding that if the charges against Mr. Dukes constituted a conflict of interest, then all Council members would have the same conflict, sought an advisory opinion not only for Mr. Dukes but for all Council members. Delaware Courts have noted that zoning decision makers are residents of the town or county for which they are responsible. As such, they bring their experience as citizens and residents of the town or county. When exercising judgment they are required by their office to follow a process set-out by statute or dictated by due process. They need not approach their duties with no preconceptions about the course that would best promote the public good. *Pettinaro Enter. v. Stango*, Del. Ch., C.A. Nos. 1488, 1501, C. Allen (July 24, 1992).

(2) The Council Members' Discretion is Restrained by State and Local Zoning Law. Having concluded that speculative claims do not support the purpose of the Code, we also note that Sussex County Council Members were to comply with the State Comprehensive Development law when making zoning decisions. 9 Del. C., Chapters 68 and 69. Delaware courts have held that the State law limits the discretion of those making land use decisions and that such "limits on discretion" are legally and judicially significant. *Lawson,* C.A. No. 1615-S; *See, Green v. County Council of Sussex County*, Del. Ch., 508 A.2d 885 (1986). Land use decisions are also restrained by local zoning laws and regulations. *See*, Sussex County Code, Chapter 99. The local restraints include the requirement that the developer must consult with such sources as the County's Land Use Planning staff; the County Engineer; the State's Department of Natural Resources; the State Fire Marshal's office; and other professional and technical representatives as deemed necessary. *Id*. Public hearings are held so property owners can provide input, and a Committee then submitted a report with recommendations to the Council. *Id*. Thus, the developer's application was reviewed by a multitude of persons for compliance with not only the State comprehensive plan, but local ordinances and regulations, with public input, before Council ever voted. As zoning laws limited the discretion of those making land use decisions, such "limits on discretion" are of importance when it is alleged that

there may be an appearance that an official's discretion/judgment would be impaired because of a mere possibility that he might benefit from a land use decision.

(3) Like Delaware, other jurisdictions have held that claims of conflicts of interest in the zoning context can be too remote and nebulous to require an official to recuse. A review of case decisions from other jurisdictions, revealed that before the courts would hold that an interest in the zoning "matter" being considered, was sufficient to create a conflict, they required some ascertainable benefit; not speculative benefits based on conclusory allegations. *See*, "Zoning: Proof of Bias and Conflict;" *Van Itallie* 146 A.2d 111 (1958) (cited by Delaware Court in *Prison Health*); *Moody v. University Park,* Tex. App., 278 S.W.2d 915(1955); and *Touphoeus v. Joy*, N. J. Super., 196 A.2d 250 (1963). Complainant must overcome a strong legal presumption of honesty and integrity. *Beebe*, C.A. No. 94A-01-0004; *Mack*, C.A. No. 86A-AU-2. Here, the presumption of honesty and integrity was bolstered by facts which Delaware Courts have found to be legally significant, such as the legal restraints imposed by State and local zoning laws. In stark contrast, was the conclusory allegation that the activity could create a strong potential for a conflict.

V. CONCLUSION

Based on the foregoing law and facts, the complaint against Council Member Dale Dukes was dismissed as the speculative allegations fail to establish either a conflict of interest or even the appearance of a conflict. Further, we found that all Council members, like Mr. Dukes, might possibly enhance their private interests if the re-zoning request was approved. However, they, like Mr. Dukes, could only be said to have a potential speculative interest, which was insufficient to require recusal.

00-11 - Personal or Private Interest—Representing Clients Before Own Agency: An individual was considering accepting an appointment by a Cabinet Secretary to serve on the agency's strategic planning policy subcommittee to develop policies by one of the agency's Divisions and one of its Commissions. He asked if accepting the appointment raised any Code of Conduct issues. Based on his correspondence, the Commission found that the appointment would raise an issue under the provision which restricts honorary State officials from representing or assisting a private enterprise on matters before the agency to which they are appointed. 29 Del. C. § 5805(b). The State appointment would require him to develop policy for the particular Commission and Division, and he and members of his private enterprise would be representing complainants or respondents before the same Commission and Division on issues dealing with the policies. Under those circumstances, it would violate the Code of Conduct if he accepted the appointment and he or his law firm represented clients before that same agency.

00-10 – Personal or Private Interest--Interests Arising from Outside Hobby & Employment: NOTE: Generally, requests for advisory opinions are confidential. 29 Del. C. § 5807(d). However, an exception to the rule of confidentiality is that the applicant for an advisory opinion may give the Commission written authorization to release the information. 29 Del. C. § 5807(d)(1) and § 5810(h)(1)(l). In the instance below, such authority was given.

Dear Mr. Schrader:

This is the State Public Integrity Commission's written opinion on the two issues you raised in your request for an advisory opinion. You wanted to properly advise your Town clients on complying with any Code of Conduct restrictions on their participation on a land use ordinance. As you know, we concluded that: (1) Council President Orem was not required to recuse himself; and (2) Council Member Susan White, who has recused herself from participating, should comply with the post-recusal conduct discussed below.

I. Applicable Law

(A) Officials are restricted from reviewing or disposing of matters if they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 Del. C. § 5805(a)(1).

(B) Officials are restricted from representing or otherwise assisting a private enterprise before the agency by which they are associated by employment or appointment. 29 Del. C. § 5805(b)(1).

(C) Officials may not engage in conduct which may raise suspicion among the public that they are engaging in conduct which would violate the public trust. 29 Del. C. § 5806(a).

(D) Officials are restricted from participating in official decisions if as a result of their outside employment, their participation may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

II. Facts Applied to the Law

ISSUE 1 - Does Robert H. Orem, Town Council President, have a personal or private interest in the home-occupation ordinance such that he should recuse himself from participating?

Town Council is to consider a zoning amendment on the use of private residences as "home occupation" sites. At a town meeting on February 1, 2000, Council President read a letter signed by 17 persons. It suggested that Mr. Orem and Ms. White may have a conflict of interest if they participate in a zoning ordinance decision. It alleged that Mr. Orem has a "possible conflict of interest" because he "may, in the future, have a home-based craft workshop for the sale of handcrafted items." By affidavit, Mr. Orem stated: "I have at no time nor do I have any plans to, receive any monetary reimbursement for any object constructed in my woodworking shop which is located in a garage on my property...." He said woodworking is a lifelong hobby and he develops such things as furnishings for his church, furniture for his home and for others free of charge.

Mr. Orem may participate in the decision on the home-occupation ordinance. For Mr. Orem to have a conflict, he must have a "personal or private interest" in the home occupation ordinance. "Home occupation" means: "any enterprise or activity conducted solely by one or more members of a family." That definition does not say if the ordinance applies only to commercial enterprises. However, another ordinance section refers to "Business Licenses." Reading the business license ordinance in conjunction with the zoning amendment, leads to the conclusion that the zoning ordinance applies to commercial ventures, not hobbies. Mr. Orem's "personal and private interest" is in maintaining a hobby, not in making money. Thus, his interest is not one that would be affected by the ordinance. The citizens who wrote the letter of complaint said that he had "a possible conflict of interest" because "he may, in the future, have a home based craft workshop for the sale of handcrafted items." This is a speculative and

conclusory allegation. Delaware Courts, in interpreting the Code of Conduct, have noted that is a "strong presumption" of honesty in the actions of public officials. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996). Mr. Orem has submitted an affidavit that he does not have a pecuniary interest at present or in the future in "home occupation" ventures. Against that statement, which carries the "strong presumption of honesty," is the conclusory and speculative allegation. Conclusory allegations of conflicts of interest without specific factual grounds are insufficient to state a claim. *See, e.g. Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). Accordingly, we hold that Mr. Orem may participate in the decision on the zoning ordinance.

> ISSUE 2 - As Ms. White will not be participating in her official capacity, what is the proper post-recusal conduct to insure compliance with the Code of Conduct?

Because Ms. White has a home-owned business, she contacted the Public Integrity Commission in December 1999 and was sent information on the Commission's prior rulings, Delaware Court decisions, etc., which discussed when officials should recuse themselves. In that correspondence, she was advised that the Commission had never specifically ruled on what limits would apply to officials after they recused themselves, and that she may, therefore, wish to seek an advisory opinion. Based apparently on that correspondence, she decided to recuse herself. However, her post-recusal conduct was questioned because, among other things, she was attending and participating in public meetings, and had signed the "letter of protest" which said she and Orem may have conflicts of interest and they should obtain an advisory opinion. Those events occurred at a public meeting and were reported in The Wave. The editorial concluded that if Ms. White had truly recused herself on the home-based business ordinance, then her obligation was to remain neutral--even outside of Council Chambers. At that point, your request had been sent to the Commission, identifying some post-recusal conduct which you believed required advice from this Commission. The facts regarding Ms. White's signature on the "letter of protest" were not in your request as that event happened after your request was submitted. A private citizen sent The Wave article to this Commission on the date before it met. That information was given to the Commissioners and you at the meeting, so we could decide if those facts had relevance. As the Town Attorney, you recommend to Town Council members who have been recused that they leave the meeting during consideration of the matter. This precludes them from participating in any way in the deliberation. Further, you advise them not to express oral opinions on the matter; not to gesture or request third parties or others to participate or express opinions on their behalf; and to generally conform themselves to the standards expected from judiciary members. You asked if you should continue giving that advice to your Town clients in this matter.

Ms. White wanted to attend the public meetings on the ordinance; did attend an ordinance workshop; and wanted to know if she could speak at these public meetings. In response to her inquiry, it was noted that the Commission had not specifically addressed an official's post-recusal conduct, and it was suggested that she could seek an advisory opinion. *See*, Ltr to Ms. White, p.2. As Town Attorney, you are now acting on her behalf to obtain clarification on the advice you should give her.

First, the statute clearly states that even if an official recuses himself, he may respond to questions if asked. 29 Del. C. § 5805(a)(1). From that language, it appears the official would not have to leave the meeting, and could comment if asked. However, it appears that Delaware Courts have indicated that where it is proper for the official to recuse, it is then improper to

comment even if the comments are "neutral and unbiased" and even if the participation is "indirect and unsubstantial." *See, Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) ***aff'd***, Del. Supr., No. 304 (January 29, 1996) and *Prison Health v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993). Also, the Code restricts officials from representing or otherwise assisting a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). The purpose of that restriction is to insure that there is no undue influence and/or that they will not receive preferential treatment from their colleagues. Thus, to the extent Ms. White's participation could be construed as "representing or otherwise assisting" her private enterprise before her own agency (the Town Council), then her participation should be restricted.

We note that "representing and otherwise assisting" after a recusal is discussed not only in Delaware cases, but also in a federal court decision interpreting a similar federal ethics law. *Van EE v. EPA*, D.C. Dist. Ct., 55 F. Supp. 2d 1 (1999). In *Van EE*, the employee wanted to speak at public meetings regarding the use of certain federal lands. The meetings were not before his own agency. The Court held the government had a compelling interest in restricting a federal employee's speech before federal agencies. It said his speech was not prohibited in all circumstances, only before the federal agencies. The applicable Delaware law, in this situation would only restrict her activities before her own Town agency. The government's interest is to insure not only compliance with the law, but also insure that there is no appearance of impropriety. The concerns of improper appearances "surely are greater" when an employee addresses their own agency, and when the audience is aware that the speaker is an employee of that agency. *Van EE*.

Here, Ms. White wants to engage in conduct which the Code restricts--representing or otherwise assisting a private enterprise before her own agency. Moreover, as noted in *Van EE* the appearance of impropriety is "surely greater" because she would not only be addressing her own agency, but certainly the audience at the Ocean View town meeting will know she is a Town official because they elected her to that position. Other federal case law supports the restriction on her activities, such as having others speak on her behalf. Where one purpose of the ethics restrictions is to insure the official does not exercise undue influence on their colleagues, even if the official does not participate at all in the meeting, by being in attendance he potentially could have used his inside knowledge to help direct the statements and activities of those participating. *United States v. Schaltenbrand*, 11th Cir., 922 F.2d 1565(1991). Accordingly, based on the above law and facts, we conclude that the advice you have been providing to your Town Council clients regarding post-recusal conduct comports with the Code of Conduct in this particular situation.

III. Conclusion

We find and hold as follows: (1) Mr. Orem does not have a "personal or private interest" in the zoning matter, and, therefore need not be recused; (2) Ms. White has properly recused herself from participating because of her "personal or private interest" (her private business); and (3) Ms. White should continue complying with the Code by not "representing or otherwise assisting" her private enterprise before her own agency.

00-09 – Personal or Private Interest—Hearing Officer's Interest in Board Decision: The Commission was asked if any restrictions applied to a State Board's hearing officers, and the Board's members, concerning participation in a claim against the State by one of the Board's

hearing officers. The Commission found that some restrictions do apply. The agency, in most instances, had already implemented ways to avoid violating the Code of Conduct.

I. Applicable Law

State employees, officers and honorary State officials may not review or dispose of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 Del. C. § 5805(a)(1). Such persons also may not engage in conduct that may raise suspicion that the public trust is being violated. 29 Del. C. § 5806(a). An actual violation is not required as this provision only requires conduct that "may raise suspicion," and is, therefore, basically an "appearance of impropriety test." Commission Op. No. 93-12.

II. Application of Law to Facts

Several State employees were legal advisors to a Board. They also may serve as hearing officers, in lieu of the Board, if the parties consent. One hearing officer petitioned for certain benefits, and the decision on her petition would normally be heard by this Board, or one of its hearing officers. The hearing officer had a lawyer to represent her before the Board. Another lawyer will represented the opposing side. The lawyers, and members of their firms, regularly appeared before the Board or its hearing officers. The hearing officer who filed the claim would not participate in her official capacity on her own case. However, the agency asked if the circumstances created other conflicts and, if so, how to resolve those issues. The agency's questions and our conclusions are as follows:

> **(A)** Would it violate the Code of Conduct for the State employee who sought the benefits to provide legal advice to the Board on cases being handled by: (1) her lawyer or her lawyer's law firm; and/or (2) the opposing side's lawyer or his law firm ?

The State employee's duties required her to give legal advice to the Board and draft its decisions. Her personal or private interest was her business relationship with her attorney who regularly appeared before the Board. Business relationships can create a personal or private interest that requires recusal of a State employee, even where the official would not directly benefit from the decision and where any comments by the official were neutral and unbiased. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) ***aff'd***, Del. Supr., No. 304 (January 29, 1996). Moreover, even where the official's participation was "not direct and substantial" it was held that he should not have participated. *Prison Health Services Inc. v. State,* Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993).

While the State employee might not directly benefit from her decisions on other cases handled by her lawyer or her lawyer's firm, the State employee's participation would be direct and substantial as she would be giving legal advice to the Board and drafting its opinions. The same rationale applied to her reviewing and disposing of matters involving the opposing lawyer or his law firm. As in *Beebe* and *Prison Health*, it could appear that her judgment in performing official duties could be impaired because of her business relationship. The agency had assigned other hearing officers to hear cases presented by those two attorneys and their firms. It expected to continue the arrangement. Thus, if the State employee did not serve as legal counsel to the Board in cases presented by the two attorneys, or their firms, she would not be

violating the restriction against reviewing or disposing of matters where there is a personal or private interest.

> **(B)** Assuming the parties consent, could the State employee adjudicate a case in lieu of the Board if the case is handled by the employee's attorney, the opposing attorney, or their firms?

Such activity would create even more direct and substantial involvement by the State employee. Thus, based on the law cited above, this too would be a conflict. While the parties' consent may be appropriate under the Delaware Lawyers' Rules of Professional Responsibility, under the Code of Conduct, consent of the parties is insufficient, by itself, to cure the conflict. *See*, *In re: Ridgely*, Del. Supr., 106 A.2d 527 (1954). In *Ridgely*, a "personal interest" created a conflict for a State attorney. The Court noted that under the lawyer's rules of ethics he could proceed in the face of a conflict if the parties agreed. However, the Court said it need not consider the lawyer's rules of ethics because the lawyer was a State officer and, therefore, his duty to the public commanded precedence over the lawyers' rules of ethics. We have followed that ruling, and held that where a hearing officer has a conflict of interest, the parties' consent, by itself, cannot resolve the conflict for a State officer. Commission Op. No. 99-51. Again, the agency has arranged the cases to avoid the State employee's participation as a hearing officer on cases presented by her attorney, the opposing attorney, and their firms. If that continues, the Code of Conduct would not be violated.

> **(C)** Would it violate the Code of Conduct if: (1) the present Board members, who are appointees, or (2) other hearing officers presided over the hearing, participated in the hearing or deliberations, adjudicated the State employee's claims, and/or drafted the written decision?

(1) Effect on Board Members

The Code requires that the interest be "personal and private." We assume the relationship between the State employee and the Board members is official; not "personal and private." However, even assuming a conflict, if Board members decided her claim, the statute provides that if there is a statutory duty that cannot be delegated, then the officials may proceed, if the matter was fully disclosed to the Commission. 29 Del. C. § 5805(3). Here, the Board has the statutory duty to decide these types of cases. (Citation omitted). The only clear delegation authorized by the statute is that the Board may delegate its authority to a hearing officer, if the parties consented. However, if Board members had a conflict in the situation, the hearing officers would have even more of a conflict: They have the same status and authority as the State employee who filed the claim; she is their colleague; and unlike Board members, the hearing officers worked in the same office with her on a daily basis. Their participation as a hearing officer to decide her claim raises an appearance that their relationship with her was closer than her relationship with Board members. Moreover, if they acted as hearing officer, as the single decision maker they would have the opportunity to make subjective decisions about their own colleague, e.g., credibility, etc. Because their decision would be subjective it could appear that the hearing officers would give their co-worker favorable treatment. Also, it put them in an unnecessary and probably uncomfortable position of judging their own colleague. Thus, given the two options, having it heard by the Board, or by a hearing officer, the latter was the least attractive. We, therefore, concluded that the Board members could proceed to make the decision based on the statutory exception which permitted them to proceed if they could not delegate. The agency had discussed with the law firms the possibility of having an independent mediator for the State employee's claim. Our ruling

did not preclude the parties from pursuing other legal avenues that could result in the decision being made by someone other than the Board.

(2) Effect on Hearing Officers

That left the issue of whether the other hearing officers could act as legal advisors to the Board when her case came before it. When the hearing officers acted as legal counsel it did not require the same type of decision-making required if they acted as the hearing officer, e.g., they insured the Board was informed of the applicable law; they did not make factual determinations, etc. Accordingly, they would have less of an opportunity to make more subjective decisions, such as credibility of witnesses, etc., if they were a legal advisor. Moreover, this was one of their statutory duties. As noted above, if there is a statutory duty that cannot be delegated, then they can proceed after disclosure to this Commission. We understood that the agency was considering having a legal advisor from another agency (e.g., the Attorney General's office) advise the Board on the State employee's case. Again, we did not, preclude use of other legal avenues that could result in a legal advisor other than a hearing officer from the agency.

