OUTSIDE EMPLOYMENT
1991-2013

13-31 - Outside Employment: [State Officer] recently began practicing law with a new firm of approximately 300 attorneys, most of whom practice in [another state]. One of the attorneys specialized in the area of abandoned property. The attorney represented companies attempting to retain property state finance departments had decided to claim as abandoned. Usually, the companies were contacted by private auditing firms that represented the state; it was not uncommon for a company to receive a notice that numerous states were simultaneously seeking to claim abandoned property. Because Delaware is a state of incorporation for many companies, it is common for Delaware to be one of the companies involved in the multi-state audits. As a result, the attorney at [State Officer]'s new firm had contact with private companies that were representing the State of Delaware, and he occasionally had direct contact with employees of [a State agency]. Most of the abandoned property cases are resolved informally but some of the cases result in litigation.

The [State agency] did not identify any companies with whom it was negotiating over abandoned property. That information was considered confidential taxpayer information. [The State Officer] was also screened from any knowledge of his law firm's clients that have any connection with any Delaware state agencies. Therefore, if there were to be any abandoned property issue involving the [State agency] and a client of his new law firm, he would not know about it from either end – short of litigation, the matter would begin and end without [State Officer] ever knowing that a matter existed.

[The State Officer] requested the Commission consider whether he would have a conflict of interest if he worked for a law firm that was negotiating abandoned property settlements with the State of Delaware as long as he did not have any information about either of the parties, nor participate in any way. He also asked the Commission to consider whether the opinion would be different If the case were to proceed to the litigation stage, where [State Officer]'s law firm would be publicly adverse to the State.

The Delaware Lawyers' Rules of Professional Responsibility (DLRPR) and the State Code of Conduct restrict, but do not completely bar holding concurrent private and public employment. Rule 1.11; 29 Del. C. § 5806(b). PIC does not interpret the DLRPR, only the Delaware Supreme Court regulates the practice of law. To avoid impaired judgment, in his State capacity, [State Officer] may not review or dispose of matters if he has a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5806(b). Outside employment creates a personal or private interest. 29 Del. C. § 5805(a)(2). Under 29 Del. C. § 5806(b), State employees may not accept other employment if acceptance may result in: (a) impaired judgment in performing official duties; (b) preferential treatment to any person; (c) official decisions outside official channels (d) any adverse effect on the public's confidence in the integrity of its government.

[The State Officer] stated in his written request, and at the hearing, he would not have any knowledge a matter was pending between his law firm and the State unless it became the subject of public litigation. His law firm was willing to screen him from information related to abandoned property matters. [The State Officer] also stated that the [State agency] did not identify the parties involved in abandoned property issues. To that extent, he would not be reviewing and disposing of matters in which he had a private interest. He did have peripheral involvement in abandoned property issues in the general context of budget discussions. The

Commission decided the limited budget discussions did not create a conflict in which [State Officer]'s judgment would be impaired. Assuming [State Officer] was not aware of any pending negotiations between the State and his private employer, he would not be in a position to show preferential treatment to anyone. His lack of knowledge would also prevent [State Officer] from making official decisions outside official channels. Further, [State Officer] stated his law firm would be willing to limit their representation of clients to those matters that can be resolved without litigation.

The Commission decided that under the facts presented, [State Officer] did not have a conflict of interest. However, the finding was conditioned on the fact [State Officer]'s law firm would not participate in litigation against the State.

13-29 - Outside Employment: [An employee of DMV] processed [documents] for car dealers and the general public. She also supervised other DMV employees. When asked if she had any discretion in the performance of her job duties, [the State employee] indicated her job required that she exercise her own judgment.

[The State employee] had been offered two part-time positions with two [private companies]. [One company] wanted to hire [the State employee] to run an auto auction and to complete [other paper] work. [The second company] wanted to hire [the State employee] to process their [paper] work. Subsequently, the [paper] work would be brought to DMV for processing by the [companies]. [The State employee] indicated she would not process any paperwork for her part-time employers while working at DMV. If she was presented with a situation in which her part-time employer was the next customer in line, she would skip over their [documents] and work on the next application in line. Work for her private employers would be processed by other DMV employees. [The State employee] acknowledged she supervises some of the employees who would be tasked with processing the work submitted by her private employer.

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

At her State job, [the State employee] stated she would not be processing [paper] work for her private employers. She claimed those duties would be assumed by other employees at DMV. However, some of those employees were actually supervised by [the State employee]. It would be difficult to determine if the employees' decisions related to the [paper] work were a result of their independent judgment of if they were motivated by external factors. (i.e. fear of retribution from their supervisor; their personal attitude towards [the State employee]). The remaining employees were [the State employee]'s colleagues and co-workers. As a professional courtesy, her co-workers could extend preferential treatment to the [private companies] that employed [the State employee] or subject their submissions to lesser scrutiny. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). [The State employee] stated she would not use State time or resources to complete her part-time work. However, the inquiry was more involved. It was assumed other [businesses in the industry] would become aware of the working relationship between [the State employee] and her private employers. Any legitimate rejection of submitted documents by other [private companies] would raise the warranted specter of favoritism.

After a conflict of interest was identified, the Commission considered whether [the State employee] served a ministerial function. 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.*, 336 A.2d 209, 211 (Del.1975). Thus, if the matter was merely "ministerial" the presence or absence of a conflict of interest was immaterial. [The State employee] revealed she often used her own judgment to determine if work complied with DMV regulations. Because she used her own judgment, her job status could not be categorized as ministerial.

The Commission decided that [the State employee]'s employment by private enterprises that contracted with her State agency would be a conflict of interest that could not be cured by recusal or by a determination that her job duties included merely ministerial functions.

13-28 - Outside Employment: [A State employee who worked for a division] within the Delaware Economic Development Office placed media advertisements, responded to media requests, and proactively sought media coverage. [The State employee] coordinated with magazines and other publications regarding graphics, placement, and timing of the ads. Billing for each ad went directly to an administrative person in his department. The cost of each ad was generally $250 per placement. The final decision regarding placement of an advertisement was made by [the State employee's] supervisor. Approximately once a quarter, an ad was placed in [a publication]. [The publication] also reached out to [the State employee] to solicit advertisements.

[The State employee] had been asked to write articles for [the publication]. The topics he expected to cover included profiles of "local personalities and businesses". He believed he would have some control over the topics he would write about. When the Commission asked if he would be able to recuse himself from dealing with [the publication] in his State position, he said he could pass those duties to another employee. [The State employee] said he discussed the position with [the publication] with [his supervisor]. He didn't anticipate any problems with his State employer allowing [the State employee] to recuse from any issue related to [the publication]. He also asked for advice about the information he should include in his byline.

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

[The State employee] stated he would communicate with the editor at [the publication] in reference to his articles. The advertising department employed different staff reducing the likelihood a conflict of interest would affect [the State employee's] judgment. His ability to recuse himself at his State job from any matter related to [the publication] ensured that official decisions would not be made outside official channels. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the position would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). [The employee] said he would not use State time or resources while working for [the publication].

The Commission found there would not be a conflict of interest if [the State employee] recused himself from any matter dealing with [the publication] in his State position. Additionally, [the State employee] could not use his State title in his byline.

13-26 - Outside Employment: [A State employee] worked for the Department of Health and Social Services (DHSS). In his position, [the employee] was responsible for [some processes related to] a Request for Proposal (RFP). He was not responsible for awarding contracts. Recently, [the employee] started his own small business consulting firm. As part of the marketing effort for his new firm, he asked if it would be allowable for him to use his State title in the marketing material. The Commission advised that it would be inappropriate for him to use his State title on any marketing materials, including presentations or material requiring biographical content. [The employee] was concerned about how to answer a direct question regarding his position with DHSS. The Commission advised If he was asked directly [about his position with DHSS], he should answer honestly.

[The employee] stated his firm would not do business with DHSS. If he was questioned about the appropriate procedure for completing an RFP for DHSS, he would refer the vendor to a website designed to explain the bidding process. [The employee] did want to offer guidance to his private clients about completing RFPs for other agencies. His work would be focused on [a different process from the one] he monitored in his State job. Additionally, [the employee] stated his guidance would not require him to interact with other State agencies on his client's behalf. His work would be limited to helping his clients [with] the RFP. When asked how he would avoid unanticipated interactions with clients contracting with DHSS, [the employee] said he would have his prospective clients fill out a disclosure form.

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

Because [the employee] would not contract with, nor accept clients that contracted with, DHSS, there was little concern about impaired judgment, preferential treatment, or official decisions outside official channels. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the Code would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). [The employee] stated he would not use State time or resources to work with his private clients.

The Commission decided it would not be a conflict of interest for [the employee] to consult with private clients regarding the RFP process for agencies other than DHSS. [The employee] should also refrain from using his State title on any material related to his private enterprise.

13-25 - Outside Employment: [A State employee] worked for the Department of Natural Resources and Environmental Control (DNREC). He supervised employees at DNREC. [The employee] was offered a part-time job working for [an organization]. [The organization] was a non-government agency which advocated to the federal government on behalf of [state] agencies in all 50 states. Delaware was a member of [the organization]. However, [the organization] did not comment on State regulations or statutes. According to [the employee], the only professional contact between his agency and [the organization] was participation in [the organizations] meetings to share and gather information about matters of interest to DNREC. [The employee] had attended those meetings in the past.

[The employee] would develop, review, and manage contract proposals (Request for Proposals (RFPs)) submitted to [the organization] for development of on-line training courses. The training courses were geared towards employees of natural resource agencies. In addition to managing the contracts, he would also be teaching some of the online courses. [The employee] would be paid a flat fee for teaching the course, his salary was not dependent on the number of students enrolled.

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

[The employee] indicated that because [the organization] did not represent or contract with DNREC there would be no effect on his judgment in performing his State job, there would be no preferential treatment to any person, and his private work would not result in official decisions outside official channels. When asked if he would use his influence to get his employees to enroll in the online courses, [the employee] said he would not be responsible for making that decision. In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the employment would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). One concern raised in this regard was the use of [the employee's] State title. [The employee] agreed his State title would not be used for any work he did for [the organization]. He also stated he would not use State time or resources to perform his part-time job.

The Commission decided [the employee's] acceptance of the part-time position would not be a conflict of interest and there would be no appearance of impropriety as long as [the employee] did not use his influence over his DNREC employees to encourage enrollment in the online courses. Also, [the employee] must not expend State time or resources for his part-time position.

13-23 - Outside Employment: Applicant worked part-time for the Division of Public Health (DPH) within the Department of Health and Social Services. She maintained a database which collected health-related data and she reported that data to a federal agency. Applicant also evaluated a health-related prevention program. Her agency contracted with Brandywine Counseling and Community Services, Inc. (BCCS) to provide various services. BCCS was required to report statistics using the database that applicant managed. She had also trained BCCS employees on the use of the database. Applicant was also co-owner of a consulting business. The business recently entered into a contract with BCCS to provide BCCS with data support services. In that instance, BCCS was contracting with the Department of Corrections (DOC). Applicant would be working directly with BCCS staff.