> **(D)** If the Board or the hearing officers are or are not permitted to preside over the State employee's petition, what, if any, procedural or administrative measures must the Board and hearing officers take to avoid violating the Code of Conduct?

First, by law, when an advisory opinion is issued, if the persons seeking the opinion fully disclosed the matter to the Commission and acted in good faith reliance on that advice, then they shall not be subject to discipline or other sanction under the Code with respect to those matters. 29 Del. C. § 5807(c). Thus, all Board members and hearing officers should be made aware of this opinion in order to comply with it. Second, after reviewing the opinion, if there was additional factual information that needed to be disclosed to this Commission by a particular hearing officer or Board member, then they should so advise the Commission. For example, if a hearing officer or Board member has some "personal or private interest," in the State employee's situation, which created a conflict for them, e.g., if they were related to her; if they expected to be called as a witness; if they had a close personal friendship outside the office, etc., then they should bring that to the Commission's attention to insure full disclosure, and further guidance if necessary.

00-08 – Personal or Private Interest—Dual State Employment: A State employee asked if she could be paid for attending meetings of a State Council to which she was appointed, if she took leave from her full-time State job to attend the meetings. Based on the following law and facts, the Commission held that she could be paid for attending the Council meetings when she was on leave from her full-time State job.

The "double dipping" law was passed in 1986 because, in some instances, it was believed that State officers were being paid from one fund for discharging their appointed or elected duties, and simultaneously, were paid from other public funds for regular State employment. *Att'y Gen. Op. No. 87-I016*. The General Assembly expressly provided that the State should not pay an individual more than once for coincident hours of the workday. 29 Del. C. § 5821 (emphasis added). To insure that persons holding dual State positions were not paid from two sets of public funds for coinciding hours, the law set procedures to follow when holding dual positions, such as: requiring additional time records; audits of those records; and referral by the State Auditor to this Commission or the Attorney General if false records or discrepancies

were revealed in the audits. 29 Del. C. §§ 5822 and 5823. Regarding payment, the statute states:

> Any person employed by the State...who also serves in an elected or paid appointed position in State government...shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions. 29 Del. C. § 5822(a).

Thus, the statute does not prohibit her from being paid by the Council; rather, her full-time State salary could be prorated. However, the statute then expressly excluded vacation time from being prorated. It said: "Any hours or days during which an employee uses vacation or personal days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter." 29 Del. C. § 5822(e). Accordingly, the language is clear--if she was on vacation or used personal days when she attended the Council meetings, then her State salary was not prorated for the time she was absent from her full-time State position. Copies of the Merit Rules, which also have provisions on dual employment by State agencies, were included in the information sent to us. *See,e.g*., Merit Rules 5.0400; 5.0500; and 18.0200. We cannot interpret the Merit Rules as our jurisdiction is limited to Title 29, Chapter 58. *Commission Op. No. 96-17*.

We also did not rule on whether her second position with the State created a conflict of interest; only interpreting the law on "double dipping." The employee was advised that the Code of Conduct has a specific provision on accepting "other employment". 29 Del. C. § 5806(b). We have held that "other employment" includes a second position with the State. *Commission Op. No. 99-35*. Further, she was advised that as an appointee she was considered an "honorary State official." Thus, her conduct in her full-time State position was governed by the Code of Conduct provisions as they applied to "State employees," and her conduct as an appointee was governed by the provisions as they applied to "honorary State officials."

00-05 – Personal or Private Interest—Local Official Contracts with his Local Government: The State Code of Conduct applies to all local government employees and officials unless the local government adopted its own Code which must be as stringent as the State Code. 68 Del. Laws, c. 433 § 1. Here, the local government had not adopted its own Code. If an employee or official has a private enterprise which does business with their government entity, they must file a full disclosure with the Commission. 29 Del. C. § 5806(d). "Full disclosure" requires sufficient information for the Commission to decide if there is a conflict of interest. *Commission Op. No. 98-11.* Such disclosures are a condition of commencing and continuing employment. 29 Del. C. § 5806(d). The local official filed a disclosure of his private business dealings with his local government. Specifically, the town entered two contracts with his private company.

Absent other conflicts, local officials may contract with their government. However, if the contract is: (1) less than $2,000, it requires arms' length negotiations; and (2) if greater than $2,000, it requires public notice and bidding. 29 Del. C. § 5805(c). Here, the official contracted with the town in two emergency situations when other contractors were not available or the cost was too high because of the distance they would have to travel to do the work. The contracts were for less than $2,000, so public notice and bidding was not required, but arms' length negotiations were required. "Arms' length negotiations" means that unrelated parties negotiate the contracts, each acting in his or her own self-interest, which forms the basis for a fair market

value determination. *Commission Op. Nos. 98-11, 98-23 & 97-17.* Delaware Courts, in ruling on arms' length negotiations, have noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id*. (*citing Oberly v. Kirby*, Del. Super., 92 A.2d 445 (1991)).

The first contract was to repair a main sewer line that was destroyed by the use of heavy equipment because the sewer line was not properly marked. The town employees could not handle the repair and the town contacted the official's firm because it had the expertise and could quickly respond to eliminate the possibility of a hazardous spill. It was our understanding that when a sewer line breaks, the Department of Natural Resources and Environmental Control (DNREC) requires immediate repair, or it could impose a fine of $10,000 per day on the town. Aside from the official's firm, the town's representative told the Commission that the nearest firm that did the work was in Dover and it would charge not only for the repair, but also for travel time to and from the site. The local official's firm did not charge the town for travel time to and from the site. Thus, the price paid, $698, was less than could be obtained in an alternative transaction.

The second contract was to repair an underground water main. The main was too deep for town employees to repair. As there was a construction firm in town working on another site, the town's representative first contacted that firm for a quote. It said repairs would cost between $1500 and $2000 as it did not have workers on the site who could do the work and would have to bring in them in. The local official's firm made the repair for $450. Thus, his price was less than could have been obtained in an alternative transaction.

Aside from contracting at a lower price, the official did not: (a) violate 29 Del. C. §5805(a)(1) which restricts officials from reviewing or disposing of matters where there is a personal or private interest, because in his official capacity he was not involved in the town's decision of which firm to use; (b) violate Del. C. § 5805(b)(1) which restricts officials from representing or assisting a private enterprise before their own agency because the contract was not with the agency by which he was employed, but with another town agency; (c) violate 29 Del. C. § 5806(e) which prohibits officials from using public office for unwarranted privileges, private advantage or gain because he charged only the costs of repair which was not only less than another firm would have charged, but resulted in no profit for his firm. Based on those facts, we found no violation.

00-04 – Personal or Private Interest--Board Member Cannot Hear Cases Presented by His Law Firm: The Chair of a State Board which regulated a certain industry sought advice on restrictions to participating in matters related to an industry member when the industry member was also a client of his law firm and was represented by his partners in the law firm on several matters, as described below. Based on the following law and facts, the Commission held that he should not, as an appointee to the Board, be involved in matters regarding this company while it is a client of his law firm.

I. Background to the Decision

Our jurisdiction is limited to interpreting the State Code of Conduct, and does not include authority to interpret the Lawyers' Rules on Professional Conduct. *Commission Op. 94-01.* Therefore, we did not decide what restrictions may be imposed under those rules of conduct. Moreover, Delaware Courts have held that where there is a possible conflict under the Lawyers' Rules of Professional Conduct, and a possible conflict arising from an individual's duty as a

public officer, the ruling would be based on the duties owed by public officers. *In re Ridgely*, Del. Supr., 106 A.2d 527, 530-31 (1954). *Ridgely* was decided before the Code of Conduct was enacted; thus, it interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. The court said the reason for not having personal interests which are opposed to public duties is because "no man can serve two masters," and that in choosing between the State and the outside employment, "his private interest must yield to the public one." *Id*. at 531. In *Ridgely*, the State officer derived a direct financial benefit from his outside law practice.

Here, the appointee addressed at length the restrictions on participating in decisions when a State official has a financial interest in a private enterprise that would be affected, to a lesser or greater extent than others similarly situated, by the official's action or inaction. *See*, 29 Del. C. § 5805(a)(2). By operation of law, such pecuniary interests tend to impair judgment. *Commission Op. No. 96-61*. However, we did not focus on § 5805(a)(2), because § 5805(a)(1)--the restriction on reviewing or disposing of matters where there is a "personal or private interest" --is not limited to direct pecuniary benefits. *See*, e.g., *Commission Op. Nos. 97-24 and 97-30.* We based those decisions on both common law decisions on conflicts arising from "personal or private interests," and later decisions interpreting the codification of that common law. At common law, Delaware Courts recognized that relationships between a government official and a law firm or other business or social interest could raise issues of conflicts. *Commission Op. Nos. 97-24 and 97-30*. Conflict of interest statutes generally do not abrogate common law conflict of interest principles. *Commission Op. Nos. 97-24 and 97-30* (*citing* 63C Am. Jur. 2d *Public Officers and Employees* § 253 (1997)). Moreover, the common law restriction on participating where there is a personal or private interest was codified at 29 Del. C. § 5805(a)(1).

The common law concern against public officials participating in decisions if they have a "personal or private interest" is the same as arises under the State Code which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." 29 Del. C. § 5805(a)(1). Delaware Courts have twice interpreted 29 Del. C. § 5805(a)(1). *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996), and *Prison Health Services, Inc. v. State of Delaware*, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993). In both cases, Delaware Courts continued to hold that an outside business relationship of an official can raise a "personal or private interest" which tends to impair independent judgment, even where no facts alleged any direct financial benefit to the official.

II. Restriction on Reviewing or Disposing of Matters if There is a Personal or Private Interest

In *Beebe*, a State appointee was one of a five-member committee which had to recommend whether a hospital's application should be approved. The agency made the final decision. The official said he thought he had a conflict, but proceeded to discuss the application. After the discussion, he declared a conflict and did not participate in the vote. It was not alleged that he violated 29 Del. C. § 5805(a)(2) because he or his private employer would experience a financial benefit to a lesser or greater extent than others similarly situated. Rather, it was alleged that the business relationship between the official's private employer and the applicant created a "personal or private interest" which tended to impair his judgment in violation of 29 Del. C. § 5805(a)(1). The Court found that his comments were "neutral and unbiased," but said he should have recused himself from the outset. Similarly, in *Prison Health*,

a State official attended a meeting of his agency's contracting committee which discussed the awarding of a State contract. The official was not on the committee, but he gave it a list of his agency's employees from which to select an agency representative for the committee. Also, he asked several questions. The contract was awarded to a company which employed his wife. It was not argued that as a result of the decision his wife or her employer experienced a benefit or detriment to a greater extent than others of the same class or group, under 29 Del. C. § 5805(a)(2). Rather, it was argued that he had a "personal or private interest" because of his wife's employment. The Court said: "his personal participation was not direct and substantial," but went on to hold that: "Undoubtedly [his] conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders." *Prison Health, supra*.

We apply those decisions to this situation as follows:

Like the *Beebe* official, this official was appointed to a State Board, and therefore, an "honorary State official" under the Code of Conduct. 29 Del. C. § 5805(13). His Board, like the *Beebe* Board, made decisions about applications. Also, as in *Beebe*, his employer had an alliance (attorney-client relationship) with an applicant. However, while the *Beebe* Board only made a recommendation to the State agency, his Board was the final authority on whether applications would be approved. By statute, the applicant must file certain documents for his Board to review. (Citation omitted). Those documents included a statement of its resources and liabilities. (Citation omitted). Moreover, the Board was to have access at all times to the books, records and accounts of the applicant. *Id*. A partner at his law firm provided legal services to the applicant on financial and tax-related matters, business organizational questions, and some commercial transactions. His partner's work would be an underlying basis for the source materials of the applicant's resources and liabilities. Thus, in reviewing the application, his Board would consider the underlying work of his law firm. While this may seem remote, the *Beebe* situation appeared to be more attenuated, as there was no indication that the official's outside employer was involved with the application being considered. The Board addressed complaints against the regulated company by users of the facilities, and could sanction the company. He said that if that situation arose, his law firm would not represent the company, but even if it did, he concluded that the disposition of the matter would not result in a financial benefit or detriment to his firm, "at least not directly." However, that type of relationship is what created the conflict in *Beeb*e--the outside employer was not involved in the proceedings and it was not argued that the official's company was benefitting from the official's participation in the application decision; rather, it was argued that the business relationship, by itself, tended to impair the official's judgment, and resulted in a benefit to a party seeking the decision.

Here, the honorary official said there could be no matter pending before the Board where the disposition would augment or detract from the law firms' compensation, although "it certainly might result in a financial benefit or detriment to the law firms' client" (the applicant). Again, in *Beebe*, no facts indicated that the official's outside employer would directly benefit from the Board's decision; rather, the applicant who had an alliance with the official's outside employer would benefit. Here, also, the appointee's law firm might not directly benefit, but the applicant who had a business alliance with his firm could directly benefit from the Board's decision. Like the official in *Beebe*, his outside employment was his primary source of income; he had a duty to his private employer which had a vested interest in seeing its business alliance be successful. In *Beebe*, that relationship was enough for the Court to conclude that the official should not have participated even to the limited extent of making "neutral and unbiased" comments. Aside from the partner who advised the company on its finances, a commercial transaction involving the applicant's caterer resulted in litigation, and another of his partners represented the

applicant in that matter. That litigation would not be considered by the Board. However, the litigation could impact the assets/liabilities of the applicant, which were considered by the Board. We addressed the concerns that this raised in the latter part of our opinion dealing with appearances of impropriety. Consistent with *Beebe*, we held that it would be improper for him to review or dispose of matters related to the company's annual application for a license, or complaints against the company. As indicated in *Beebe*, he should have recused himself from the outset of such matters even if the Board's ruling was only a recommendation, not a final decision; and he should not have engaged in even neutral or unbiased comments on the matters.

In *Prison Health*, the Court noted that the official's spouse was a low-level employee, and that his participation was not "direct or substantial." The record showed that some of his conduct appeared to be purely ministerial, e.g., providing a list of his agency's employees to the committee making the decision. Here, the official's partners were not employees of the company, but had a significant role in dealing with its finances, liabilities, etc., which impact its applications, a matter for which he normally would be directly and substantially responsible. Moreover, we understood that as Chair, he had been routinely called by companies which his Board regulated to discuss various matters. Thus, in matters affecting the entities over which he made decisions, his participation had been more direct and substantial than occurred in *Prison Health*. Consistent with *Prison Health*, we held that: it would be improper for him to participate in discussions on matters relating to the applicant which was a client of his law firm, even if he was not voting on the matter; and he should attempt to avoid *ex parte* communications with the company. "Persons charged with upholding the integrity of the administrative process must be scrupulous in ensuring that all claimants receive a fair and unadulterated examination of the merits of their individual claims. Any conduct giving the appearance that impropriety is involved therein should be studiously avoided." *Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (noting the importance of avoiding *ex parte* communications). We understand that recently his Board hired an administrator, and the administrator should be able to deal with those types of issues, rather than the company calling him.

III. Appearance of Impropriety

While the restrictions may appear rather stringent, we believe they are consistent with the Court's interpretations of 29 Del. C. § 5805(a)(1). Moreover, as the appointee noted, the Code also requires that he not engage in conduct that may raise suspicion among the public that the public trust is being violated. 29 Del. C. § 5806(a). It also restricted his activities if he had any interest that was in substantial conflict with performing official duties and if outside employment may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; and (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). We have held that actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" or "may result in" conduct that reflects unfavorably or adversely on the public's confidence in its government. *See*, e.g., *Commission Op. No. 92-11*. Thus, it becomes a question of whether there was an appearance of impropriety. He was clearly aware of that issue and believed that acting on matters related to the company when it was a client of his firm may raise an appearance of impropriety. Moreover, he advised us that previously one of his partners represented another company in a personal injury matter. That company, which is also regulated by his State Board, raised a concern about the involvement of his partner in the lawsuit because of his status as Chair of the Board. We know that matter was addressed by the Bar Association's Committee on Professional Ethics. It concluded that under the lawyers'

rules of conduct he should not participate in his official capacity on matters that directly relate to that company and should recuse himself not only from any formal proceeding before, or decisions, of the Board, but his isolation should extend to any informal discussions, contacts or the like.

The significance of that situation was that he was now in a similar position where a partner in his law firm represented another company in a civil matter, when that company was regulated by him in his State capacity. Clearly, under similar circumstances the law firm's client and the Committee on Professional Ethics thought his participation on the Board in matters related to the company, when his firm represented it, "may raise suspicions" of at least an appearance of impropriety. Similarly, we believe that his participation on matters related to this applicant could raise the same suspicions. His firm obviously had an interest in maintaining the company as its client, and in providing it with the legal services on finances, taxes, liability issues, etc., that can have some impact on decisions by his Board. Also, his firm had an interest in the outcome of the litigation referred to above. His law firm's connection to the company, combined with his official responsibilities which could impact the company's application, complaints against it, etc., could raise suspicion that: his judgment may be impaired; he would be in a position to make official decisions outside official channels; or the company may receive preferential treatment in Board decisions because of its status as a private client with his law firm. For example, if he participated in State decisions affecting the company, such as ruling on complaints, it may appear that he would give it a favorable decision because he would not want to sanction his law firm's client, or if he continued taking calls from the company to discuss various matters, it may appear that while officially recusing himself, he was making decisions outside official channels. These are merely examples of how the public may perceive the conduct, and are certainly no indication that he would actually engage in such activities. However, by imposing those restrictions, the possibility of such perceptions is greatly diminished.

IV. Conclusion

Based on the foregoing, he should recuse himself from participating as a Board member in "matters" related to the company as long as it was a client of his firm. "Matters" is broadly defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(6). "Matters" are not limited to just formal proceedings. Thus, as indicated above, he should recuse himself not only in formal proceedings, such as the company's annual application or complaints against it, but refrain from discussing matters related to the company, even if the comments would be neutral and unbiased; delegate discussions of matters pertaining to the company to the Board's administrator; and exercise caution even in purely ministerial matters dealing with the company.

99-51 – Personal or Private Interest – Personal Interest in Private Employment: WAIVER GRANTED. Under the Code of Delaware Regulations (CDR), the Delaware State Secondary Athletic Association (DSSAA) is the Secretary of Education's official designee to implement the Department of Education's (DOE's) rules and regulations on interscholastic athletics, including a student's eligibility to participate in such sports. Disputes over interscholastic athletics rules and regulations are subject to final review by the State Board of Education (the Board). *CDR 72-000-003 (1999), Chapter 3 ¶ 6*. The Board, pursuant to its statutory authority, 14 Del. C. § 122 and the Administrative Procedures Act, established procedures for such proceedings. The procedures included time-lines, such as 20 days to respond to notice of hearings, etc. *CDR 72-000-003 (1999)*.