In their State capacity, State employees 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). Applicant interacted with BCCS employees frequently. She trained them to use the State's database and when the information in the database was not in compliance with federal standards, she was required to contact them and bring them into compliance. At the meeting she described the standards she had to enforce as a matter over which she had no discretion, a ministerial duty. 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).

Thus, if the matter is merely “ministerial” the presence or absence of a conflict of interest is immaterial. In their private capacity, State employees may not represent or otherwise assist a private enterprise before the State agency with which they are associated with by employment. 29 Del. C. §5805(b)(1). In her written disclosure, applicant indicated that she would not represent or assist BCCS in obtaining a contract with DHS. At the meeting, she also indicated she had made her supervisor at DPH aware of her private contract.

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). In deciding if the conduct would raise the appearance of impropriety, the Commission considered whether the conduct would be contrary to the restrictions on misuse of public office. 29 Del. C. §5806(e). One prohibition considered by the Commission under that provision is the State employee may not use State time or State resources (i.e. computer, fax, phone, etc.) to work on the private business. Applicant is entitled to a strong legal presumption that she would not engage in a violation. *Beebe Medical Center.* Applicant stated in her disclosure form that she would not use State resources. The Commission decided there was no conflict due to the ministerial nature of her position with the State.

13-21 - Outside Employment: Applicant was not present due to a death in his family. However, the Commission may provide advice based on a written statement. 29 Del. C. § 5807(a). An employee of the Department of Corrections (DOC) filed the required disclosure of his plan to work a part-time job with New Behavioral Network (NBN), as it contracted with the Department of Services for Children, Youth and Their Families. 29 Del. C. § 5806(d). NBN was considering the employee for employment as a Behavioral Interventionist or a Bilingual Parent Aide. In his DOC job, he was not assigned juvenile clients. He was not involved in any matters related to NBN. Thus, he would not review or dispose of matters where he had a financial interest as a result of the part-time employment. 29 Del. C. § 5805(a)(1). At NBN, as a Behavioral Interventionist he would be working with children. If he was selected as a Bilingual Parent Aide, he would translate parenting skill information for parents of the NBN child clients. The employee stated that if there were any overlap between his assigned clients and his NBN clients, he would recuse as needed. He would not have any NBN duties that would require him to represent them before the DOC. 29 Del. C. § 5805(b)(1). The Commission decided that there was no actual conflict as long as he recused as necessary and reminded the employee of his obligation not to use State working hours or State resources to do work for his private employer. 29 Del. C. § 5806(a) and (e).

13-20 - Outside Employment: The State employee worked for the Department of Corrections (DOC). She filed a disclosure of her intention to work part-time for New Behavioral Network (NBN), because it contracted with the Department of Services for Children, Youth and Their Families (DSCYF). 29 Del. C. § 5806(d). The employee stated her employment with the State consisted of supervising construction workers on the grounds of a correctional facility. Occasionally, she worked inside the building with adult inmates. Her duties did not include any review or disposal of matters related to NBN. 29 Del. C. § 5805(a)(1). Her job at NBN would require her to work with adults as a Parent Aide. Logically, if the employee was working with an adult at NBN, they would not be an inmate that she would be supervising at the correctional facility. However, she stated it is possible that she may be assigned to work with an adult who had a relative that was incarcerated. Should that situation arise, she would be unable to recuse herself from her State position, but she would be able to recuse at NBN. Efforts would be made

by NBN to determine if the client she would be assigned to work with had an incarcerated family member so that the issue could be addressed prior to case assignment. The Commission found no conflict as long as she recused as appropriate.

13-08 - Outside Employment: After an ethics training class to a State Board, a member who was also a director and president of a private enterprise, concluded he would recuse from any hearings the private enterprise brought before the Board. That is consistent with 29 Del. C. § 5805(a) (1) and (a) (2). Although he planned to recuse as a Board member, he wanted advice on proper recusal. He noted that, at the training, it was stated that if there was a conflict the official should recuse from the outset. *Beebe Medical Center.* It was stated that PIC usually recommends that the individual leave the room because some Courts have held that even "mere presence" could influence other decision makers. *United States v. Schaltebrand,* 11th Cir., 922 F.2d 1565 (1991). He said that his observation had been that Board members participated when they had a conflict but recuse from the vote. That is what occurred in the *Beebe* case and the Court said it was improper not to recuse from the outset. The Board Member said he did not even plan to attend the meetings. The other reason he wanted a formal opinion from PIC was because at the training it was stated that if the advice was followed that the individual would be protected from a complaint or disciplinary action. 29 Del. C. § 5807(c). The private enterprise's attorney was at that meeting, and encouraged the Board Member to get a formal opinion because of the protection it offered, especially as there was a gentleman who was suing the Board over a similar circumstance.

However, it became clear he had another conflict. The Code barred him, in his private capacity, from representing or otherwise assisting the private enterprise in the matter before the Board on which he is associated by appointment. 29 Del. C. § 5805(b)(1). He said he had been involved in the project for more than 4 years, and because of his position as President, Board member, and investor, he would find it difficult to totally recuse. He said as other matters related to the private enterprise were being discussed, it was possible that the subject matter of the Board application may be raised or that someone may bring it up for other purposes. The Board Member was appointed about six months prior, and the application was recently submitted. There had not been a ruling on the application. It would go to a subcommittee then to the full Board. He said he did review the application after it was submitted to the Board. He also said he is familiar with the Board's procedures because he had gone through the application process twice with other entities related to his private enterprise.