The New Castle County Technical School District (hereinafter "District") submitted an application to DSSAA's Director, seeking a waiver of DSSAA's eligibility requirements so one of its students could participate in interscholastic athletics. DSSAA twice denied the waiver, and an appeal was filed with the Board. The named parties to the appeal were the student and DSSAA. The District was not a named party. Basketball, one of the sports the student wanted to play, was already underway. If the normal procedural time-line for Board proceedings was adhered to, the final decision would not be obtained until after the season was over. The parties asked the Board to expedite the hearing, and they waived their rights to the timelines established in the Board's procedures.

The Board appointed David Blowman, Executive Assistant to the Secretary of Education, as the hearing officer. After the hearing, he was to decide if a waiver should be granted and issue an order with his findings of facts and ruling, which would be a recommendation to the Board. Ten days before he was appointed as the hearing officer, he applied for a job with the District. Two days before the hearing, he interviewed for the job with the District's Board of Education, its Superintendent, and its Deputy Superintendent. According to Blowman, they did not discuss the pending hearing at the interview. The hearing was held as scheduled and "during the course of the hearing," Blowman "realized for the first time the potential conflict between my role as hearing officer and my application to the school district attended by the student in the appeal..." While recognizing a "potential conflict," he proceeded with the hearing. Immediately afterwards, he spoke with Deputy Attorney General (DAG), Louann Vari, expressing his concern about a possible conflict. At that time, he also said he intended to rule in the student's favor. Within an hour after the hearing, he learned that he did not get the District job. This Commission's office was contacted and it was decided that he would seek an advisory opinion. That same day, he notified the parties of the employment situation; asked if they would object if he continued as the hearing officer; and advised that he was requesting an advisory opinion from this Commission. Subsequently, the parties notified him that they did not object. At the time of the Commission's meeting, January 12, 2000, he had not issued his order to the parties or the Board. He did not believe his job application impaired his neutrality, and did not believe that the denial of the job would impair his judgment. He asked if his conduct violated the Code of Conduct, and if so sought a waiver. The basis for a waiver was that the parties specifically asked the Board for expedited proceedings. The next Board meeting was set for January 20, 1999. If a new hearing officer must be appointed to re-hear the appeal, it could preclude a Board ruling in January. A delay would mean additional time and costs to reargue the appeal, and could negate the decision to expedite the hearing.

I. Applicable Law

The State Code of Conduct restricts State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair their independent judgment in performing official duties. 29 Del. C. § 5805(a). Delaware Courts, in interpreting 29 Del. C. § 5805(a), have held that whether the personal or private interest is sufficient to require a State employee to recuse himself from participating in a matter is an issue of fact. *Prison Health Services, Inc. v. State of Delaware*, Del. Ch., C.A. No. 13,010,V.C. Hartnett, III (June 29, 1993).

A. ISSUE 1: Was Blowman's "interest" sufficient to require him to recuse himself?

The "personal or private interest" was his pending employment in the same District which requested a waiver for its student. He interviewed with the District two days before the hearing. Government decisions are to be based on a "fair and unadulterated examination of the merits" and "any conduct giving the appearance that impropriety is involved therein should be studiously avoided." *See, Kulesza v. Star Services Inc.*, Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (Court expressed concern for any deviation from the administrative process as provided by law or participating in ex parte communications between one party and those charged with reviewing the merits for the State agency). In the specific context of restrictions against public officers or employees participating in decisions when employment is being negotiated, ethics laws have noted that the rationale is to avoid putting the official in a position where his public office could be exploited for private gain; and preferential treatment or an unfair advantage for a prospective employer. *See, e.g.*, Comment, Delaware Lawyers' Rules of Professional Conduct, Rule 1.11(c)(2). There was no Delaware case, interpreting 29 Del. C. § 5805(a)(1), directly on-point where employment was pending. However, there were Delaware cases interpreting that provision where State officials, who participated in administrative proceedings, had an indirect interest as a result of existing outside employment. In both cases, it was held that they should not have participated, even though their participation was limited; they did not vote on the matter; and no facts indicated that they personally benefitted from their limited participation.

In the first case, a State official, Glen Davis, was one of five appointees to a State Council which reviewed applications submitted by hospitals regarding their facilities. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). The Council did not make the final decision, but made recommendations to the State agency on whether applications should be granted. Davis' outside employment was as a Milford Hospital administrator. The named parties to the administrative proceeding were Beebe Medical Center and Nanticoke Hospital. Milford Hospital was not a named party. At the hearing, Davis said he might have a conflict, but reserved declaring a conflict until later. When the applications were discussed, Davis made what the Court called "neutral comments." At the end of the meeting, Davis said he had a conflict, and did not vote. Beebe's application was denied and Nanticoke's was granted. Fourteen days after a final decision was made, Milford and Nanticoke Hospitals announced an alliance. Beebe appealed, alleging that Davis had a personal or private interest which tended to impair his judgment, and should have recused himself under 29 Del. C. §5805(a)(1). Beebe alleged that Davis' conflict, among other things, resulted in an unfair hearing and violated Beebe's due process rights. One fact looked at by the *Beebe* Court was the timing of the hearing and when the discussions regarding an alliance occurred. The Court found that the record did not clearly establish bias because the record was not clear on when the concept of the alliance between the two hospitals was first discussed-before or after the favorable decision.

Here, the "concept of the alliance" (Blowman's employment by the District) was discussed in his interview with the District's Board of Education, its superintendent, and deputy superintendent two days before the hearing. At that time, Blowman knew he would be hearing the case. Here, the District was not a party, just as Milford Hospital was not a party in Beebe. However, the District submitted the application to DSSAA for its student. If the student prevailed, the District would have the benefit of her participation in its interscholastic sports. In *Beebe*, the Court noted that Delaware law holds that bias can be imputed and that since Davis ultimately declared a conflict, the court "would assume" he was biased and therefore had a conflict. It also noted that Davis' comments were "extremely limited and neutral;" he did not vote; and the Council's decision was a recommendation, not the final decision on the

application. While it found that his conduct did not rise to the level of a due process violation, it said that "since Davis admittedly had a conflict he should have recused himself from participation in this matter at the outset." Here, Blowman, during the proceedings, like Davis, thought there might be a conflict. He proceeded to participate. Unlike the *Beebe* situation, where other State officials who were Council members made the decision to recommend approval of the application, Blowman was the sole hearing officer on whether to recommend approval on the eligibility waiver application, and wanted to continue participating. Thus, his participation was not as "limited" or "neutral" as in *Beebe*.

In *Beebe*, no facts indicated that Davis could personally benefit from a favorable decision for Nanticoke. Rather, a favorable decision would benefit Nanticoke, a party to the hearing. Because Davis' company was negotiating with Nanticoke, the indirect implication was that Davis' employer could indirectly benefit, or that a party to the proceedings would receive preferential treatment because of the official's outside employment interest. Similarly, in Blowman's case, a favorable decision for the student would indirectly benefit the District which submitted the application on her behalf, as it would result in her playing sports for the District. Since Blowman's employment was pending at the time of the hearing and when he told the DAG immediately afterwards that he intended to rule for the student, it could appear that a favorable decision for the District's student may be the result of preferential treatment, and/or may result in a personal benefit to Blowman, since at the crucial time he did not know that the District did not select him.

In *Prison Health*, the Court held it was "improper" for a State official, Henry Risley, to be involved in matters related to a contract which was awarded to ARA where his wife was employed. The Court said the record showed that Risley was not a member of the five-member Evaluation Committee that recommended ARA for the contract. It found his activities were limited to:

> "1) providing a list of Bureau of Prisons employees from which Larry Sussman-- the Department's Administrative Services Division employee who oversaw the award of the contract--could select a Bureau of Prisons' representative, and 2) attending and asking three questions (but not voting) at the Department's Executive Committee's meeting that was comprised of the Department's four division chiefs when Sussman presented the selection committee's recommendation to Commissioner Watson, chief of the Department. The Court found no evidence that any of the members of the Evaluation Committee or the Executive Committee were not disinterested or not fully informed."

The Court found "his personal participation was not direct and substantial," but held that: "Undoubtedly Risley's conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders."

Thus, *Beebe* and *Prison Health* narrowly construed the permissible activities under 29 Del. C. § 5805(a)(1). In both cases, although the officials' participation was limited to comments during the proceedings; they did not vote; the decision was made by other officials; and their interest was indirect, the Court still concluded that they should not have participated even to that limited extent. In *Beebe*, the Court said that officials were entitled to a "strong presumption of honesty and integrity." Thus, Blowman was entitled to that "strong presumption." He stated that there was no discussion with the District regarding the case when he interviewed for the job and

that his judgment or neutrality were not impaired. However, as noted in *Beebe*, even neutrality does not preclude the need for the official to recuse himself. Based on *Beebe* and *Prison Health*, we conclude that even though Blowman's interest was indirect, and no facts indicated that he benefitted from the decision or gave preferential treatment, etc., he should have recused himself.

B. ISSUE 2: Did disclosure to the Parties permit Blowman's continued participation, if the parties did not object?

The plain language of the Code of Conduct does not have an exemption that permits a State official to proceed in the face of a conflict, even if the parties agree. This Commission is to be consistent in its opinions. 29 Del. C. § 5809(5). We have held that where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. Commission Op. No. 95-01 (*citing Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)). The only exception permitted by the plain language was if a State official had a statutory responsibility that could not be delegated, then he may proceed if he filed a full disclosure with the Commission explaining why the matter could not be delegated. 29 Del. C. § 5805(a)(3). No facts indicated that Blowman had a statutory responsibility that could not be delegated.

Aside from the plain language, which did not include an exception if the parties agreed, the Delaware Supreme Court addressed a similar situation in *In re: Ridgely*, Del. Supr., 106 A.2d 527 (1954). A State employee, who was an attorney, also held outside employment. Because of a conflict of interest between his State job and his outside employment, he was alleged to have violated: (1) the Canons of Professional Ethics for lawyers; and (2) his duty as a public officer by placing himself in a position where "his personal interests were opposed to his duty to the public." The Court noted that under the canons of ethics for lawyers, "in civil cases he may ordinarily choose between two clients whose interests conflict, with full disclosure when required." However, the Court said that it need not address his conduct under the lawyers' ethics, which would permit him to continue if the parties agreed, because as a public servant "his private interest must yield to the public one." Thus, Delaware Courts have frowned on merely disclosing the conflict to the parties as a remedy when the conflict arose in the context of a public servant's outside employment. *Ridgely* was decided before the Code of Conduct was enacted. Thus, it interpreted the common law restriction on public officials having a "personal interest." Again, the Commission must be consistent in its opinions, and has held that: "The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." *See*, 29 Del. C. § 5805(a)(1). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253* (1997). Thus, the State Code is basically a codification of the common law restrictions. *Commission Op. Nos. 97-24 and 97-30*. Thus, we concluded that merely informing the parties of the conflict, without more, was not a remedy.

C. ISSUE 3: Should a Waiver be Granted?

The statutory remedy available is this Commission's authority to grant a waiver if the literal application of the law is not necessary to achieve the public purpose or there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a).

1. Is the literal application of the law necessary to achieve the public purpose?

The public purpose of the Code of Conduct is so the conduct of officers and employees of the State hold the respect and confidence of the public. 29 Del. C. § 5802(1). Thus, "they must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *Id*. In the specific context of prospective employment, the concern is the official may use his public position to obtain a private benefit; or may give preferential treatment that benefits the prospective employer. The law does not require that these events actually happen. Rather, it imposes on State employees that they not engage in conduct which "tends to impair their judgment"; or may result in impaired judgment or preferential treatment to any person; or which may raise suspicion among the public that the public trust is being violated. *See,* 29 Del. C. § 5805(a)(1); 29 Del. C. § 5806(a) and 29 Del. C. § 5806(b)(1), (2) and (4). Here, as in *Beebe*, participating in the decision "raised suspicion" in the official's own mind that he should not participate. Thus, it appeared that the literal application was necessary to serve the public purpose.

2. Undue Hardship

Regarding any "undue hardship," we have held that "undue" means "more than required" or is "excessive." *See, e.g*., *Commission Op. No. 97-18*. Here, the Board, pursuant to its statutory authority, had established procedural rights for the parties who sought an appeal. The parties specifically waived those rights so the Board could expedite the hearing because the student was in her Senior year and wanted to play basketball. The basketball season was already underway and would end in February or March. The parties wanted the Board's final decision at its meeting on January 20, 2000, so that if an eligibility waiver was granted the student could participate in the last part of the basketball season. If Blowman could not participate by issuing his findings of fact, conclusion of law, etc., the Board could take two possible actions: (1) appoint a new hearing officer to re-hear the case and give the Board a recommendation; or (2) the Board, rather than a hearing officer, could re-hear the case and make a final decision. If option (1) were exercised, the parties would have to re-argue their cases, costing additional time and money, and it was not clear if all of that could occur before January 20. If the Board exercised option (2), it was possible that it would not re-hear the case on January 20, 2000; rather, it would just take that occasion to schedule a hearing before the Board. If no waiver were granted, in effect, we would be negating the Board's decision to let the parties expedite the proceedings. The time-lines established by the Board in its rules and regulations were to insure that the parties know of pending actions; have an opportunity to be heard; and know there was a foreseeable finality. The decision to waive the Board's time-lines was so the "opportunity to be heard" could occur at a meaningful time. If a waiver was not granted, the "meaningful time" would have passed. Further, as we must base our opinions "on the particular facts" we noted that the parties waived their rights to the Board's time-lines, and neither party objected to Blowman continuing. Moreover, when we grant a waiver, the proceedings become a matter of public record, so that the public understands the basis for letting the official proceed in the face of a conflict. Based on all those facts, we concluded that to, in effect, negate the Board's statutory authority to make rules and regulations regarding its hearings, including the authority to let the parties expedite the proceedings would be "excessive." Accordingly, we granted a waiver based on an undue hardship.

99-37 – Having an Occupation Regulated by the State: While attending an ethics class, a State employee became aware that the Code of Conduct requires State employees who have a financial interest in a private enterprise which is regulated by any State agency to file a full

disclosure with the Commission. 29 Del. C. § 5806(d). "Full disclosure" requires sufficient information for the Commission to decide if a conflict of interest exists. *Commission Op. No. 98-23*. As she had a private business which was regulated by the State, she submitted a disclosure to the Commission. Based on the following law and facts, her submission constituted full disclosure and there was no conflict of interest.

(A) Applicable Law

State employees may not: (1) review or dispose of State matters if they have a personal or private interest which would tend to impair judgment. 29 Del. C. § 5805(a); (2) represent or otherwise assist a private enterprise before their own agency. 29 Del. C. § 5805(b); (3) contract with the State unless public notice and bidding requirements, or arms' length negotiations requirements, are met. 29 Del. C. § 5805(c); (4) use public office to secure business for their private enterprise. 29 Del. C. § 5806(f); (5) improperly use or disclose confidential information. 29 Del. C. § 5806(f) and (g); (7) hold other employment if it may result in impaired judgment in performing official duties; preferential treatment to any person; official decisions outside official channels; or any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

(B) Application of Facts to Law

In addition to her State employment, she had a private business that was regulated by the Department of Administrative Services, Division of Professional Regulations. *See*, Title 24, Delaware Code for various businesses and occupations regulated by the State. Her private business was in no manner similar to her State position, and her private business was not regulated by her own agency, nor did her private business contract with any State agency. She performed the regulated occupation on her own time; not State time. Her disclosure worksheet indicated that she: did not review or dispose of matters regarding her private business; had no reason to believe her private enterprise would be involved in decisions she made in her official capacity; had not represented or assisted the private enterprise before her own agency; had no contracts with the State; and used no confidential information obtained as a result of her State position to benefit her private business.

As she had no decision making authority on the regulated occupation in her State job, it did not appear that her judgment would be impaired. As her private enterprise did not do business with the State, but was merely subject to licensing regulation by a State board, which was under a totally separate State agency, it did not appear that she would be in a position to obtain any preferential treatment for her company. Nor did it appear that she would be in a position to make official decisions outside official channels that would benefit her private enterprise.

Based on the above, her submission constituted "full disclosure" and there was no conflict of interest.

99-34 – Working for a State Contractor: A State employee was hired by a private enterprise which contracted with his State agency. He did not work on the Delaware contract, but on a contract the company had with another State. The Commission found no violation as long as he did not participate in his official capacity on matters related to the company. As he raised a number of issues regarding merit rules, collective bargaining, etc., the Commission addressed the limits of its jurisdiction.

(A) Applicable Law

Under the State Code of Conduct, State employees:

(1) Who have a financial interest in a private enterprise which does business with, or is regulated by the State, must file a full disclosure with the Commission. 29 Del. C. § 5806(d). The filing of such statement is a condition of commencing and continuing State employment. *Id*.

(2) May not review or dispose of matters if they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 Del. C. § 5805(a)(1);

(3) May not represent or assist a private enterprise on matters before the agency by which they are employed. 29 Del. C. § 5805(b)(2);

(4) May not have any interest in any private enterprise or incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No state employee shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

(a) Impaired independent judgment in exercising official duties;
(b) An undertaking to give preferential treatment to any person;
(c) Making governmental decisions outside official channels; or
(d) Any adverse effect on the confidence of the public in the integrity of the government of the State. 29 Del. C. § 5806(b).

(5) May not engage in a course of conduct which may raise suspicion among the public that they are violating the public trust and which will not reflect favorably upon the State and its government. 29 Del. C. § 5806(a).

(B) Application of Law to Facts

(1) Limits of Jurisdiction

The Commission's jurisdiction is limited to interpreting the Code of Conduct. *Commission Op. No. 95-20*. Thus, as to some issues discussed at the Commission's meeting, to the extent they required interpreting other laws, we had no authority to rule on such matters. For example, the State employee discussed a grievance filed over an agency policy on other employment. He said the matter was "settled" by an agreement that resulted in a different policy. Under separate law, his Department could "develop and implement rules, regulations, standards and policies governing the internal operation and administration of the Department and provision of services." (citation omitted). Delaware Courts have upheld an agency's policy that was more stringent than a statute when the policy was justified because of the potential for favoritism, undue influence and conflicts of interest if a State official participated in a contract with his agency. *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). However, the Commission had no authority to interpret either: (1) the scope of his Department's legal authority to issue policies; or (2) any agency policy that it issued pursuant to such laws. Similarly, to the extent that other employment is governed by other rules, i.e., Merit Rule 18.0200, or any collective bargaining agreement, the Commission has no authority to interpret the Merit Rules or contract terms. *Commission Op. Nos. 97-17; 95-05*. He also said other employees in his

agency held other employment with contractors. Our decisions must be based on "particular facts." 29 Del. C. § 5807(a). As he did not give any "particular facts" regarding their situations, this opinion interpreted only the State Code of Conduct as it applied to his particular situation. His particular situation was that the private enterprise contracted with his division. He did not participate in awarding the contract; did not administer the contract; and did not supervise the person who did administer it. However, his position exposed him to what he referred to as "indirect" decision making on the company's contract obligations. Those activities are discussed in more detail below.