The Board Member said his board position was voluntary and he could resign, but did not want to because he considered it an honor to sit on the Board. He explained why his private enterprise's application would garner extra scrutiny: Before he became a Board member, a competitor filed an application to put a similar facility in New Castle County. The Board did a study on whether it was needed. They do it county by county. The board initially determined that there was not a need for this type of enterprise in New Castle County. But there was a need, according to the Board, at that time in Sussex County and Kent County. The application was initially voted down. The competitor was unhappy with the Board's decision. Subsequently, there was some change in Board members and then it apparently got voted in the positive. According to the Board Member, a case was currently pending the court system. The Board had not acted on an application since that time. The Board Member then spent some time differentiating his proposed facility from his competitor's facility. He also discussed the fact that the Board felt that the facility proposed by this Board member's private enterprise was more appropriately considered for approval. However, a question remained about why the Board changed their vote for the New Castle County project after the Board members were changed.

He said: “I don’t think it’s possible for me not to participate at [his private enterprise]. First of all, I’m an investor. I’m already an investor. Not a large amount of money. It’s a very small amount of money so far in this little center. …. It’s not a big investment; it’s just some founder shares to try and get it started. For me to sit here and tell you I’m not going to have anything to do with--I mean I’m President of [the private enterprise]. I’m going to have to help negotiate. You know…[the private enterprise] going to have to pay rent on the place, on the property or are we going to have to sell it out right. So I’m going to be involved in one shape or form. I will try not to be involved as far as participation with the… Board. That I’ve been trying to stay away after I heard you talk.”

The Commission decided that while recusal from the Board’s action would cure that conflict, he still had a conflict because he said he could not totally recuse from assisting the private enterprise on the matter in his private capacity because of his job, his fiduciary duties as a board member, and the inability to always know when an issue would come up, coupled with the appearance issues that may be raised because he knew he had an application coming before the Board before accepting the position, and it could be seen as putting himself in an advantageous position. As the conflict could not be cured, and no facts indicated a waiver could be granted, then the advice was that he should leave the Board.

13-04 - Outside Employment – Gavin Bethell – Waiver Request- Granted (As a waiver was granted, the proceedings are not confidential. 29 Del. C. § 5807(b)(4).) (Footnotes have been omitted for ease of publication).

April 1, 2013

Waiver Granted so proceedings no longer confidential. 29 Del. C. § 5807(b)(4).

Mr. Gavin Bethel
XXXXXXXXXXXX.
Wilmington, DE 19805

13-04 – Outside Employment
Hearing and Decision by: *Wilma Mishoe, Chair; Andrew Gonser, Esq., and William Tobin, Vice Chairs; William Dailey, Lisa Lessner, and Jeremy Anderson, Esq.*

Dear Mr. Bethel:

The Public Integrity Commission PIC reviewed your request for a waiver to accept a part-time position with Crossroads, which contracts with your State office. Based on the following law and facts, we grant a limited waiver.

Applicable Law and Facts

State employees who have a financial interest in a private enterprise that does business with, or is regulated by, a State agency, must file a full disclosure with PIC. 29 Del. C. § 5806(d). It is a condition of commencing and continuing employment with the State. Id.

“Financial interest” in a “private enterprise” includes private employment. 29 Del. C. § 5804(5)(b).

You work for the Division of Prevention and Behavioral Health (DPBH), Department of Services for Children, Youth, and their Families. Crossroads contracts with your Division. Your written statements, and your statements at PIC’s meeting, constitute the disclosure.

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).

Your State job involves working with children ranging from 8-16 years of age. They are referred to your agency by their parents who say something is wrong. The agency then diagnoses their problems. You said the parent explains the child’s previous history to you; you also review any prior diagnoses, and the opinion of the Psychologist who meets with them as part of the intake procedure, which gives you a well-rounded version of all the issues they have. From that review, it may be determined that the child needs drug and alcohol counseling. You said that in making such referrals, you “go off of past history,” “anything the child speaks about in therapy,” or if, at some point, they “have a dirty urine test.” You said you also “make contact with all the providers.” That includes Crossroads and Aquila, who are the only drug and alcohol counseling providers under contract with your Division. Thus, your normal duties include reviewing the child’s case, and if necessary referring them to Crossroads or Aquila. At present, your team has only one child who is actually involved in drug and alcohol counseling. Once the child has been referred, the State duties include following up on that treatment. In other words, you could have occasion to review your State client’s case and decide if they should be referred to Crossroads—your private employer.

A personal or private interest includes private employment. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff'd*., No. 304 (Del. January 29, 1996). In *Beebe*, a State official served on a State Board reviewing hospital applications to assess health care resources and the need for such resources. *Id*. at p. 1. From that review, the Board made a recommendation to the State Bureau under which the Board operated. Id. Persons at the Bureau level made the final decision. *Id.* The State official, Mr. Davis, was also privately employed by a hospital. *Id*. at p.6. Beebe Hospital (BMC) alleged he violated the above provision because he participated in the review of a Nanticoke Hospital application when his private employer was involved in a business dealing with Nanticoke. *Id*. at p. 6. The Court reviewed the record and found that during the Executive Session he made comments, and asked questions on some procedures. It found the “minutes of the executive session established that his participation in the discussion was extremely limited and neutral.” *Id*. at p. 7. It also found that he did not vote, and the vote was “only a recommendation.” *Id*. The Court said: “I find that nothing Mr. Davis did prejudiced the BMC application.” However, it still held that “he should have recused himself from participation in this matter at the outset.” *Id*.