The employee wanted to contract with the company to work on its contract requirements for a program in Florida. He gained his experience in the work the company wanted him to do, not in his present position, but in a position he held a dozen years ago. He would perform the work during hours when he was not working for the State, e.g., annual leave.

First, as to the requirement for full disclosure when there is a financial interest in a private enterprise which does business with the State, we have held that "full disclosure" requires sufficient information for the Commission to decide if the conduct complied with the Code. *Commission Op. No. 97-17*. We found that his written submission and statements at the Commission's meeting, with the relevant information identified in this opinion, constituted the required disclosure. Second, as to representing or assisting a private enterprise on matters before the agency which employed him, 29 Del. C. § 5805(b)(2), he would not represent or assist the company before his agency because he would not work with, or for, the company on any contract they had with his agency. Rather, he would represent and assist it on its Florida contract. Thus, we found no violation of that provision.

However, under two provisions, we found that to comply with the Code of Conduct, he should recuse himself from participating in matters regarding the company for the reasons stated below.

The first provision is the one prohibiting State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair independent judgment in performing State duties. 29 Del. C. § 5805(a)(1). Delaware Courts have held that the provision requires State officials to recuse themselves from participating in State decisions when they have the requisite personal or private interest. *Beebe Medical Center v. Certificate of Need Appeals* Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd,* Del. Supr., No. 304, Veasey, C. J. (January 29, 1996); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). In *Beebe*, the Court held that while the State official did not vote on the decision and his only remarks were neutral, he should not have participated even to that extent because the private enterprise for which he worked had a business agreement with the company over which the State Board on which he served was making a decision. In *Prison Health*, the State official was not on the contract selection committee and did not vote on the contract. However, he went to a meeting and asked three questions when a Departmental employee made a recommendation to some committee members and the head of the Department. The Court said that his participation "was inappropriate and he should have abstained from even this limited role in the procurement process because his wife was an employee (albeit a fairly low-level employee) of one of the bidders." *Id.* Here, the personal and private interest which he had in the company is more direct than in *Prison Health*. He privately contracted with the company. Further, he was involved in his agency's committee which made contract decisions. Although he had no vote, he said the committee may ask him to give a "thumbs up" or "thumbs down" on a program. For that and

other reasons discussed below, and based on the *Beebe* and *Prison Health* rulings, we found that he should not participate in matters regarding the company because of his private contract.

The other provision, 29 Del. C. § 5806(b), restricts other employment if it may result in:

(A) Impaired independence of judgment in performing official duties-- This incorporates the same concerns raised under 29 Del. C. § 5805(a), but sets it explicitly in the context of having other employment. Thus, we discussed his dealings with the company under this provision. As contract administrator, a number of years ago, he participated in awarding the company a contract. After three years, he transferred the oversight responsibility to a State employee in another county, whom he did not supervise. Subsequently, the contract was not renewed. Thus, as to official duties regarding that contract, he had not made any decisions for a number of years. The Commission has previously held that the passage of time can be given "some weight" in deciding if an activity violates the Code. *Commission Op. No. 99-16* (*citing CACI, Inc.-Federal v. United States*, Fed. Cir., F.2d 1567 (1983)). Here, a number of years passed between his dealings with the company on its Delaware contract and the company's subsequent offer to contract with him on its Florida program. The passage of time aided in reducing the appearance that his personal interest affected his State decisions regarding that contract, as nothing indicated that he anticipated privately contracting with the company at the time of his contract decisions. The fact that the contract was not renewed also served to diminish the appearance that he may have used public office for private gain or undue influence. The non-renewal also meant that in performing official duties for his division, no more decisions would be made on that matter. The company's contract with his division was not the type of work the company wanted him to perform under the Florida contract. He had no direct involvement with the existing contract, which was managed by a State employee in another county, whom he did not supervise.

However, he said he had some indirect involvement on that matter. In his official capacity, he gave his opinion on which program was best suited for certain clients, and one company to which he could refer a client would be the company he was contracting with. That would only occur about once in every 40 situations. He said that he constantly reviewed case files and "makes a lot of decisions" and can "redirect them" [other State employees] if their plan was "out of whack." He also said those employees were "constantly giving feedback to their regional director, supervisors, and contract administrators" on the contracts. However, his immediate supervisors had approved the forwarding of questions on the company's program to the administrator who handled the company's Delaware contract. That would remove him from any indirect involvement with the contract in that respect. He also said he was a consultant to the committee which authorized all contracted spending. He was not a voting member. He said he would not participate in any decision regarding spending State funds on the company. However, he said as a consultant to the committee, "they might look at me for thumbs up or thumbs down," or might ask him to comment on a case. Thus, he had significant indirect decision making authority as a consultant to the committee.

The statute does not limit its application to direct and final decision making. *Beebe; Prison Health*; and *Commission Op. Nos. 98-12 and 96-78*. Rather, if a State employee had significant indirect decision making authority where they have a personal or private interest which tends to impair judgment, there may be a conflict. Here, he expressed his personal and financial interest in the company by saying that the compensation from it was "very lucrative" and that "just to go down there for 2 or 3 days of training, which is all they're

asking for this time, I can make a payment, a monthly payment to [referring to college tuition for his child]. That's really what this is about." While the Commission sympathized with his situation, the purpose of not participating in matters where there is a personal or private interest, is to insure that "the line between public duty and private interest [is not] blurred." *In re Ridgely*, Del. Supr., 106 A.2d 527 (1954) (holding that State employee's private interest in other employment must yield to his public duties). Accordingly, we held that also under this provision, it was improper for him to consult with the committee or his agency on matters related to the company.

(B) Preferential Treatment to Any Person--The passage of time since his involvement with the company's contract with his division, and the fact that it was not renewed aided in diminishing the possibility that he gave preferential treatment to the company regarding that contract. Regarding the new contract, he said that because it was a cost-reimbursable contract, rather than a *per diem* contract, that it "is not as easy to influence." He said that was because a cost reimbursable contract was "a fully funded contract where negotiations take place at the award of the initial contract and then yearly thereafter for the budget they will have for that year." While it may not be as easy to influence, decisions still would be made regarding the initial award, contract renewals, new contracts, contract compliance, etc. The State employees referred to above work hand-in-hand with contract administrators, such as himself. Further, the committee could look to him for a "thumbs up" or "thumbs down" on a program. Thus, if he consulted with the State employees, the committee members, etc., on matters regarding the company, it not only could place him in a situation where his decision making ability might be questioned, but also could raise the specter that because of his personal, financial interest in the company, he would be in a position to show preferential treatment to it in giving a "thumbs up" to its program. However, as the calls regarding the existing contract would be delegated to another individual who worked in a different county and was not supervised by him, and if he did not consult with the contract committee members or his agency on company issues, those restrictions would serve to diminish the possibility that he could give the company preferential treatment.

(C) Official Decisions Outside Official Channels--With the above restrictions in place, no facts indicated that he would be in a position to make official decisions outside official channels regarding the company.

(D) Any adverse effect on the public's confidence in the integrity of the government--We emphasized that 29 Del. C. § 5806(a) and § 5806(b) do not require an actual violation, only that the conduct "may result in" or "raise suspicion" that a State employee was violating the Code. Actual misconduct is not required; only a showing that a course of conduct "may result in" or could "raise suspicion" that the conduct violates Code provisions. *Commission Op. No. 92-11.* Similarly, the provision does not require actual misconduct; only an "adverse effect" on the public's confidence in its government.

At the Commission's meeting, in discussing how the public would perceive his employment with the company which contracted with his agency, he first noted that there were "a lot of people who work for both the department and the contractors that we have." As previously noted, we did not have the "particular facts" required to rule on those situations. 29 Del. C. § 5807(a). He also said that if he made a competitive salary with his peers in other States, he would not have to do this. We had no authority to engage in State salary matters. However, we did note that the General Assembly, perhaps in recognition that State employees may want, or need, to supplement their State salary, has not placed a complete ban on other employment with private enterprises which contract with the State as

some government entities have done. See, e.g., *Refine Construction Company, Inc. v. United States*, U.S. Claims Ct., 12 Cl. Ct. 56 (1987) (federal agency issued order prohibiting its employees from performing service for a contractor or other person who contracted or did business with the agency). In Delaware, the General Assembly directed that "citizens be encouraged to assume public office and employment, and therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3). That concern was balanced against the General Assembly's directive that State officers and employees are to "avoid conduct which is in violation of their public trust or which creates a *justifiable impression* among the public that such trust is being violated." 29 Del. C. § 5802(a); 29 Del. C. § 5806(a) (emphasis added). We emphasized that language because he said that in his agency "nobody questioned anything that I would do with these people that would be out of line--that would violate any integrity." Courts have held that even where an agency acquiesces in the other employment, an employee's superior may not appreciate the nature of the conflict, and employees cannot claim an exemption from a conflict of interest simply because his superiors did not discern the conflict. *Refine* at 63. In *Refine*, the Court discussed the provision which prohibited any activity "affecting adversely the confidence of the public in the integrity of the Government," which is like Delaware's. *Id*. at 61. It said that "even perceived transgressions...can and do have an effect on the trust that the American people put into their government." *Id*. Thus, to ascertain if conduct would have an "adverse effect" we looked at the totality of the circumstances from the point of view of the public.

If he participated in decisions regarding the company when he had a personal and "lucrative" financial interest, the public's confidence in its government could be adversely affected because the "perceived transgression" could be that: his judgment could be impaired; he could provide preferential treatment to the company; or he was using public office for private gain, which is prohibited by 29 Del. C. § 5806(e). Accordingly, to interpret the provision without "unduly circumscribing" his activities and at the same time insure that the public trust was not perceived as being violated, he must recuse himself from decisions pertaining to the company.

(C) Conclusion

Based on the above law and facts, we concluded that his employment with the company which contracted with his division would not violate the Code of Conduct as long as he recused himself from participating in matters before his agency involving the company.

99-24 – Personal or Private Interest--Wife's Employment by Subsidiary when Another Subsidiary was Regulated by Agency Hiring Her Husband: A State agency asked if there would be a conflict of interest if it hired an individual when his wife was employed by a wholly-owned subsidiary of a corporation which had another wholly-owned subsidiary regulated by the State agency. The Commission concluded that based on existing facts, if the individual were hired it would not violate the Code of Conduct; but he should be alert for possible conflicts.

For nearly a year, the agency had tried to hire someone for a position as a regulator of certain industries. Filling the position was a problem because of the tight market arising from industry restructuring laws, which resulted in, among other things, more private industries which were regulated coming into the market and hiring people with backgrounds which the agency also needed. Also, according to the agency, pay differences between government and private enterprises limited the field of candidates. The agency identified the best qualified candidate,

who had many years of experience in the industry in both the public and private sectors. At the agency, he would deal with regulating suppliers. He would work to resolve regulatory matters. If he could not, the matter would be brought before the agency's quasi-judicial board. He would be involved in those proceedings and the board would rely on him in making decisions. Among the regulated entities was a wholly-owned subsidiary for a parent company. The candidate's wife worked for another wholly-owned subsidiary of the same company. She did not work for the regulated subsidiary or the parent company, and the agency did not regulate the subsidiary where she was employed. She held stock in the parent company.

State employees are restricted from reviewing or disposing of matters where they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 Del. C. § 5805(a). Two interests which, by operation of law, tend to impair judgment are where: (1) any action or inaction on the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or (2) the person or close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 Del. C. § 5805(a)(2). The Code also restricts State employees from engaging in conduct which may raise suspicion that the State employee is violating the public trust. 29 Del. C. § 5806(a). Additionally, it restricts State employees from improperly using or disclosing confidential information. 29 Del. C. § 5806(f) and (g).

While the Code of Conduct requires recusal if a State employee or a close relative has a financial interest which would benefit to a greater extent than others of the same class or group of persons, the agency's statute provided, in essence, that no one was eligible to hold the job if they directly or indirectly controlled any stock of an entity regulated by the agency. Based on that provision, the spouse's stock would be sold if the individual were hired. While the Commission had no authority to interpret another agency's statute, the effect of her disposing of her stock means that, under the Code of Conduct, his "action or inaction" on matters related to the regulated subsidiary would not affect that financial interest.

Having disposed of the possibility of a conflict arising from the financial holdings, the Commission turned to whether the marital relationship was sufficient to create an interest which tended to impair independent judgment. The clear language of the statute requires more than just a relationship between the State employee and the close relative. It requires action or inaction by the State employee resulting in the close relative benefitting to a lesser or greater extent than other persons in the same group or class. 29 Del. C. § 5805(a)(2)(a). The restriction insures that close relatives do not capitalize on decisions made by their relative, and insures that the State employee is unbiased in making decisions. The Delaware Superior Court has held that marital status, by itself, is not sufficient to create bias such that a State official on a regulatory board must recuse herself from a State decision, not impacting on her spouse, without facts to substantiate bias. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). In *Camas*, the Court noted that the State official had a statutory obligation not to discuss cases with any person or party and no facts suggested that had occurred. Similarly, the Code of Conduct prohibits improper disclosure of confidential information. Thus, to the extent his agency work would entail confidential information, the individual was advised not to discuss such matters with his spouse.

The Code also restricts conduct if it may raise suspicion that the public trust is being violated. 29 Del. C. § 5806(a). This is basically an appearance of impropriety restriction.

However, Delaware Courts have held that "an unarticulated concern of an appearance of impropriety" is insufficient to establish a conflict of interest. *Seth v. State*, Del. Supr., 592 A.2d 436 (1991). First, under the Code of Conduct, State officials are entitled to a presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996). Second, the individual's spouse was employed by a totally different subsidiary which was not regulated by the agency. Moreover, her subsidiary was not co-located with the regulated subsidiary, which limited the possibility that she would hear any company employees discuss regulatory issues that may come before her husband's agency. Additionally, her employment was not related to the regulated matters: her subsidiary offered totally different services; she did not evaluate customer needs for the regulated services; she did not solicit the work or make decisions on company proposals relative to the regulated matters. Rather, she coordinated the schedules of sales representatives and marketers, and if a customer selected her subsidiary to perform the work, she coordinated that schedule. Nothing in those facts indicated that she or her employer would benefit from her husband's regulatory decisions on a totally different wholly-owned subsidiary.

The agency said that the regulated industry had its finances audited so that there was no cost-shifting to other companies, including subsidiaries. However, an independent auditor, not the individual who was offered the State job, or the agency, audited the company and its wholly-owned subsidiaries. Thus, the employee would not be in a position to confer favors on the company regarding those matters.

The Commission must base its decisions on a "particular fact" situation. 29 Del. C. § 5807(c). Accordingly, it did not speculate on what issues may later arise if the individual accepted the position. Thus, because of the martial relationship, he should exercise caution in his activities, being sensitive to the Code restrictions. Additionally, he could seek guidance through the Commission's prior decisions on close relatives. For example, as her company might have functions to which spouses were invited, he was advised to review the *Op. No. 97-11,* dealing with attendance by State officials at corporate functions of a regulated entity when matters are pending before the agency.

99-18 – Personal or Private Interest—Soliciting for Private Enterprise: A State employee was a member of a private organization which asked her to solicit funding from private companies to pay for the organization's annual conference. She was worried that such soliciting might violate the Code; declined to solicit for the organization; and sought an advisory opinion for future guidance. Based on the following facts and law, the Commission held that it would be improper for her to solicit for the private organization during State hours, using State resources.

Her State job dealt with issues that also concerned the private organization. As part of the organization's activities, it hosted conferences on those issues. Persons invited to the conference included government administrators, policy makers, teachers and people in direct service for those issues. Because of the common denominator between her State job and the interests of the organization, she had joined it. The organization to which she belonged was not the only private enterprise which provided services, such as conferences on the issues. She had attended its conferences in the past, and this year was asked to serve on its conference planning committee. Planning committee members were to solicit funds to help pay for the conference. Funding opportunities ranged from an ad in the conference program to sponsoring the awards dinner. The organization asked her to solicit a specific company, and to identify herself as associated with the private organization, not as a State employee.

To the extent that she wanted to act for the private enterprise on her own time as a member of that private organization, the Commission has ruled that where an individual was associated with an organization and the activities engaged in were not related to his public duties, it had no jurisdiction over the matter because the statute refers repeatedly to "public trust," "public interest," "official duties," "government decisions," "official capacity," etc. *Commission Op. No. 91-20*. However, acting for the private enterprise during State hours or using State resources raised a different issue. State employees are restricted from incurring any obligation of any nature which is in substantial conflict with the proper performance of State duties in the public interest, 29 Del. C. § 5806(b); using public office to obtain unwarranted privileges, private advancement or gain, 29 Del. C. § 5806(e); or engaging in conduct which may raise suspicion among the public that the public trust is being violated, 29 Del. C. § 5806(a).

While the private enterprise had a conference which some government employees attended, nothing indicated that the State had sanctioned the private enterprise's effort to raise money for its private venture. Thus, she had no State obligation to solicit for the private enterprise. Therefore, to use State time or resources (e.g., telephone) to solicit for a private organization in which she had a personal interest as a member could raise the public's suspicion that she was using public office to secure unwarranted privileges and that she had placed her personal interests in the private enterprise before her State duties. Further, if she solicited for one private company which offered the service, then its competitors, and the public, could view her solicitation during State hours as preferential treatment to the private enterprise.

99-04 – Personal or Private Interest—Private Enterprise as Sponsor of State/Federal Event: A State agency asked if an alcoholic beverage company could sponsor a Division's festival that was to be open to the public. The festival would promote recreational safety matters, including restrictions on drinking while recreating. The company would advertise the event and provide things such as safety tip cards and door prizes.

The only Code provision that may apply is the one restricting State employees or officials from accepting anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). Here, the things of monetary value would be the costs paid by the company for advertising and door prizes. The agency did not have the funding to launch the type of advertising campaign which the company could launch. It believed if the company advertised the festival, the publicity would draw larger public attendance, resulting in wider exposure to recreational safety issues. Alcoholic beverages would not be served.

(A) Impaired Independence of Judgment - The division was, among other things, responsible for enforcing certain recreation related laws, regulations and rules regarding permits, licenses, and other program requirements for the agency. However, the division had no decision making authority or any dealings with the company. Thus, it did not appear that anyone in the division would have their judgment impaired as they made no decisions regarding the company.

(B) Official Decisions Outside Official Channels - As the division had no decision making authority over the company, it did not appear that anyone in the division would be in a position to make any official decisions outside official channels relative to the company.

(C) Preferential Treatment to Any Person - No other company had offered to sponsor the event. The agency said that if another company wanted to sponsor the event, the agency would look at their package and see how their offer would benefit the State. Thus, each offer would be treated the same as the offer from this company.

(D) Any Adverse Effect on the Public's Confidence in the Integrity of its Government - In deciding this issue, the Commission looked at the totality of the circumstances. Commission Op. No. 96-78. First, it noted that no agency employee had decision making authority over the company; and no facts indicated that acceptance would result in preferential treatment or official decisions outside official channels. Further, no State employee would personally benefit from the sponsorship because although the company said it would offer door prizes, the agency said that division employees would not be eligible for the prizes.

Based on those facts, a majority of the Commission's quorum found no violation of the restrictions on accepting anything of monetary value if it may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; or (3) preferential treatment to any person. However, those members concluded that acceptance would have an adverse effect on the public's confidence in the integrity of its government, in violation of 29 Del. C. § 5806(b)(4). They concluded that it may result in an adverse effect on the public's confidence in the integrity of its government if an agency, which is responsible for enforcing certain recreational laws, accepted an alcoholic beverage company's offer to: advertise a State event; distribute literature on safety with its logo; and offer door prizes.

Dissent: I respectfully dissent from the conclusion that 29 Del. C. § 5806(b)(4) would be violated. I agree that it might constitute poor judgment to have an alcoholic beverage company sponsor a safety program, but in my opinion, the State Public Integrity Commission does not have jurisdiction to make that determination. Title 29 Del. C. § 5806(b)(4) is limited to acts which adversely affect "the public's confidence in the integrity of its government." (Emphasis added). The part of the decision from which I dissent does not deal with integrity or anything else over which the Commission has jurisdiction. *See*, *Commission Op. No. 93-17*; *Seth v. State of Delaware*, Del. Supr., 592 A.2d 436, 442-443(1991).

99-02 – Personal or Private Interest—State Employee Conducting State Training: A State employee asked if he could train State employees on a subject which was part of his expertise in his other employment. In his State job he was a trainer, but not in the area of his other employment. His other employment required that he be licensed. Besides having private clients, he taught at a school, training students in the subject.

He wanted to give the training during State hours. It was expected that he would be paid his State salary while giving the training. He and his division director envisioned that the training sessions would be set-up through the State Personnel Training Unit and would be open to any State employee who desired to sign up.

The Code of Conduct restricts State employees from:

(A) reviewing or disposing of matters where they have a personal or private interest which tends to impair independent judgment. 29 Del. C. § 5805(a);

(B) representing or assisting a private enterprise on matters before the agency which employs the individual. 29 Del. C. § 5805(b);
(C) having other employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b); and
(D) using public office to obtain a personal gain. 29 Del. C. § 5806(e).

Whether he could be paid his State salary to train on matters which were part of his other employment was not an issue within the Commission's jurisdiction, as State pay issues are governed by other statutes and regulations. Similarly, it could not decide which agency would be responsible for paying, if such payment were permitted. Thus, it addressed only those issues within the purview of the Code of Conduct.

The decision of whether the State Personnel Unit could use his expertise in its training program would be made by the State Personnel Office. Thus, he would not review or dispose of the matter in his official capacity, nor would he represent or assist his private enterprise before his own agency. Here, he wanted to tell the State trainees that he was licensed, so they would know of his credentials. If he informed them that his outside business provided the service, it might create the perception that he was trying to create business for his private enterprise. Thus, it could appear that he was using public office to obtain a personal financial benefit. Such appearance could have an adverse effect on the public's confidence in the integrity of its government. Similarly, the same perception, that he was using public office to obtain a financial benefit for the school, could arise if he informed them that he provided training at the school. Thus, the Commission held that he may say that he was licensed, but he may not take State attendees as his private clients. The Commission understood that it would be unlikely because he was not seeking new clients and his primary focus was to provide training at the school. Also, he could not refer to the school in his presentation to State employees.

98-34 – Personal or Private Interest—Board Member's Business Regulated by Board: The Commission was asked if licensed professionals who are appointed to the boards which regulate their profession or occupation (Title 23 or Title 24 Boards) are required to file a full disclosure with the Commission. The Commission concluded that assuming the language may require them to file, it would grant a partial waiver for the following reasons.

Under the Code of Conduct, any honorary State official who has a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, shall file with the Commission a written statement fully disclosing the same. 29 Del. C. § 5806(d). The disclosure is confidential and the Commission shall not release the information, except as may be necessary for enforcing the Code of Conduct. *Id.*

First, no Title 23 or 24 board appointees did business with the State agency on which they serve as an appointee. If they did, it would pose a different factual situation and may require a different result. Thus, no waiver was granted as to that portion of the statute. If such situation should arise, they could request an opinion based on the specific facts. The remaining portion of the statute required appointees, who were regulated by the Board to which they were appointed, to file a full disclosure with the Commission if they had a financial interest in a private enterprise regulated by their Board. It was indicated that the licensing boards' jurisdiction was limited to its own licensees as individuals and did not extend to private enterprises in which licensees may have a financial interest. While the Commission understood that to mean that

the individual, not the business, was “subject to the regulatory jurisdiction” of the licensing boards, it noted that for some professional enterprises to operate, they must have a licensed professional. As a consequence, the operation of a business may depend on the licensee maintaining that license. For example, a barber who was regulated by a licensing board may have a financial interest in the barber shop where he or she is licensed to practice the profession, and without a licensed professional that shop may not be able to operate.

The Code defines “financial interest” as: (1) having a legal or equitable ownership interest in a private enterprise; (2) being compensated more than $5,000 per year as an employee, officer, etc., of the private enterprise; or (3) having a creditor relationship with the private enterprise. 29 Del. C. § 5804(8). Thus, if the licensed professional was compensated at more than $5,000 per year, or had the requisite ownership or creditor status, the license and the private enterprise were directly connected. The Commission did not review the particular status of all Title 23 & 24 appointees, which was estimated at more than 100. Rather, it assumed they may have a financial interest in a private enterprise.

With that assumption, the issue was whether they must file a full disclosure with the Commission. The Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the State official or agency. 29 Del. C. § 5807(a).

The public purpose of disclosing financial interests is to insure that government officials refrain from acting in their official capacity on matters where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independent judgment, and avoid the appearance of impropriety. 29 Del. C. § 5811(2). We understand that the following actions are taken to insure that such concerns are avoided:

(1) Title 23 and Title 24 statutes require that a certain number of appointees be members of the profession or occupation which is being regulated, and the statute is a public record;
(2) the identity of all licensed professionals is publicly available from the Division of Professional Regulation;
(3) appointees recuse themselves from participating if there is a potential conflict of interest;
(4) the recusal is recorded in minutes of the meetings;
(5) questionable issues are referred to the deputy attorney general assigned as counsel to each board; and
(6) the identity of board members as either public or professional members is recorded at each meeting.

Thus, the information that is critical to the public, the knowledge of the appointees’ direct or indirect financial interest, was a matter of public record.

Under the Code, even if the appointees filed a disclosure with the Commission of their financial interest in a private enterprise regulated by their Board, it would generally be confidential. *See,* 29 Del. C. § 5806(d). As handled, the information in which the public was interested was publicly available, and the professional or occupational interest was identified at each meeting. Accordingly, the purpose of the statute was served through the information which was publicly available. Therefore, a literal reading which would require confidential filings was not necessary to achieve that public purpose.

98-02 – Personal or Private Interest—Negotiating with State Agency When Son Had Contracted with the Agency: The Commission concluded that it would not violate the Code of Conduct for a State employee to participate in lease negotiations regarding a State agency when his son had contracted to provide video conference capabilities and perform other general assignments for the agency.

The Code prohibits State employees from reviewing and disposing of matters where a close relative will benefit to a greater extent than others of the same class or group. 29 Del. C. § 5805(a)(2)(a).

Here, the State employee did not review or dispose of the decision by the State agency to contract with his son. He did not work for the agency which needed the lease and which had contracted with his son. Further, the agency's contract with his son had nothing to do with the leasing negotiations. Thus, the lease negotiation activities did not violate the restriction on dealings with close relatives.

97-36 – Personal or Private Interest—Promotion of Relative: An agency wanted to promote an individual but asked if the action complied with the Code of Conduct because the father of the individual being considered for promotion was in the same section and was a manager.

The Code of Conduct prohibits State employees from reviewing or disposing of matters if the individual has an interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1). As a matter of law, an individual has an interest that tends to impair independent judgment if action or inaction would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons. 29 Del. C. § 5805(a)(2)(a).

Here, the agency publicly announced the job; the father was not on the team which reviewed the applications from the ten candidates and recommended the son for promotion; team members were not persons whom the father supervised; and the team member who evaluated the specific technical skill required was a supervisor from a completely separate agency, who supervised persons with the technical skill. Thus, the father did not review or dispose of the promotion decision concerning his son. Moreover, the father and son would work different shifts, and the son would report to an individual who did not report to the father, to insure that the father would not review or dispose of matters pertaining to supervising or evaluating his son.

Under those circumstances, the Commission found no violation of the prohibition against reviewing or disposing of matters where a close relative may benefit. Moreover, the Commission noted that the agency had worked to reduce any appearance of impropriety by publicly noticing the position; by having a representative from another agency evaluate the candidates' technical qualifications; and placing the two relatives on different shifts.

97-35 – Personal or Private Interest—Close Relative Contracting with State Agency: A State officer asked the Commission if the Code of Conduct would be violated if his father were selected as a contractor by his agency.

The Code of Conduct prohibits State officers from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment in performing duties with respect to that matter. 29 Del. C. § 5805(a)(1). By operation of law, a person has an interest which tends to impair judgment with respect to any matter when: (a) any action or inaction on the matter would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or (b) the close relative has a financial interest in a private enterprise or interest which would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises. 29 Del. C. § 5805(a)(2)(a) and (b).

The State Officer did not review or dispose of the contract which was awarded to his father's firm, and normally did not review or dispose of such contracts. The contract was publicly noticed and bid, therefore, giving any class or group of persons the opportunity to bid. Further, all bidders which responded to the public notice were reviewed by a "short list" team. He did not select the team; did not review its decisions; or decide which firms were to be short listed. Once the bidders were short listed, another team was selected to decide the winning bidder. Just as with the short list team, he did not play any part in selecting the team, reviewing bids, or disposing of any decision regarding the final selection in terms of interviewing candidates engaged in contract negotiations, or made any decisions relating thereto. In short, he removed himself completely from the process. Additionally, both teams consisted of merit employees who were not supervised by him, nor were their performance evaluations signed by him. The final contract was signed by an individual who did report to him; however, that individual's signing of the final contract did not deviate from the selection team's recommendation. When the contract was publicly noticed the advertisement said the contract was subject to renewal. If the contract was renewed, he would not participate in any aspect of the contract decision.

97-34 – Personal or Private Interest—Commission Chair seeks State position: An appointee to a State Commission intended to apply for a full-time position with a State agency. By law, the Commission, which he chaired, had to approve all personnel actions by the agency, including the hiring of full-time employees.

(a) The Chairman's Conflict

A conflict arose for the Chairman because as an Honorary State Official he may not review or dispose of matters in which he has a personal or private interest that tends to impair independent judgment in performing official duties. 29 Del. C. § 5805(a)(1). As a matter of law, an individual's judgment tends to be impaired if action or inaction would result in a financial benefit to that individual to a greater extent than it would to others who are members of the same class or group of persons. 29 Del. C. § 5805(a)(2)(a). Because the name of the recommended candidate must be submitted for approval to the Commission of which he was Chair, it appeared clear that he should not participate in selecting the recommended candidate. While the Chair could recuse himself from participating, the Commission found that if he continued as Chair while also being considered for a full-time position, it continued to raise issues of appearances of impropriety that could not be overcome by mere recusal, for reasons addressed below.

(b) The Commission Members' Conflict

State employees, officers and honorary officials must endeavor to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of their public trust, and which will reflect unfavorably upon the State and its government. 29 Del. C. § 5805(a). The other Commission members, like the Chair, were restricted from reviewing or disposing of matters in which they have a personal or private interest that tends to impair independence of judgment. 29 Del. C. § 5805(a). In essence, the public trust they are charged with when making any decision, including hiring decisions, is that the decision be fairly reached. In the context of hiring, the decision must be based on merit. Because the Commission members must approve the candidate selected by the hiring official, if that candidate was also the Chair, it could, at a minimum, raise suspicion among the public that the Commission members' approval was based on their relationship with, or influence by. the Chair.

(c) The Hiring Official's Conflict

By law, the Commission appointed the individual who made the hiring decision. It set his salary and approved his budget. Also, he must have its "consent and approval" when he hired employees. Thus, if the Chair retained his Commission position, it would mean that the hiring official must select a candidate from a list of candidates which included a person who has substantial authority over him. If he selected the Chair over other candidates, there may be a suspicion that his selection was based on something other than the merits. Thus, it raised the same ethical issues for him as it did for the Commission members. Consideration was given to bringing in panelists from outside the State to avoid the conflict. However, the statute required the hiring official to appoint all authorized personnel pursuant to the Merit System rules and regulations. Thus, the Chair would still have to participate in the interviewing process.

(d) Waiver Considerations

A waiver may be granted if "the literal application of such prohibition in a particular case is not necessary to achieve the public purpose or would result in an undue hardship on any employee, officer, official or state agency." 29 Del. C. § 5807(a).

(1) Public Purpose

The purpose of the Code of Conduct is to insure that the conduct of government officers and employees holds the respect and confidence of the people. 29 Del. C. § 5802(1). Thus, such persons must "avoid conduct which violates their public trust or creates a justifiable impression among the public that such trust is being violated." *Id.* Among the public trust concerns expressed in the Code of Conduct are that government employees make decisions based on the merits, not on personal relationships and that public office not be used to secure unwarranted privileges, personal gain or benefit. See, 29 Del. C. § 5805(a) and 29 Del. C. § 5806 (e). Here, there could be a justifiable impression among the public that if the Chair continued to hold that position while being considered for full time employment that: (1) a decision to nominate him by the appointing official could be the result of the authority that the Chair exercised over him; (2) a decision by his fellow Commissioners to approve his selection could be the result of their collegial association; (3) he would receive preferential treatment over other candidates because of his relationship with both the appointing official and his fellow Commissioners; and (4) he used his appointed public office to secure a personal gain or benefit by parlaying the appointment to public office into a full-time position. Moreover, he would be doing so without risking loss of the appointed position. Thus, if he was not selected for the full-time position, he kept the prestige and authority of the appointment, where he would still

exercise authority over the appointing official's budget, hiring recommendations, etc. This placed the appointing official and the Commission members on the horns of a dilemma because, regardless of how qualified the Chair was for the position, the public may well question whether the trust in unbiased and unduly influenced decision making was violated. Under those circumstances, the Commission concluded that the literal application of the prohibition was necessary to achieve the public purpose.

(2) Undue Hardship

In considering whether an undue hardship waiver should be granted, the Commission examined the other purpose of the Code of Conduct which is "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). Here, the appointing official said that if a conflict existed because the Chair wanted to retain the appointed position, the agency would still have qualified candidates for the position. Thus, it did not appear that the agency would suffer an undue hardship by disqualifying the Chair for the position.

On the other hand, did such action result in a hardship on the Chair?

He did not wish to risk surrendering an appointment on a prestigious body, and then find that he was not selected for the full-time position. The Code of Conduct requires that the hardship be "undue," which 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). That was not the case in these circumstances. Indeed, contemporaneous service on a State Commission should not be perceived as a requirement for applying for a salaried job with the State. To hold otherwise would give little credence to the provision which mandates that conduct should be avoided "which creates a justifiable impression among the public that such trust is being violated." 29 Del. C. § 5802(1).

Here, the justifiable impression among the public would be that by retaining the appointment, the Chair used his appointed office to gain a personal benefit (a full-time position); he would receive preferential consideration from the appointing official who must have his budget, personnel decisions, etc., approved by the Chair; and he would receive preferential consideration from the Commission members who serve with him. Not only would it create a justifiable impression that he was violating the public trust, but it would force the Commission members and the hiring official into a position where their integrity could justifiably be called into question. Thus, in balancing between the need to avoid even the perception of impropriety against the need to attract qualified people to public employment, the balance must be weighed, under these facts, in favor of serving the public purpose of avoiding the appearance of impropriety, especially as there was evidence that the State would not lack qualified candidates.

If the Chair, who was not present at the hearing, or the agency believed there were factors the Commission did not consider which would support a waiver, a hearing to reconsider the matter could be requested.

97-26 – Personal or Private Interest—Hiring Agency Contractor for Personal Work: An elected State officer asked if it would violate the Code of Conduct to hire a firm which contracted with his State office to perform functions for a business in which he invested.

The Code prohibits State employees, officers, and honorary officials from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment. 29 Del. C. § 5805(a)(1). It also prohibits them from engaging in conduct that would raise suspicion among the pubic that the individual is acting in violation of the public trust and which would not reflect favorably upon the integrity of the State government. 29 Del. C. § 5806(a).

As head of the agency, he was required to review and decide which companies would contract to perform State work, which was the same type of work he wanted the firm to do for his private business. Because of the nature of his State duties, realistically he could not accomplish a complete delegation of his duties because the staff would still come to him for final decisions, which is only appropriate because he, not his staff, was elected to make those decisions. Moreover, he clearly had a continuing oversight responsibility. Thus, delegating his responsibility would be merely form over substance.

Aside from the reality that he would be reviewing and disposing of the matters, even if he delegated the responsibility to a deputy, it might raise suspicion among the public that a deputy would still act at the official's direction. Thus, the public could suspect that the firm would receive preferential treatment when it sought to renew its contracts or sought new contracts with the State office. That issue took on added significance because his employment of that firm would be an on-going, long-term arrangement, just as its dealings with the State would be on-going. He could hire firms for his personal needs which did not contract with the State, and the business was in another State so firms in that State could be considered by him. Thus, it did not appear that there was an undue hardship sufficient for the Commission to grant a waiver.

97-21 – Personal or Private Interest—Private Sector to State Employment: An individual worked for a firm which contracted with the State. The firm, which she and another individual owned, previously bid on and was awarded a State contract. She subsequently sought a full-time position with the agency with which her firm had she had contracted. The agency asked if it would violate the Code of Conduct to hire her as a full-time State employee. If it hired her, the agency would exercise its right not to renew the contract.