In another case, a State employee, Henry Risley, was not on the evaluation committee to consider awarding a State contract for health care to State prisoners, but he attended a meeting about the contract and asked some questions. *Prison Health Services, Inc. v. State,* C.A. No. 13,010, VC Hartlett, III (Del. Ch. July 2, 1993). Later, a bidder alleged Risley should not have participated because his spouse worked for one of the bidders. *Id. at p. 1*. The Court found his activities were limited to: (1) providing a list of Bureau of Prisons employees from which a Bureau representative could be selected to serve on the evaluation committee, and (2) attending and asking three questions (but not voting) at a meeting of the Department's

Executive Committee when a recommendation was given to the Bureau Chief. *Id. at 2.* 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." *Id.* However, it went on to say: "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. *Id.*

You said your Supervisor could make the final decision regarding a referral of your State clients to Crossroads or Aquila. As noted in the cases above, even if others make the final decision, it still is inappropriate for the person with the conflict to participate, and recusal is to be from the outset.

In order for your Supervisor to make the referral, realistically, you would first review the client's case to determine their issues and diagnosis and in doing so would know if they need the type of health services provided by Crossroads under the State contract before your referred the matter to your Supervisor. Thus, as in Beebe and Prison Health, you would be reviewing matters where you have a personal or private interest because of your private employment. In fact, you have a more direct interest than those officials because you would be reviewing a matter that could be directly referred to your private employer.

The reason for barring such participation is to insure no favoritism, preferential treatment, undue influence, or bias is shown by you in your decision making because of your private employment. Bias could be suspected either way. It could be suspected that, even inadvertently, you influenced your Supervisor to refer to Crossroads so that it gets a steady stream of clients, or that you may over respond because of that concern and in order to avoid such appearance inadvertently hesitate to refer which could hurt your State clients.

This is not to say you would actually engage in such conduct, but as noted in Beebe and Prison Health, even if that does not actually occur, your participation would still be "undoubtedly inappropriate", and therefore, the law dictates you should recuse "from the outset." However, for the reasons discussed below, we grant a waiver so you can handle your State cases up until the point where a referral must occur, and then turn the case over to your Supervisor for that recommendation, with the Supervisor determining who, other than you or someone you supervise, will follow-up with Crossroads on the client's progress, if the Supervisor selects that provider.

State employees may not represent or otherwise assist a private enterprise on matters before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1).

The purpose of this rule is to insure colleagues and coworkers in your agency do not have their judgment impaired when they review Crossroads' work by you because of your status as a State employee.

You indicated that you presently have 8 clients at Crossroads who are not State clients, but came to Crossroads through private insurance. As they are not State clients, you would have no occasion to represent or otherwise assist Crossroads before your own State agency on matters pertaining to those clients. We also understand that you will not take any of your Division's clients as your private clients.

However, you indicated you also wanted to work with children from the Division of Youth Rehabilitative Services (YRS) in your private job. That creates another conflict because "State agency" means any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly. 29 Del. C. § 5804(11) (emphasis added). YRS, like DPBH, is a Division of the Department of Services for Children, Youth, and their Families.

Even before this restriction was passed by the General Assembly, Delaware Courts upheld a State agency's decision not to do business with a private company when one of its employees also held a position in the State agency with which the company sought to do business. *W. Paynter Sharp & Son v. Heller*, 280 A.2d 748 (Del. Ch. 1971)**.** The agency believed that would "avoid any allegation or suggestion of undue influence" in the agency's decision. The Court noted that at that time the State had no conflict of interests laws, but upheld the agency's decision, saying that government contracts "have been suspect because of alleged favoritism, undue influence, conflicts and the like. In my view it is vital that a public agency have the confidence of the people it serves and, for this reason, it must avoid not only evil but the appearance of evil as well." Three years later, the General Assembly passed the conflicts of interest law barring private dealings between agencies and persons from their own agency, with the General Assembly making it one of the "vital" standards that carries a criminal penalty. 29 Del. C. § 5805(f).

For the reasons below, we do not grant a waiver of this provision.

(A) Waivers may be granted if there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a)**.**

Waivers are always the exception, not the rule. That is particularly true of the above Code of Conduct provisions because they are criminal provisions. 29 Del. C. § 5805(f). The General Assembly, in passing the law, said: some standards "are so vital to government that violation thereof should subject the violator to criminal penalties." 29 Del. C. § 5802(2). Thus, when we consider a waiver it must be as limited as possible.

You asked for a waiver because of your current financial situation, which we do not detail herein because when a waiver is granted the opinion becomes a matter of public record. 29 Del. C. § 5807(a). You said that you need to work part-time to meet certain critical financial obligations, and you have tried over an extended period of time to find part-time work in your professional field without success. You also are presently pursuing a further education that may subsequently lead to a better paying job.

Because realistically you may not know in advance that your State clients need referral for drug and alcohol counseling, a waiver is needed so you can review the case. From the review, or if subsequently on a urine test, it is determined your State client needs a referral, then you should refer the matter to your supervisor, and let your Supervisor decide which provider will be used, and decide who will make the subsequent follow up with any client that is referred to Crossroads. When that was mentioned at the Commission meeting, you said: "I understand that there's a conflict."

We note that it does not appear that there would be a flood of cases that you would have to refer to your Supervisor, because you said your team only has one child with a drug and alcohol assessment. The majority of the State clients you are involved with are there for mental health needs.