State employees may not review or dispose of matters in which they have a personal or private interest which tends to impair independence of judgment. 29 Del. C. § 5805(a). As a State employee, she would not make decisions regarding any contracts which her former firm may have with the State in the future. Regarding the existing contract, it was for one year, subject to renewal and it would not be renewed, meaning that she would have no opportunity to make a decision on that contract. As a State employee, she would not be involved in any decisions on whether the firm would receive future agency contracts. In fact, it was understood that her partner would not seek contracts with the agency. Therefore, she would have no occasion to review or dispose of such matters.

The Commission noted that it had no authority to decide the extent of the partnership arrangement; however, if her partner decided to seek a contract with the agency, the agency could come to the Commission for any guidance that may apply.

State employees, officers and honorary officials may not represent or assist a private enterprise on matters before the agency employs them. 29 Del. C. § 5805(b). She would not have any connection with the former firm except as a debtor. She would not perform any

functions or have any authority to engage in or make decisions for the firm concerning the seeking of contracts with the State or participate in such things as voting on whether the company would pursue contracts with her agency and would not engage in such matters as helping the firm prepare responses to requests for proposals (RFPs) issued by the agency.

As she would not: (1) review or dispose of matters related to the firm; (2) have a relationship with the firm except as a debtor; and (3) would not represent or assist the firm on matters before the agency, the Commission found no conflict.

As she would be a new employee, the Commission cautioned her about Code prohibitions against improper disclosure or use of confidential information for personal gain or benefit. 29 Del. C. § 5806(f) and (g). If, for example, she had access to such information as competitor's bids on State contracts, to the extent that information was protected, even if she was not the decision-maker on the contracts, she would be prohibited from improperly using or disclosing such information to her former firm.

97-19 – Personal or Private Interest—Contracting for Part-Time Job with Employing Agency: A State employee asked if it would violate the Code if she privately contracted to provide administrative assistance to the section where she worked full-time as an administrative assistant. State employees may not represent or assist a private enterprise on matters before the State agency which employs them. 29 Del. C. § 5805(b). The Commission has ruled that private contracts with the State constitute a "private enterprise." *Commission Op. No. 94-10.* Accordingly, it would not be appropriate for her to privately contract with the section which employed her.

97-15 – Personal or Private Interest—Private Consulting Business: A State employee had a professional degree and opened a consulting business as part of his outside activities. Primarily, his clients were from out-of-state, but three were Delaware clients.

The Code of Conduct prohibits outside employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in State government. 29 Del. C. § 5806(b).

Regarding his Delaware clients, those companies must comply with the laws which the employee enforced in his State position. In his State job, he had not investigated or taken any action against these companies. However, because those companies were subject to action by his Division, it was concluded there may be an adverse effect on the public's confidence in State government if he provided services to these Delaware clients. That was because if an employee from his office investigated those companies, they would review the documents he prepared in his consultant capacity. Although he prepared the documents based solely on what the company provided him, the State investigator from his Division could find a discrepancy between the information which the company provided to him for the reports he prepared and the actual records on which he based his reports. Accordingly, he could find himself in an adversarial position with his own Division. The Commission previously held that where a State employee wanted to engage in outside employment that could result in his private employment creating an adversarial position with his agency, it would reflect unfavorably on the employee's position of holding the public trust and, therefore, violate the Code. *Commission Op. No. 91-19; see also,* 29 Del. C. § 5805(b) (State employees are restricted from representing or assisting

any private enterprise with respect to matters before the State agency by which the employee is associated by employment.). Accordingly, the Commission found it would be improper, under 29 Del. C. § 5805(b), for him to have Delaware clients who were subject to laws enforced by his Division. Additionally, such activity may result in an adverse effect on the public's confidence in State government in violation of 29 Del. C. § 5806(b).

Regarding clients from other states, as they were not subject to the Delaware laws enforced by the employee and his Division, and he was not performing work for them during official duty hours, the Commission found no conflict in having those outside clients.

97-13 – Personal or Private Interest—Waiver Request to Contract with Employing Agency: A State employee asked if it violated the Code for him to privately contract with his agency to perform certain work. He said that if the Commission found a violation, he would like for a waiver to be granted.

A State employee may not represent or assist a private enterprise with respect to any matter before the State agency which employs him. 29 Del. C. § 5805(b). Because the employee was representing his own company as a private contractor on business transactions with the agency which employed him, such activity would violate the provision. Additionally, State employees shall not accept outside employment or any compensation if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State government. 29 Del. C. § 5806(b).

His primary contract work for the agency was not part of his official duties. While the work might not result in impaired judgment, preferential treatment, or government decisions outside official channels, the real concern was the adverse effect on the public's confidence in the integrity of the State government. Because representing or assisting a private enterprise before the employee's own agency is specifically prohibited, it could appear that his company would receive preferential treatment if selected as the contractor.

Regarding the waiver request, waivers may be granted if the literal application of the statute does not serve the public purpose or there is an undue hardship on the employee or agency. 29 Del. C. § 5807(a). There was no indication of a specific hardship on the State employee. However, he said there were instances where other vendors would not set up a charge account with the State which prevented getting parts, and that getting other contractors was sometimes difficult because the jobs were too small. To the extent he was saying there was an undue hardship on the agency, the Commission believed it would be more appropriate for the agency to address the difficulties it may have in getting contractors. It suggested he might have his agency submit information relative to a hardship if he wanted the Commission to reconsider if it should grant a waiver.

96-85 – Personal or Private Interest—Stock Holdings in Publicly Traded Company: As part of his State duties, a State officer had to find a company to fulfill a service contract. The service needed was highly technical and the State officer "did a lot of research," and "acquired a lot of knowledge," about companies which provided the highly technical service. Specifically, only three companies were the primary providers, and they had a substantial portion of the world market. He recommended that one of the companies provide equipment and phase-in services at more than $1 million. After the contract was issued, he learned that the company

was making a public offering of its stock. He concluded that he could use his knowledge about the company without any conflict because his investment was less than the amount defined by the Code of Conduct as a "financial interest." He and his wife bought 340 of the 2 million shares offered.

The State officer routinely monitored the contract for compliance and could decide if his agency needed additional services. If more services were needed, his recommendation "would carry a lot of weight." He also said other Delaware agencies and other jurisdictions might seek his recommendation on the company's ability to fulfill the contract. He said that although any sale would make the company look better, he did not think his decisions would affect the stock price. However, he recognized that his opinion could have an impact. He said that if the Commission found a violation he could delegate his decision making authority or liquidate the investment.

His investment was not enough to be a "financial interest" as defined by the Code. *See,* 29 Del. C. § 5804(5). However, the Commission noted other provisions which affected its decision. First, the code prohibits reviewing or disposing of matters pending before the State where the individual has a personal or private interest which tends to impair judgment with respect to that matter. 29 Del. C. § 5805(a)(1). The Commission pointed out that the Delaware Superior Court interpreted the provision as requiring recusal of a decision maker on matters pending before the State where a private company employed the individual and the company was seeking a decision from his agency. The Court did not discuss the amount of any "financial interest." *See*, *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry J. (June 30, 1995), *aff'd,* Del. Supr., No. 304, Veasey, J. (January 29, 1996).

Second, the Code restricts State employees from having "<u>any</u> interest in any private enterprise.. . . which is in substantial conflict with the proper performance his duties." 29 Del. C. § 5806(b) (emphasis added).

Third, the Code prohibits conduct which could raise suspicion that the individual is violating the public trust. <u>29 Del. C. § 5806(a).</u> The Commission noted that in a prior decision it said: "The significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not 'raise suspicion' that their acts will 'reflect unfavorably upon the State and its government.' Actual misconduct is not required; only a showing that a course of conduct could 'raise suspicion' that the conduct reflects unfavorably." *Commission Op. No. 92-11.*

The Commission concluded that the State officer's investment created perception and possible conflict of interest problems because: (1) only three major companies provided the service; (2) the service was in a fast developing field; (2) the limited competitiveness was to be weighed against his decision making authority; (3) he would be routinely deciding if the equipment worked properly; (4) he would be the one to recommend additional services for his agency; (5) his decision making authority carried "a lot of weight" not only within his own agency but other Delaware agencies, and even other jurisdictions; and (6) no statute or rule prevented him from delegating his decision making authority.

96-76 – Personal or Private Interest--Client Referral to Spouse's Private Enterprise: The Code permits State agencies to seek advisory opinions. 29 Del. C. § 5807(c). A State agency sought a decision on whether it could promote one of its employees, without creating a conflict. If promoted, a private enterprise owned by her husband was on the list of facilities to

which clients from her office could be referred. Her agency identified certain internal procedures that were in place and asked if the promotion would result in a conflict, even with the procedures in place.

State employees cannot review or dispose of matters if there is a personal or private interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 Del. § 5805(a)(1). One interest, which as a matter of law, tends to impair judgment is where action or inaction by the employee would result in a benefit or detriment for a close relative to a greater extent than for others similarly situated. 29 Del. C. § 5805(a)(2). "Close relative" includes a spouse. 29 Del. C. § 5804(8).

Here, federal and State laws prohibited State employees from referring clients to a particular facility. The agency kept a list of all qualified facilities and the client or the client's family selected the facility from the list. Thus, the "matter" of selecting the facility was not a "matter" over which the employee had any review or disposition authority. Further, the agency had an individual who screened potential clients. After reviewing the applications, the screener assigned the clients to employees. It was agency procedure to assign employees to handle clients from a particular facility. Clients who resided in or selected the husband's facility would not be assigned to his spouse. Thus, the "matter" of deciding eligibility for applicants at her husband's facility was not a "matter" over which the employee had any review or disposition authority. As the agency would not assign the employee to clients who lived at her husband's facility, she would not evaluate the quality of care given at his facility. Thus, the "matter" of deciding quality of care was not a "matter" over which she had any review or decision making authority.

The Code also prohibits State employees from representing or assisting a private enterprise with respect to matters before the agency with which they are associated with by employment. 29 Del. C. § 5805(b)(1). Here, the "matters" which would be of interest to the private enterprise would be client eligibility, facility assignment, and client care. No input was required from the private enterprise regarding client eligibility as it was based on financial documents submitted by the potential client. No input was required from the private enterprise regarding facility selection as the client or the client's family selected the facility. Thus, no occasion for the employee to represent or assist the private enterprise on "matters" before the agency on client eligibility and facility assignment would occur. The agency would not assign the employee to cases where the clients lived at her husband's facility. Thus, she would have no information on the "matter" of client care on which she could represent or assist the private enterprise regarding the quality of care given those clients.

The agency said that one of its concerns was any appearance of impropriety as the Code prohibits conduct which would raise suspicion among the public that an employee is engaging in acts violating the public trust. 29 Del. C. § 5806(a). Here, the agency based client eligibility principally on mathematical calculations involving income and net assets contained in documents submitted by the applicant. A supervisor routinely reviewed decisions on eligibility through the relatively simple process of reviewing mathematical calculations; not possible subjective statements by the employee. Additionally, the employee would not decide eligibility or have clients from her spouse's facility. Therefore, it was unlikely she could approve or deny eligibility in a way to benefit her spouse's facility. Additionally, the State employee had no control over the list or over which facility had space available.

The Code also prohibits disclosing confidential information gained by reason of public position or otherwise using such information for personal gain or benefit. 29 Del. C. § 5806(g).

The employee, like all agency employees holding similar positions, had signed a confidentiality statement on disclosure or use information about applicants and clients. The employee said she was aware of and understood the prohibition, and never had, nor would she, violate the prohibition.

96-64 – Personal or Private Interest--Non-Profit Organization: A Division Director was also a volunteer member of a private non-profit organization. The organization asked the Director to consider chairing its Board of Directors. The organization did not compensate the individual as a volunteer member, and would not compensate her as a Board member. The Board engaged in such activities as deciding if the organization would pursue grants-in-aid, etc. Although most of its funding was from private companies, the organization would qualify for State grants. The organization rewrote its bylaws to say that if a State employee was on the Board, it would not ask for a grant from that agency. It would seek grants from other agencies.

(A) Restrictions on the Exercise of Official Authority

The Code of Conduct restricts State employees, officers and honorary officials from reviewing or disposing of matters where they have a personal or private interest that would tend to impair their judgment in performing official duties. 29 Del. C. § 5805(a)(1)(a). It also prohibits conduct that would raise public suspicion that the individual was engaging in acts violating the public trust and that would not reflect favorably on the State. 29 Del. C. § 5806(a).

This Commission has held that where a State employee was on the Board of a for-profit private enterprise, although the entity did not compensate her, it would be inappropriate for her to review or dispose of the company's contract application as part of her official duties because, at a minimum, it might appear improper, which the Code prohibits. *See, Commission Op. No. 95-24.* "Private enterprise" includes "non-profit" entities. *See,* 29 Del. C. § 5804(8).

Here, the organization's bylaws barred it from seeking funds from a State agency if an individual from that agency was on its Board. Thus, the Division Director would not review or dispose of any funding request from the organization because it would not seek funds from her agency, if she accepted a Board position. However, if she did not become a Board member, but remained a volunteer, the bylaws did not bar the organization from seeking funds from her agency. The Commission concluded that she could not review or dispose of such request as part of her State duties. At a minimum, it might appear that because of her personal interest as a member, she might give preferential treatment to the organization if it requested funding. If such situations arose, she was directed to consider whether she should: (1) recuse herself; or (2) return to the Commission for an opinion on that specific situation; or (3) request a waiver from the Commission. The Commission may grant a waiver 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).

(B) Restrictions on representing another's interest before the State.

The Code also restricts State employees, officers and honorary officials from representing or assisting a private enterprise with respect to any matter before the State agency with which the employee, officer or official is associated by employment or appointment. 29 Del. C. § 5805(b). The organization's bylaws made it clear that if the Division Director took a Board position, it would not seek funds from her Department. Thus, it appeared she would have no

occasion to represent or assist the organization before the agency where she worked, if she served on the Board. However, if she were not on the Board but just a member, then the organization's bylaws would permit it to seek funds from her agency. The Commission concluded that it appeared the Code restricted her from assisting the private enterprise before her own agency, meaning that she could not, e.g., help prepare the organization's funding request. See, 29 Del. C. § 5805(b)(1).

"State officers" are further restricted. They may not represent or assist any private enterprise with respect to any matter before the State. 29 Del. C. § 5805(b)(2). "State officers" are persons who must file a financial disclosure form. 29 Del. C. § 5804 (12). Division directors are required to file. 29 Del. C. § 5812(a)(15). Thus, as a "State officer," she would be restricted from assisting or representing the organization, not only before her agency, but before any State agency. For example, if the organization wanted funds from an agency other than hers, the Commission concluded the Code prohibited her from such things as preparing its grant request as that would be assisting the private enterprise in seeking funding from another agency.

96-62 – Personal or Private Interest—Endorsement: A private retirement home asked a State officer to sign a letter soliciting funds. The letter mentioned that he had family members who were cared for at the facility. Although his agency did not regulate the facility, the State did. He would sign the letter as the son of a resident, not as a State official. However, he believed they asked him to sign the letter because of his name recognition that resulted from being in public office. No other persons with family members at the facility were asked to sign a solicitation letter. While he was very satisfied with the care given to his parent, he asked if signing the letter was appropriate.

The Code prohibits State employees, officers and honorary officials from using public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e). It also prohibits conduct which may raise public suspicion that the individual is engaging in acts violating the public trust and acts which will not reflect favorably upon the State. 29 Del. C. § 5806(a).

The Commission found that signing the letter would be inappropriate for the State officer as it might appear that because of his name recognition, which was based on being in public office, he (through his parent) would secure some private gain or privilege from soliciting funds and/or it might be seen by the public as an official endorsement of the private enterprise.

96-61 – Personal or Private Interest-- Stock in Private Enterprise: A State officer owned a single share of stock in a small Delaware corporation, valued at approximately $600. The stock holding was not for investment purposes, but a "gesture of community support." The private corporation rented property it owned to a second corporation in which it held stock. The second corporation had a sublease agreement with the State. The private corporation did not receive any proceeds from the sublease agreement. The State officer was responsible for selecting someone to insure that the second corporation complied with its sublease agreement. As a State officer, he had no decision making authority over the corporation in which he held stock, and the amount of stock did not constitute a "financial interest" as defined by the Code of Conduct. However, he asked if holding stock in the first corporation would violate the Code of Conduct because he selected the person who would insure that the second corporation complied with the sublease.

The Code prohibits State officers from reviewing and disposing of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1). As a matter of law, a person has an interest which tends to impair judgment if they have a "financial interest" in a private enterprise and any action or inaction would affect that interest to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 Del. C. § 5805(a)(2)(b). A person has a "financial interest" if he: (a) has a legal or equitable ownership interest of more than 10%; (b) expects to receive more than $5,000 in income during the year as an employee, officer, director, trustee or independent contractor; or (c) is a creditor in an amount equal to 10% or more of the debt of that enterprise. 29 Del. C. § 5804(4).

Here, the individual's ownership interest was less than 10%; he received no income from the corporation; and he was not a creditor of the corporation. While his stock holding did not meet the statutory definition of "financial interest", the Commission pointed to a Delaware Superior Court decision in which the Court relied only on the general prohibition against having an interest which tends to impair judgment, 29 Del. C. § 5805(a)(1), without any reference to the "financial interest" provision, 29 Del. C. § 5805(a)(2)(b), for an assumption that an individual had a conflict of interest. *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995)*, aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). The Code also prohibits engaging in conduct which could raise suspicion that they are violating the public trust. 29 Del. C. § 5806(a).

The Commission said that although the $600 stock did not constitute a "financial interest," the question was whether the holdings might create a perception of impropriety. The Commission held that under these facts, it found no justifiable impression because: (1) the holding was small; (2) it was fully disclosed; (3) the basis of the holding was a "gesture of public support," as opposed to an investment opportunity; (4) the State officer would recuse himself from reviewing decisions on whether the second corporation was complying with the sublease; and (5) the first corporation received no proceeds from the sublease agreement with the State.

96-56 - Personal or Private Interest--Holding Stock Interest in Non-Profit Organization: A State agency asked if it would raise ethical issues if a non-profit 501(c)(3) private corporation were formed to promote the exchange and dissemination of certain client information between the State and private enterprises. According to the proposed bylaws, the private corporation would issue stock to certain State officers, such as an elected official, cabinet secretaries, and division directors. Representatives of private enterprises, which the State regulated, would hold the majority of the stock. The stock held would be voting stock and holders would, among other things, vote to elect the board of directors, which might include these State officers. Alternatively, it was asked if ethical issues could be eliminated if the State, instead of the individuals, held the stock.

The bylaws provided that the entities which would make up the private corporation would exchange client information. The State would be expected to contribute information to the network based on the data it collected on State clients. While other states had created similar information networks, they were created by statute, not by incorporation of a private enterprise.