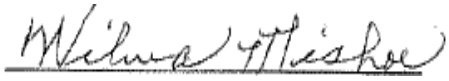
This will allow you to perform your State duties, and at the same time accept employment with Crossroads and assist you in overcoming your financial hardship.

However, we do not grant a waiver so that you may accept YRS clients, or other clients from the Department by which you are employed. That is because Crossroads has other clients with whom you can work without having to violate the provision that bars you from dealing with your own agency. As you can accept the employment, and have that source of income, with the waiver of only one provision, we will not waive another criminal provision when it is not necessary.

I. Conclusion

Based on the above law and facts, we grant a waiver to the restriction that would bar you from reviewing your State cases in order to determine if they need to be turned over to your Supervisor for referral for drug and alcohol counseling.

FOR THE PUBLIC INTEGRITY COMMISSION



Wilma Mishoe, Chair

The Commission decided it would be a conflict to review cases, then hand them off to his supervisor once he [Mr. Bethell] had decided they needed referral to Crossroads or Aquila because the Code bars "review" of matters where there is a personal or private interest. 29 Del. C. § 5805(a)(1). At a minimum, it could appear his review would influence the Supervisor's decision, but an undue hardship waiver should be granted for that provision so he could find work before his financial hardship worsened. The waiver was limited to 29 Del. C. § 5805(a)(1) so he cannot represent or assist Crossroads in his private capacity before his own agency.

13-04 – Outside Employment--Reconsideration of Denial of Waiver: A State employee asked for reconsideration of the Commission's denial of his waiver request to work with clients referred to Crossroads by Youth Rehabilitative Services (YRS). Previously, the employee had asked for a financial hardship waiver to allow him to work for Crossroads. Crossroads contracted with the Department of Services for Children, Youth and Their Families (DSCYF), and the applicant worked for a different Division within the Department. His State duties included making referrals to Crossroads. A limited waiver was granted to the provision that provides that he may not review or dispose of matters where he has a personal or private interest. 29 Del. C. § 5805(a)(1). The waiver recognized that it would be impossible for him to know upon intake of a client in his Division if it would require that the child be referred to Crossroads or another provider. He would have to review the case to make that decision. The employee recognized that if a referral was required, he was to then recuse and have his Supervisor make the decision. At that time, he also asked about taking YRS clients. YRS is a Division of his State agency, DSCYF. The law bars State employees from representing or

otherwise assisting a private enterprise before the “State agency” by which they are employed. 29 Del. C. § 5805(b)(1). “State agency” means “Department.” 29 Del. C. § 5804(11).

He sought reconsideration of that denial so that he could accept YRS clients. According to the Deputy Director of his Division, in his State job, he worked with YRS employees on cases assigned to both Divisions. At Crossroads, if a YRS client’s private insurance did not cover the cost of the Crossroads treatment, the applicant would have to refer the client to his own Division. Thus, he would be representing or otherwise assisting the private enterprise not only before another Division in his Department, but before his own Division. He stated that in an instance where YRS may refer a client to him in his position at his State job, he would refer that case to his supervisor. However, under the first decision, his cases were already subject to referral, and this would just add to more recusal from his State duties. The Commission denied his request for reconsideration because there was too much overlap between his State job and his private position.

13-02 – Outside employment: State employee wanted to work part-time with a private company that contracted with her State agency. She filed a disclosure as required. 29 Del. C. § 5806(d). In her State job, she would not be involved in issues pertaining to the company’s contract, nor would she have any of its clients referred to her in her State job. Thus, she would not review or dispose of matters pertaining to the company. Further, she would not refer any clients to that company. 29 Del. C. § 5805(a)(1). In the private job, she would not be performing the same work as in her State job. She specifically sought work that would be different. Thus, there would be no occasion when she would represent or assist the private enterprise before the agency by which she was employed. 29 Del. C. § 5805(b)(1). The private job was performed during non-State hours, and she would not use State resources or State time to perform her private work. Thus, she would not be using her State position for her personal benefit. 29 Del. C. § 5806(e). The Commission decided there was no conflict.

12-46 - Outside Employment: A State employee wanted to start a part-time, non-profit business to assist single parents and young adults in buying/financing a car. She would conduct research on dealerships, costs, etc., and go to the dealership with them. In her State job, she may not review or dispose of matters pertaining to her private business. 29 Del. C. § 5805(a)(1). Her State job did not involve such research. She said if any issue arose pertaining to her private work, she could tell her Supervisor, and the matter could be handled by someone else in her agency that she does not supervise. She was not going to charge fees but will accept donations. She wanted to help people not get “ripped off”. She said she would perform the work after her State hours and on weekends and use her own resources, e.g., laptop, cell phone,, etc., rather than State resources. Thus, she would not be using her State position for personal gain or benefit. 29 Del. C. § 5806(e). She would hand out flyers to attract clients.

She also may not represent or otherwise assist her private clients before her own agency. 29 Del. C. § 5805(b)(1). No facts suggested she would be appearing before her agency on behalf of the parties involved in the transaction. The Commission decided that as long as in her State job she did not handle the parties involved in the sale, and did not represent or assist them on her own agency’s matters, it would not violate the Code.