The Commission, by law, must base its advisory opinions on a particular fact situation. 29 Del. C. § 5807(c). Here, a particular fact situation did not yet exist as the legal entity of the private corporation had not been created and no State officer had participated in any aspect of the corporation's activities. However, to decide if such a private enterprise model would be

used, guidance was needed on whether conflicts could arise from creating such a corporation. As the Commission may "provide assistance to state agencies, employees and officials in administering the provisions of this law," 29 Del. C. § 5809(10), this opinion was meant only to provide assistance to the State agencies and State officers involved to aid them in recognizing areas where potential conflicts could arise. It was not meant to prejudge any activities engaged in by such officers, should they have elected to be parties to the private enterprise. Further, it was not within the Commission's authority to suggest how a network, such as one proposed here, should be legally structured, as that was a matter for the Attorney General.

With those limits in mind, having reviewed the bylaws and the purpose of the corporate organization, the Commission had concerns that where State officials join forces with private enterprises under these circumstances, in a corporate activity, as a minimum, it raised issues about the appearance of impropriety. Without detailing all of those concerns, the Commission pointed out two issues. For example, the private corporation would be made up, in part, of companies that the State regulated. It could appear to the public that State officers might, in making regulatory decisions, give preferential treatment to those companies with whom they had joined forces in a private enterprise. *See,* 29 Del. C. § 5805(a)(1) and § 5805(b)(2) (State officers cannot review or dispose of matters in which they have a personal or private interest that tends to impair judgment; State officers cannot represent or assist a private enterprise in matters pending before the State). It also may appear to the public that the State officers were obtaining confidential information in their official capacity and passing that information to private companies. *See,* 29 Del. C. § 5806(f) and (g) (regarding improper disclosure or use of confidential information gained by reason of public position).

If the State held the stock, as opposed to the individual officers, some State official would still have to make voting decisions, and perform other functions and responsibilities as a stock holder. That official may have encountered the same appearance problems. Accordingly, the Commission did not see where giving the stock to the State would necessarily eliminate some of the ethical issues that might arise. The Commission had concerns about whether State officials may, within the scope of their employment, enter such arrangement, regardless of any ethical issues. However, that question was for the Attorney General's office, not this Commission.

96-53 – Personal or Private Interest-- Contract with Company Regulated by Agency: Before being appointed to a State agency, an individual had a private contract to provide maintenance for a private enterprise. For a number of years after his appointment, the company was not subject to the agency's regulations. Because of a change in business operations, the company became subject to the agency's regulatory authority. The individual notified the Commission that he would recuse himself from decisions regarding the company. He asked if he needed to take additional steps to avoid any conflicts of interest.

Because the individual's appointed position resulted in more than $5,000 a year in compensation, he was considered a "State employee," under the Code of Conduct. *See ,* 29 Del. C. § 5804(11)(a)(2). State employees are restricted from participating on behalf of the State in the review or disposition of any matter pending before the State in which they have a personal or private interest. A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in performing duties with respect to that matter. 29 Del. C. § 5805(a)(1).

The Code also prohibits accepting outside employment if such acceptance would result

in: (1) impairment of independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b). Additionally, the Code prohibits employees from pursuing a course of conduct which will raise suspicion among the public that they are engaging in acts which violate the public trust and which will reflect unfavorably upon the State. 29 Del. C. § 5806(a).

At a minimum, it may appear that participation in regulatory decisions of a company with which the employee did business would raise suspicion among the public that his judgment may be impaired and that he might give preferential treatment to the company. Accordingly, his decision to recuse himself from matters affecting the company was appropriate. The question of whether he should take further action was viewed in light of the other activities regulated by the agency. The agency had specific areas to regulate and decisions by it in areas of regulation outside the area which applied to this company, would not impact the company. Accordingly, the Commission found no violation of the Code as long as he recused himself from decisions pertaining to the company. That would preclude him from reviewing or disposing of matters in which he arguably had a financial interest and would preclude any preferential treatment to the company in making official decisions.

As far as any appearance of impropriety, the Commission emphasized that he had a long-standing contract with the company to perform the maintenance work before the company was ever regulated; he was performing the contract before his appointment; and his company was asked to continue to perform the work to give continuity to the plant maintenance. Thus, it was clear that any financial benefit received through the contract was not the result of his appointment. The Commission concluded he did not need to recuse himself from other regulatory decisions, as those decisions would not impact on the regulatory decisions pertaining to the company.

96-51 – Personal or Private Interest-- Subcontracting with Firm which has State Contract: A State agency solicited lease proposals for space to house several State agencies. Representatives from each agency which would use the space were on the Site Selection Committee. The committee narrowed the proposals to three candidate firms. One candidate firm intended to subcontract part of the work which would be required to prepare the site. An appointee to one of the State agencies which would be housed in the property owned the firm which would subcontract. Before the Site Selection Committee allowed the three candidates to present their proposals, the Commission was asked if it would violate the Code of Conduct if the appointee's firm subcontracted.

Under the Code of Conduct, "State employee" includes any person "who serves as an appointed member, trustee, director of the like of any State agency and who receives or reasonably expects to receive more than $5,000 in compensation for such service in a calendar year (not including reimbursement of expenses)." 29 Del. C. § 5804(11)(a). The individual who owned the subcontracting firm was appointed by the Governor and received a salary of more than $5,000 per year, for purposes of the Code of Conduct, he was a "State employee."

State employees may not:

(1) Review or dispose of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment. 29 Del. C. § 5805(a)(1). One interest which tends to impair judgment is when action or inaction on the

matter would result in a financial benefit or detriment to accrue to the person or private enterprise to a lesser or greater extent than others in the same class or group. 29 Del. C. § 5805 (a)(2).

The matter to be reviewed and disposed of was a leasing contract. The appointee's official duties did not include any aspect of leasing contracts. His duties were to decide regulatory matters. His agency did not regulate either his firm or the candidate firm. Also, he was not on the Site Selection Committee so he would not review or dispose of the lease. While his company might experience a financial benefit if it subcontracted, the financial benefit would not result from any action or inaction by him in his official capacity. Also, he would recuse himself from any discussion with his agency regarding the leasing decision. Thus, the Commission found that if his firm subcontracted as part of the candidate's team, it would not violate 29 Del. C. § 5805(a)(1) and (2).

(2) Represent or otherwise assist any private enterprise with respect to any matter "before the state agency with which the employee . . . is associated by employment or appointment." 29 Del. C. § 5805(b)(1).

Assuming the Site Selection Committee was a "State agency," it was not the State agency to which the employee was appointed. As he was not on the Site Selection Committee; would not discuss the matter with his agency, and would not participate in any presentation to the committee by the candidate firm, it would not violate 29 Del. C. § 5805(b), if his firm was a subcontractor.

(3) Enter any State contract for more than $2,000 (other than employment) unless the contract was made or let after public notice and competitive bidding. 29 Del. C. § 5805(c).

Although the law did not require solicitation for leasing proposals be subject to public notice and competitive bidding, the leasing contract was, in fact, advertised. Thus, there appeared to be no violation of 29 Del. C. § 5805(c).

(4) Engage in conduct that would raise public suspicion that the individual is engaging in acts violating the public trust. 29 Del. C. § 5806(a).

Regarding whether the employee's participation as a subcontractor would raise suspicion among the public that he was engaging in activities violating the public trust, such concern was diminished because: (1) the proposals were subject to public notice and bidding; (2) the activities raised no technical violations of the statute; (3) he was not on the Site Selection Committee; (4) he would not personally appear or participate in the candidate firm's presentation to the selection committee; and (5) he would not discuss the leasing arrangement with his agency. Also, if his firm subcontracted, the work was only about 5% of the overall project costs. Other than the overall costs proposed, the primary criteria in selecting a candidate focused on site location, not the type of work his firm would subcontract to perform. Thus, it did not appear that the work of the subcontractor would affect the selection, regardless of the contractor. That fact also diminished any appearance that having his firm subcontract as part of one contractor's team would influence the selection of the contractor.

If his firm participated in the contract, it was not anticipated that his State agency would have any special needs from the subcontractor which would require him to discuss those needs with his agency. However, the Site Selection Committee had not decided which candidate

would receive the contract. Even assuming that the candidate firm which wished to use his firm as a subcontractor was selected, and assuming his firm was kept as its subcontractor, the need for discussions and decisions between the individual in his private capacity and his agency were remote and speculative. As the Commission must render advisory opinions based only on a "particular fact situation," 29 Del. C. § 5807(c), it concluded that it was premature to rule on whether such discussions and decisions, if they needed to occur, would violate the Code of Conduct. The Commission advised the parties that they could seek an opinion should such a situation arise.

96-44 – Personal or Private Interest--Decisions where Daughter is Involved: State employees may not review or dispose of State matters if they have a personal or private interest which tends to impair their independent judgment in performing duties with respect to those matters. 29 Del. C. § 5805(a)(1). A person's judgment tends to be impaired when any action or inaction on a matter would result in a financial benefit or detriment to a close relative to a greater extent than such benefit or detriment would accrue to others members of the same class or group of persons. 29 Del. C. § 5805(a)(2)(a). "Close relative" includes children. 29 Del. C. § 5804(1).

A State employee was asked to review an existing agency contract for expansion. The contract dealt with scheduling and testing. The agency's senior management decided to expand the contract because legislative changes dictated that the work be assumed by the existing contractor to free up agency staff. Persons at a higher level than the employee approved the negotiations. After the contract was re-negotiated, the contractor announced plans to hire additional workers. The announcement reflected the specific hiring criteria and the particular background needed. The employee's daughter, among other applicants, had the particular background and applied for a job.

The Commission found no violation of 29 Del. C. § 5805(a) as the State employee had no foreknowledge that her daughter would be considered for a position when the negotiations were occurring. Therefore, her judgment would not have been impaired because of her lack of knowledge. Also, no evidence suggested that her contract negotiations benefitted her daughter more than other members of the same class or group of persons. The contractor established the hiring criteria and hired other similarly qualified applicants. No facts suggested that the daughter received any greater benefit than that offered to other applicants. The daughter would not work for the contractor in the same area as her mother and her mother had no responsibilities in the area of the subject matter (scheduling/testing) of the contract.

96-42 – Personal or Private Interest--Agency Contracts with Brother-in-Law: A State employee was the lead point of contact for his agency's procurement activities. On occasion, requests for locksmiths went through his office. As part of his duties, he obtained quotes from vendors, and where appropriate sought public bids. His brother-in-law was a managing partner for a locksmith company. As such, quotes from that firm could be solicited and/or that company would submit bids when public notice and bidding were required. The agency, believing a conflict might exist, had the individual's supervisor solicit quotes or handle bids on locksmith needs. The agency asked if such action was sufficient to avoid a conflict.

The Code restricts State employees from:

(1) reviewing or disposing of matters if a personal or private interest tends to

impair independent judgment in performing official duties; 29 Del. C. § 5805(a); and

(2) engaging in conduct that would raise suspicion among the public that an employee is acting in violation of the public trust. 29 Del. C. § 5806(a).

The Commission concluded that the agency had properly removed the employee from participating in the procurement activity because if he called and obtained quotes, his familial relationship might, as a minimum, tend to impair judgment. Even if it did not, the public could suspect that he would give his brother-in-law preferential treatment by: (1) calling him for a quote and not calling others; and/or (2) passing quotes of other contractors to his brother-in-law.

The Commission found that the procedures set up by the agency sufficiently removed any suspicion that he was engaged in activities violating the public trust because very few such requests came through his office; his supervisor decided if the bid complied with State procurement rules; and an individual from another section reviewed the contracts and judged the supervisor's recommendation on the bases of costs, competence, past track record, etc., of the contractor.

96-16 – Personal or Private Interest—Regulating Activities Where Spouse Has Interest: The Code of Conduct requires honorary State officials who have a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, to file with the Commission a written statement fully disclosing the same. 29 Del. C. § 5806(d). An honorary State official notified the Commission that he served in a regulatory agency which regulated activities in which his spouse planned to engage. He said he would recuse himself from decisions concerning his spouse.

Honorary State officials are restricted from reviewing and disposing of matters before the State where they have a personal and private interest which would tend to impair independence of judgment. 29 Del. C. § 5805(a)(1). One interest which, as a matter of law, tends to impair independence of judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C. § 5805(a)(2). "Close relative" is defined to include a spouse. 29 Del. C. § 5804(1). The Code also prohibits such persons from engaging in conduct that would raise suspicion among the public that he is engaging in acts violating the public trust and that would not reflect favorably upon the State. 29 Del. C. § 5806(a).

Without deciding if the spouse would receive a benefit or detriment greater than that received by others in the same class or group, the Commission held that if the honorary State official decided matters concerning his spouse, it could appear to the public that his judgment would be impaired, and therefore, it was appropriate that he recuse himself on such matters. The Commission noted that a separate statute governing the particular regulatory body had specific provisions dealing with appointees having a direct or indirect pecuniary interest in the regulated activity. As the Commission had no jurisdiction to interpret that statute, it suggested the individual discuss compliance with that statute with the appropriate authority. The individual later notified the Commission that his spouse would not engage in the regulated activity as long as he served on the regulating agency.

95-36 – Personal or Private Interest – Endorsement: The head of a State agency was asked to appear in a video prepared by a private enterprise. In the past the enterprise had contracted

with the agency, and was expected to seek future contracts. The contracts were in a highly competitive area. In reviewing the video script, the Commission found that it was a promotional/marketing tool for the firm, and statements to be made by the agency head served little, if any, public purpose. The Commission found that appearance in the video might be seen by competitors and/or the public as an endorsement of that firm. While the agency said it was willing to appear in videos for all competitors, the Commission found that was not a viable solution because some firms might not have the capacity to engage in such marketing efforts. Further, because the individual participated in reviewing the contract applications, there could be a perception that the individual's judgment was impaired or that preferential treatment would result. The Commission held that the individual could not appear in the video.

95-27 – Personal or Private Interest – Contracting w/Relative's Firm: A State employee asked whether it would violate the Code of Conduct if his agency contracted with a private enterprise which employed his son. Documentation and testimony revealed that the private enterprise was awarded the contract after public notice, competitive response, objective evaluation, and interviews conducted by a team composed of members from the State employee's agency and another agency. The employee was not involved in any of those matters, did not select the team, was not a member of the team, and was not part of the selection process. Further, the son worked in a department of the private enterprise that would not be involved in the State project. The State employee would not review or sign any contracts, invoices, change orders, etc., on the project involving the private enterprise. Such decisions would be made by persons not directly supervised by the employee. With those limitations on the State employee's actions, the Commission found it would not violate the Code for the agency to contract with the private enterprise.

95-24 – Personal or Private Interest—Board Membership: State duties required an employee to review responses to Requests for Proposals (RFPs). A private enterprise, on which the employee served on the Board of Director's submitted a response for review. The private enterprise had not told the employee it intended to submit such response and the employee had not, as a Board member, been asked for information about how to prepare the response, nor as a Board member had the employee reviewed the response before it was sent to the State. The individual alerted a supervisor and declined to review the response before seeking a decision from the Commission on what action, if any, should be taken relative to the matter.

The Code prohibits employees from participating in the review or disposition of matters before the State where there is a personal or private interest that tends to impair independence of judgment. 29 Del. C. § 5805(a). One interest which tends to impair judgment is where the person has a financial interest in a private enterprise which could be affected by action or inaction on matters before the State. 29 Del. C.§ 5805(a)(2). While the employee received no compensation from the private enterprise and no determination had been made by the private enterprise regarding any ownership interest by the employee, the private enterprise would benefit financially if selected to fulfill the contract. The Commission held that the employee's review of the response could violate the prohibition against reviewing such matters or, at a minimum, could create an appearance of impropriety which is prohibited by 29 Del. C. § 5806(a).

95-20 – Personal or Private Interest – Retaining an Attorney: A State regulatory

commission asked whether its members would be in violation of the Code of Conduct if they contracted with a private firm to provide legal counsel when that firm also would represent private clients before the same regulatory agency. "State employee" includes "an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive more than $5,000 in compensation for such services in a calendar year." 29 Del. C. § 5804(11)(a)(2). Members of the agency were appointed and each received more than $5,000 annually. Thus, they were subject to the Code of Conduct.

The applicable provisions in the situation were: (1) Pursuing a course of conduct which would raise suspicion among the public that he was engaging in acts in violation of the public trust and which would not reflect favorably on the State and its government. 29 Del. C. § 5806(a); and (2) Disclosing confidential information. 29 Del. C. § 5806 (f) and (g).

In determining the applicability of those provisions, the Commission noted that State employees, officers or honorary officials could not represent or otherwise assist private enterprises in matters before the State agency with which they were associated by employment or appointment. 29 Del. C. § 5805 (b)(1). Contracts violating the Code of Conduct may be voidable. 29 Del. C. § 5805(g). Here, the contractor was not be subject to the Code of Conduct, but the effect would be that the agency could achieve by contract that which otherwise was not permitted. Specifically, the contractor, while working for the State, could also represent or assist their private enterprise in matters before the same agency. The risk existed that the power or discretion vested in public authority might be used to benefit a private client or that an unfair advantage could accrue to the private client by access to confidential government information about the client's adversary. *See, Midboe v. Com'n. on Ethics for Pub. Employees, La. Supr.,* 646 So.2d 351 (1994)*; Howard v. Florida Com'n. on Ethics, Fla. App.,* 421 So.2d 37 (1982)*; Delaware Lawyers' Rules of Professional Conduct, Rule 1.11 Comment* (lawyer representing government, whether employed or specially retained, is subject to Rules of Professional Conduct and to statutes and government regulations on conflicts of interest).

While it was presumed the attorney would not improperly use or disclose such information, there was a question of whether such access would appear improper. As a factual matter, it was not feasible to make a complete and isolated separation of the private clients from the agency representation. For example, while representing the agency, the attorney/firm could possibly establish precedent applicable to all regulated entities appearing before the agency--including the private clients. The Commission also considered the statutory purpose of the agency. The statute identified a very public purpose for the agency. In light of its statutory duties to the public, the public could well look with suspicion on an agency hiring an attorney to "work both sides of the street." The Commission concluded that for the agency and/or its members to agree to a contract with such results would, at a minimum, create an appearance of impropriety.

95-16 – Personal or Private Interest – Appearance of Impropriety: A State employee managed certain State housing facilities. The employee hired a tenant from one facility for child care. The Commission held that the arrangement violated the prohibition on engaging in acts in violation of the public trust and would not reflect favorably on the State. 29 Del. C. § 5806 (a) and (b). The Commission's concern was that, at a minimum, it might appear that the tenant would receive preferential treatment from the State employee.