12-45 – Outside Employment: A Division Director asked if he could accept part-time employment with a company that previously had a contract with a different State agency, than the one he works for, but has fulfilled that contract and is not expected to seek further work in Delaware. Thus, he would have no occasion to review or dispose of matters pertaining to the company. 29 Del. C. § 5805(a)(1). That also would mean he would not have an occasion to represent or otherwise assist the private enterprise before his own agency. 29 Del. C. § 5805(b)(1). The work he would perform would be related to regulatory matters in a totally different State. His State job deals with the same type of regulatory matters, and the company had asked if he would be interested in working on such matters. The company had previously dealt with him when he worked for a different State before coming to Delaware. He would perform the work during non-State hours, and without using State resources, e.g., fax, phone, computer. While the work would pertain to another State, he does not expect it to involve much travel, but could work from home. Those facts did not suggest that he had used, or would use, his Delaware position to obtain the job, or perform the work. 29 Del. C. § 5806(e). The Commission recommended that his request be approved as long as he returned to the Commission if the company sought to do business with the State of Delaware, 29 Del. C. § 5806(d), and did not improperly use or disclose any confidential information gained from his State job. 29 Del. C. § 5806(f) and (g).

12- 34 - Outside Employment – Writing a Book: A State employee worked for the media before accepting a State job. During that time, he wrote about an event in Delaware that occurred several years ago. He wanted to write a book about the event in his spare time. The Code bars State employees from reviewing or disposing of matters where they have personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). The employee's official duties were in no way related to the subject matter he wished to write about, so he would not have the opportunity to review or dispose of matters related to his personal interest. State employees also may not represent or otherwise assist a private enterprise on State matters before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). Although writing the book could involve interviews with some people who worked for the State, he would not be dealing with any people in his own agency. State employees may not use their State office for personal benefit or gain. 29 Del. C. § 5806(e). No facts suggested that he would be obtaining and using confidential information for his personal benefit. Also, he would not use State time or resources to work on his book. He would primarily work evenings and weekends, but would take annual leave on occasion if, for example, the person he wanted to interview was only available during the day. However, he would advise his supervisor, and other senior level officials at the Department of his plan to write the book before that would occur, to insure they did not have a problem with him writing the book for any reason, since his public duties were to "command precedence" over his outside employment. *In re Ridgley,* 106 A.2d 527 (Del. 1954). State employees may not engage in conduct that may raise public suspicion that they are violating the public trust, or have any adverse effect in the public's confidence in its government. 29 Del. C. § 5806(a) and § 5806(b)(4). He expressed concern that because there had been litigation about the event, and some government officials had spoken on the issue, that their comments could have an adverse effect. What he described depicted the usual tensions related to litigation in a high profile case. However, the concern dealt with here was whether his conduct would raise such issues. The Commission decided there was no violation of the Code of Conduct.

12-32 - Private Job With Agency Vendor – Waiver Granted. When waivers are granted, the opinion becomes a public record. 29 Del. C. § 5807(a). (Footnotes have been omitted for ease of publication).

12-32 Concurrent Employment

Hearing and Decision By: Barbara Green, Chair; William Dailey and Wilma Mishoe, Vice Chairs; Lisa Lessner and Andrew Gonser, Commissioners

Dear Ms. [Christine] Montgomery:

The Public Integrity Commission reviewed your disclosure on your planned employment with New Behavioral Network (NBN), which contracts with your Department, Children, Youth and Their Families (DCYFS), but not the Division of Family Services (DFS), where you work. Based on the following law and facts, we find one conflict but grant a waiver of that provision.

I. Applicable Law and Facts:

(a) State employees must file a full disclosure if they have a financial interest in a private firm that does business with the State. 29 Del. C. § 5806(d). Financial interest includes private employment. 29 Del. C. § 5804(5)(c)).

You filed the required disclosure so a waiver of this law is not required.

(b) State employees may not:

(1) review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing State duties. 29 Del. C. § 5805(a)(1). Private employment can create a personal or private interest. *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). You are a Family Service Assistant, in DFS. Your duties involve assisting social workers in the adoption unit. You deal with adoption recruitment, paper and computer work related to adoptions; transportation of the children (e.g., to meet with prospective families) and do not have a caseload. That work does not require you to review or make decisions about NBN's contract. A separate Division, Prevention and Behavioral Health Services (DPBHS). develops, awards, and oversees that contract. In your private job, you will work with clients that are not processed for adoption through your Division. Thus, you would have no occasion to make decisions about your private clients in your State job. Your conduct does not violate this provision, so no waiver is required.

(2) represent or otherwise assist a private enterprise before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). **State agency means a Department. 29 Del. C. § 5804(11).** Your work for NBN will involve working with clients who receive treatment and assistance in behavioral health. Specifically, you expect to do such things as take the clients to functions or activities and observe their behavior in social settings. You will report your observations to the NBN therapist who is assigned to the child. Your observations will assist her in assessing the child's needs.

If your clients are not State clients from your Department, this provision would not apply. However, if your NBN client is from your agency, the therapist is required to meet with DPBHS on a regular basis to discuss the clients. The effect is that your

observations, reported to the therapist, are being used by NBN to show how it is fulfilling its contractual obligations of providing services to the Department's clients. We have held that such involvement constitutes assisting the private enterprise before the agency by which the State employee is associated. *Commission Op. No. 06-38.* Ideally, NBN should not assign you clients from your State agency to avoid a violation. We discuss below, the waiver granted so you can continue to deal with the one client who is assigned to you.