The Commission may grant a waiver if it determines the literal application of such prohibition in a particular case is not necessary to achieve the public purpose of the statute or

would result in undue hardship on any employee, officer, honorary official or State agency. 29 Del. C. § 5807(a). The employee testified that she had no relatives to care for the children, the costs of child care with other sources were prohibitive, and she could not find feasible alternative care, among other things. Agency testimony was that the employee's responsibilities involving the exercise of discretion regarding this tenant could be given to the employee's supervisor or another agency official. With that restriction, the Commission granted a waiver.

95-12 - Personal or Private Interest—Nepotism: Complainant alleged that a State employee directly hired close relatives to work in the same agency in both a Merit position and a temporary position. Upon investigation of the allegation of hiring into the Merit position, the Commission found the hiring was conducted pursuant to competitive hiring requirements governing the hiring of Merit employees. *See,* 29 Del. C. § 5901, et. seq. The position was publicly announced. Applicants were tested and ranked by test scores by agencies other than the hiring agency. *See,* 29 Del. C. §§ 5917 and 5919. The list of eligible candidates was forwarded to the hiring agency for interviews. Appointment of persons on the list was of persons "standing among the highest 5 or highest 15%, whichever is the greater number." 29 Del. C. § 5921. The top six candidates were contacted for interviews, but had either accepted other jobs or did not respond to calls to schedule interviews. The next four top ranking people included the State employee's close relative. All four were interviewed by individuals other than the person charged with violating the Code. The agency was not required to interview more than one person on the list. 29 Del. C. § 5921. The documentary evidence also showed that of the remaining candidates, two were interviewed (one was selected for another position in the agency), two did not respond to calls for interviews, and the last three on the list were not contacted. The reason for non-selection was documented, even though by law, the employing agency cannot be required to give a reason for non-selection unless all applicants are rejected. 29 Del. C. § 5921.

The individual charged did not have any decision making authority in the announcement of the position, the testing of candidates, the selection of candidates to be interviewed, and the actual interviews. Also, the person charged was not physically located in the same office, could not observe the relative's work habits and skills limiting any input on the relative's evaluation, did not supervise the relative, and was precluded by the agency from participating in matters relating to the relative's evaluation or any grievances regarding the relative's employment if they arose.

Regarding the hiring of a close relative in a casual/seasonal position, the agency's procedure was for its personnel staff to rank persons to ensure they were qualified prior to being hired. The individual charged was not involved in the ranking and the ranking was conducted by a separate division within the agency. The individual did not make the hiring selection.
The Commission found no violation because the individual did not participate in the "review or disposition" of the hiring of close relatives and would not "review or dispose" of their evaluations, grievances, etc.

94-16 – Personal or Private Interest – Grants: The Commission granted a limited waiver to an appointee on the Criminal Justice Council, to complete a grant application for SODAT-Delaware, Inc., for which she was contracted. Prior to being appointed to the Criminal Justice Council, the appointee had contracted to complete four applications. She had completed three and was working on the fourth at the time of her appointment. The waiver was limited to the completion of the fourth application. The waiver was granted because it would be an undue

hardship on the appointee if she were required to break the contract and it would be an undue hardship on the organization to find a new contractor at that stage.

94-13 – Personal or Private Interest – Starting a Business: State employees asked if a conflict would exist if they started a private enterprise, while employed by a State agency. No State employee, officer or honorary official shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No employee, officer, or honorary official shall accept other employment, any compensation where such acceptance may result in: (1) impairment of independence of judgment in the exercise of official duties; (2) giving preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 Del. C. § 5806(b). The Commission concluded the proposed endeavor would conflict with their agency duties because the proposal entailed technical assistance to private enterprises in areas evaluated by the employees in their State jobs. No facts were presented to justify a waiver under 29 Del. C. § 5807(a).

93-19 – Personal or Private Interest – Dual Positions: A State officer was asked to represent the State on a consortium of health care providers. The consortium was funded in part by a State commission to which the officer was appointed. He sought a decision of whether serving on the consortium conflicted with either his State position or his State appointment. He stated he would abstain from voting on consortium contracts that dealt with his agency or the commission on which he served. The Commission found no violation as long as he recused himself from matters that could create a conflict of interest or that could create a perception of such conflict. He was advised to bring any specific matters that arose to the Commission for an advisory opinion.

93-16 - Personal or Private Interest – Dual Positions: A division director in a regulatory agency also served on a board which consisted of appointees from local and State government and other persons who were elected to the board. The board was responsible for overseeing facilities' management of a public facility. Vendors for the facility were licensed and regulated by the division director's State agency, but had no dealings with the board on which he served. He requested a determination of whether serving on the board created a conflict of interest. The Commission held that the director could serve in the dual capacity as long as he recused himself from any action with his agency whenever an application was made by a licensee in connection with the facility which the board managed.

93-14 – Personal or Private Interest – Renting to Employee: A State officer asked whether it would be an ethical violation for him to rent an apartment to a State employee. The employee was not assigned to his agency and did not report to the officer or anyone in his agency. She performed reception work for a suite of offices that the State officer used about three days a week. The offices were occupied full time by the individual to whom the employee reported. The employee served as the receptionist to all users of the suite and was available to do secretarial work for all persons in the office. The employee was looking for a temporary rental while she purchased a home. The officer had a condominium for rent. The Commission found no violation as he was not incurring any obligation "in substantial conflict "with performing his official duties. 29 Del. C. § 5806(b).

93-12 – Personal or Private Interest – Appointment: An individual was appointed to serve on a regulatory agency but did not wish to execute the appointment until there was a determination that his financial holdings did not create a conflict of interest. In accepting the appointment, the individual would receive more than $5,000 compensation per year. The Code of Conduct defines such persons as "State employees." *See,* 29 Del. C. § 5804(11)(a)(2). The Code requires State employees with a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency to file a disclosure statement. 29 Del. C. § 5806(d). The disclosure from the employee revealed that he was the president and majority stock holder in two corporations. Neither corporation was subject to the regulatory jurisdiction of, nor did they do business with, any State agency. However, the corporations had contracts with a company which was regulated by the agency to which the individual was appointed. The individual disclosed that the corporations would not, in the future seek contract work with any company regulated by the agency to which he was appointed. However, the corporations, to avoid defaulting on the existing contracts, needed to complete the projects with the company regulated by the agency. The work was not a significant part of the corporations' business and the work was in its final phase.

The Code also prohibits employees from acquiring financial interests in a private enterprise directly affected by decisions to be made by them. 29 Del. C. § 5806(c). It also prohibits employees from having an interest in any private enterprise which is in substantial conflict with the proper performance of public duties. 29 Del. C. § 5806(b). The Commission found that neither of these provisions was implicated because the corporations were not affected by the regulatory agency; did not directly or indirectly benefit from any decisions made by the regulatory agency; and had insignificant business with a regulated company.

The Commission also found that performing responsibilities for the regulatory agency would not create an appearance of impropriety, which is addressed by 29 Del. C. § 5806(a), § 5806(b)(4) and § 5811(2). It found that not only were the businesses not regulated by his agency; that the contracts were inconsequential to agency action; that the contracts were almost completed and no further contracts would be pursued, but that the individual had initiated the request for an opinion and filed a disclosure statement on his own and had initiated discussion and disclosed these facts during Senate confirmation hearings.

93-10 – Personal or Private Interest – Local Government: Complainant alleged that a local government official, in a legislative capacity, prepared a revised ordinance and submitted it to the town's Board of Commissioners. Complainant alleged that the official violated the Code of Conduct by reviewing and disposing of matters where there was a personal and private interest which tended to impair judgment in official decisions. 29 Del. C. § 5805(a). Complainant also alleged that the official had worked, not only with the town's attorney, but with unidentified citizens in preparing the revised ordinance. Upon request for identification of these individuals at a public meeting, the official refused to identify such persons, which complainant believed violated the Freedom of Information Act. See, 29 Del. C. § 10001, et. seq.

The Commission found no substantiation of the allegation that there was an attempt to pass the proposed revision without proper notice and an opportunity for opponents to be heard. The draft legislation had been made public. The Commission noted that officials are entitled to draft proposed legislation and can be assisted by a government attorney and other employees hired by the legislative body. It found that legislators are not prohibited from being assisted by

unidentified private citizens in drafting proposed legislation under the Code of Conduct provisions. There were no facts to support the allegation that the official had any personal or private interest in the matter. To the extent the activities violated the Freedom of Information Act (FOIA), that was not a matter for the Commission, as its jurisdiction is limited to the Code of Conduct. Enforcement of FOIA is within the Attorney General's jurisdiction. 29 Del. C. § 10005.

93-08 – Personal or Private Interest – Municipal Officials: Complainant alleged that municipal officials improperly voted on a matter where they had a financial interest. Effective January 23, 1993, the Code of Conduct applied to local governments if they had not adopted a code at least as stringent as the State Code. 68 Del. Laws § 1, c. 433. The Code prohibits officials from participating in the review or disposition of matters where there is a personal or private interest which tends to impair a person's independence of judgment in the performance of duties. 29 Del.C. § 5805(a)(1). A person has an interest which tends to impair judgment if action or inaction would result in a financial benefit to the person to a greater extent than such benefit would accrue to others of the same class or group of persons. 29 Del. C. § 5805(a)(2)(b).

The "action" was a vote to impose a moratorium on a certain matter due to weather related reasons so that there could be a discussion at the next public meeting. There were no facts alleged showing that the vote resulted in any financial benefit to the town officials charged, and no prejudice accrued to any party. Accordingly, the complaint was dismissed.

93-06 – Personal or Private Interest – Spouse's Business: An individual seeking State employment was requested by the agency for which he intended to work, to seek a determination of whether his spouse's operation of a private enterprise created a conflict of interest. The individual would be working in an area dealing with transportation and his spouse owned and operated a company that provided certain transportation services. While the spouse had to obtain a business license and the necessary permits for her company from the State, the company was not otherwise regulated by the State and did not contract with the department to which he had applied for a job or with any State agency. The individual seeking State employment did not have any direct involvement in the company's operation, decision making or direction; did not own stock in the corporation; and was not an officer or director of the corporation. If he were hired by the State, he would not be involved in any decisions in his official capacity regarding his spouse's business interest.

The Code prohibits employees from reviewing or disposing of matters before the State where there is a personal or private interest. 29 Del. C. § 5805(a). It also prohibits employees from acquiring a financial interest in a private enterprise where he has reason to believe it may be directly involved in decisions to be made by him in his official capacity. 29 Del. C. § 5806(c).

The Commission found no violation of the Code of Conduct under these circumstances.

Note: No State employee, officer or honorary official shall acquire a financial interest in any private enterprise which he has reason to believe may be directly involved in decisions to be made by him in an official capacity on behalf of the State. 29 Del. C. § 5806(c). Any State employer or officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency (and any honorary State official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee)

shall file with the Commission a written statement fully disclosing the same. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the State. 29 Del. C. § 5806(d).

93-05 – Personal or Private Interest – Honorary Official: An individual served as an honorary State official on a State Board. "Honorary State officials" are persons who serve as appointed members, trustees, directors or the like of any State agency and receive not more than $5,000 per calendar year in compensation. 29 Del. C. § 5804(13). The official was subsequently hired as the director of a State agency. He requested a determination of whether holding these concurrent positions created a conflict of interest. None of his decisions as an Honorary State official would have any effect on the State agency for which he worked. None of his activities for the State agency had any effect on the commission to which he was appointed. He advised the State Ethics Commission that he would decline any payment of expenses or the $75 stipend he would normally receive from the position to which he was appointed. The Commission found no violation of the Code of Conduct.

NOTE: The Code prohibits persons employed by the State who also serve in an elected or paid appointed position from accepting payment from more than one tax-funded source for duties performed during coincident hours of the workday. 29 Del. C. § 5822.

93-03 – Personal or Private Interest – Spouse Employment: A State officer notified the Commission that in his official position he reviewed and approved contracts for services for his Department. A private enterprise which contracted with his Department employed his spouse. He noted that her employment represented a financial interest on his part and his review of such contract might appear improper. *See*, 29 Del. C. § 5806(a). He delegated his authority to review such contracts to another individual in the agency.

The Code prohibits officers from reviewing or disposing of matters where there is a personal or private interest that tends to impair judgment. 29 Del. C. § 5805(a). The Code specifically identifies as an interest which "tends to impair judgment," one where the individual reviews or disposes of matters where action or inaction would result in a financial benefit to the person or close relative to a greater extent than would occur for others who are in the same class or group. 29 Del. C. § 5805(a)(2)(a). A "close relative" means "a person's parents, spouse, children (natural or adopted) and siblings of the whole and half-blood." 29 Del. C. § 5804 (1). Where there is such an interest, the person can delegate such authority. However, if the responsibility cannot be delegated, the individual must fully disclose to the Commission why the matter cannot be delegated. 29 Del. C. § 5805(a)(3). The Commission found the delegation to be appropriate.

92-05 – Personal or Private Interest - Connection with Civic *Association*: Two individuals were members of a regulatory agency which reviewed the licensure status of businesses. The individuals were both members of a civic association which was active in matters pertaining to certain types of businesses which were regulated by the agency. A request was made for a determination of whether it would be a conflict of interest for the two individuals to participate in the review of the licensure status of those particular businesses. The Commission concluded it would violate 29 Del. C. § 5805(a), which prohibits the review or disposition of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment in performing duties with respect to that matter. It also concluded that their

involvement in the review would violate 29 Del. C. § 5806, which prohibits conduct that would have an adverse effect on the public's confidence in the government.

The Commission noted that its holding was without prejudice to the possible applicability of 29 Del. C. § 5805(a)(3), which provides that where a person has a statutory responsibility where he has a personal or private interest and the matter cannot be delegated, that the person may exercise responsibility with respect to that matter if they promptly notify the Commission and fully disclose the personal or private interest and explain why the responsibility cannot be delegated.

92-04 – Personal or Private Interest - Financial Interest of Spouse: A State employee, who was a computer specialist, was tasked with requesting bids by phone or fax, when small items were needed in an emergency. The sealed bids or telephone responses were to be handled by other office personnel and then a committee of three decided who would be awarded the job. The State employee's spouse owned a computer firm. The agency asked if purchase of services from the spouse's company would implicate any provisions of the Code of Conduct. The Commission concluded that any involvement of the employee in purchases from the spouse's company would violate 29 Del. C. § 5806(a), which prohibits conduct that would raise suspicion by the public that the public trust was violated.

91-19 – Personal or Private Interest - Expert Witness: A State employee wished to pursue outside employment as an expert witness in an area related to his State employment and his professional training. The Code prohibits State employees, officers or honorary officials from accepting other employment or compensation under circumstances where such acceptance may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making governmental decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State. 29 Del. C. § 5806(b).

Witness testimony revealed that if the employee became an outside expert, his courtroom appearance could result in testimony on his own work for the State or the work of the agency. The employee stated he agreed with the agency "a hundred percent" that there would be a conflict if he testified as a private consultant on jobs he worked on for the State. He said he would refrain from testifying in such instances. He suggested he could provide the expertise to similar agencies in States surrounding Delaware, rather than in Delaware. However, the agency said it had joint projects with those States and that to have a high level manager from the Delaware agency providing comments and guidance to another state's agency for a fee could "prove difficult" in terms of working relationships with those States. The employee said the reason he wanted to become an expert was so he could get experience before he retired and could then pursue that career after retirement. The agency said it could provide the employee with some experience by having him as a witness for the State on certain matters, which would provide him with experience without going to the private sector.

The Commission concluded that if the employee testified in a private capacity, while employed by the State, his State position would be a topic of testimony. It was the Commission's opinion that this would reflect unfavorably on the employee's position of holding the public trust, and therefore would violate the Code.

91-13 – Personal or Private Interest - Representation of Private Enterprise: State officers are prohibited from representing or otherwise assisting any private enterprise with respect to matters before the State. 29 Del. C. § 5805(b)(2). A Public Service Commissioner requested a waiver from this restriction so he could represent his full-time employer, an insurance company, in matters before the Delaware Insurance Office. Waivers can be granted if 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 undue hardship to any State employee, officer or agency. 29 Del. C. § 5807(a). The Commission granted a waiver because the Public Service Commission (PSC) did not regulate insurance companies; had no relationship with the Delaware Insurance Office; and membership on the PSC could not result in undue influence on the Insurance Office.

> **NOTE:** The law provides that employees, officers or honorary officials may not represent or assist private enterprises with respect to matters pending before the agency with which the employee, officer of official is associated by employment or appointment. 29 Del. C. § 5805(b)(1). For officers, the statute goes further and states that officers may not represent or assist private enterprises with respect to any matter before the State. 29 Del. C. § 5805 (b)(2). The Code defines "employees" as including persons appointed to a State agency, who receive or expect to receive more than $5,000 per year in compensation. 29 Del. C. § 5804 (11)(a)(2). "Officers" are persons required to file a financial disclosure form, except members of the General Assembly and the Judiciary are not included in the term. 29 Del. C. § 5804 (12). The PSC Commissioner was appointed by the Governor and, by law, received more than $5,000 per year in compensation. 26 Del. C. §§ 103, 105, and 110. Thus, he would be considered a State employee, not an officer, and the Commission could have alternatively ruled that no waiver was required as the PSC Commissioner was not representing a private enterprise before the agency with which he was associated with by appointment.

91-12 – Personal or Private Interest - Consulting Work: Prior to establishment of the Commission in 1991, a State employee was part owner of a consulting firm which engaged in work that included some matters reviewed by the employee's State agency. The employee did not participate in the review, but the State employee sitting next to him conducted the review. After the Commission was created, the employee did not engage in outside work that was reviewed by his office. He sought a decision on whether the outside consulting work would violate the requirement that no State employee may represent or otherwise assist any private enterprise with respect to any matter before the State agency with which the employee is associated by employment or appointment. 29 Del.C. § 5805 (b)(1). His agency expressed concern that even if the employee recused himself from the review, there would be an appearance of conflict because of the small size of the office. The agency stated that the small office size also created problems in making assignments to avoid a conflict. It also noted that private enterprises, over the years, had complained of unfair competition when a State employee engaged in this technical work and that from time to time there was a perception that the State employee might receive preferential treatment during the review process by a co-worker. The Code prohibits conduct that raises an appearance of impropriety. 29 Del. C. § 5806(a) and (b)(4). The Commission held that the employee could not participate in the outside consulting business.

91-03, 91-04, 91-06 – Personal or Private Interest - Financial Disclosure: Regulatory board members filed disclosures with the Commission that they were involved in the operation of a

facility regulated by the board on which they served. The board members were honorary State officials and as such were required by law to disclose financial interests in private enterprises which are subject to the regulatory jurisdiction of, or did business with, the agency on which they served as an appointee. 29 Del. C. § 5806(d). Such filings are confidential except as may be necessary to enforce the Code of Conduct. *Id.* The filing is a condition of commencing and continuing appointed status with the State. *Id.*