(3) Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(c). One purpose for not representing or assisting a firm before one's agency is to ensure your colleagues and co-workers do not base their decisions on the fact that you are involved with the private enterprise. The other reason is to insure that State employees do not use their public office to secure unwarranted privileges for themselves or the private enterprise. Here, nothing suggests these purposes could not be served. Regarding decisions by your immediate colleagues and co-workers, no decisions are made by anyone in your Division. Thus, the possibility of loyalty or favoritism toward you is more remote. Moreover, the decisions made by DPBHS employees are not direct decisions about your work. Rather, your interactions and observations pertaining to the child are evaluated by a professional therapist at NBN so that the therapist can decide on the approach to, and success of, therapy. How, and whether, that approach or its effectiveness fits into NBN's contractual obligations—not whether your reported observations are correct or incorrect—is what DPBHS determines.

Regarding using your public office to obtain special benefits for NBN that is not likely to occur as you do not draft, write, approve, manage, etc., the contract, nor does anyone in your Division. Also, you said that in performing these same functions for your prior employer, you never had occasion to deal with DPBHS. Finally, at present, you only have one client. You explained that during approximately 2 years with this client, the client has been relocated with different family members several times; has had several different therapists; and as a result, you have been the only stable feature in the client's life. We weigh that against the remote possibility that your input on a single client to the NBN therapist will influence the decisions of State employees in another Division, and the even more remote possibility that you could use your public office on behalf of NBN to influence DPBHS decisions, and conclude that a literal application is not necessary under the particular facts of this case.

(4) State employees may not misuse public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e). We noted above the remoteness of you misusing your public office to give NBN an advantage. Additionally, under this restriction, you are precluded from using State time and/or State resources (e.g., phone, fax, computer, e-mail, etc.) to perform any of your private work.

II. Conclusion

We find compliance with most of the rules and waive one provision because of the remoteness of possible misconduct. This waiver is limited solely to these particular facts. Should your situation change, you should contact the Commission.

FOR THE PUBLIC INTEGRITY COMMISSION

Barbara Green, Chair

12-32 - Outside Employment: A waiver was granted, so the opinion is a public record. 29 Del. C. § 5807(a). (Background: Last month the Commission granted a waiver for Ms. Montgomery to accept outside employment with the New Behavioral Network (NBN). *Commission Op. No. 12-32.* She provided NBN with a copy of the Commission's decision. It noted that the opinion cited Ms. Montgomery as saying NBN had a contract with a Division in her Department, but not with her Division, Family Services. NBN contacted Counsel to advise that it does have a contract with her Division. Ms. Montgomery had no involvement with that contract. No facts indicated misrepresentation on Ms. Montgomery's part, because she previously was honest with the Commission in telling them she had had outside employment with another State vendor but did not know she had to file a full disclosure with PIC until NBN told her. Moreover, she gave a copy of the Commission's decision to her prospective employer with the statement that NBN did not contract with her division, which would be inconsistent with any deliberate misrepresentation. After a review of this new fact, the Commission decided that the new fact did not change the outcome of the original decision, but that the opinion should be reissued with the corrected information.

STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION
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August 21, 2012

Ms. Christine Montgomery
309 Odessa Ave.
Wilmington, DE 19809

12-32 Concurrent Employment – Revised Opinion
Hearing and Decision By: *Vice Chairs William Dailey and Wilma Mishoe; Commissioners Mark Dunkle, Esq., and Andrew Gonser, Esq., Commissioners*

Dear Ms. Montgomery:

The Public Integrity Commission previously reviewed your disclosure on your planned employment with New Behavioral Network (NBN). At that time, you knew NBN contracted with the Department of Services for, Children, Youth and Their Families (DCYFS), Division of Prevention and Behavioral Health Services (DPBHS). You did not know it also contracted with the Division of Family Services (DFS), where you work. NBN alerted us to that change in fact, which has now been considered. Based on the following law and facts, we still find one conflict, but still grant a waiver of that provision.

I. Applicable Law and Facts:

(a) State employees must file a full disclosure if they have a financial interest in a private firm that does business with the State. 29 Del. C. § 5806(d)**. Financial interest includes private employment.** 29 Del. C. § 5804(5)(c)**).** You filed the required disclosure so a waiver of this law is not required.

(b) State employees may not:

(1) review or dispose of State matters if they have a personal or private interest that may tend to impair judgment in performing State duties. 29 Del. C. § 5805(a)(1**)**. Private employment can create a personal or private interest. *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). You are a Family Service Assistant, in DFS. Your duties involve assisting social workers in the adoption unit. You deal with adoption recruitment, paper and computer work related to adoptions; transportation of the children (e.g., to meet with prospective families) and do not have a caseload. That work does not require you to review or make decisions about NBN's contract with DFS**.** Also, DPBHS develops, awards, and oversees another contract. Again, you have no involvement in that contract. In your private job, you will work with clients that are not processed for adoption through your Division. Thus, you would have no occasion to make decisions about your private clients in your State job. Your conduct does not violate this provision, so no waiver is required.

(2) represent or otherwise assist a private enterprise before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). **State agency means a Department.** 29 Del. C. § 5804(11). Your work for NBN will involve working with clients who receive treatment and assistance in behavioral health. NBN has said it will not assign clients from DFS to you. Specifically, you expect to do such things as take the clients to functions or activities and observe their behavior in social settings. You will report your observations to the NBN therapist who is assigned to the child. Your observations will assist her in assessing the child's needs.

If your clients are not from your Department, this provision would not apply. However, because your NBN client is from DPBHS, the therapist is required to meet with DPBHS on a regular basis to discuss the clients. The effect is that your observations, reported to the therapist, are being used by NBN to show how it is fulfilling its contractual obligations of providing services to the Department's clients. We have held that such involvement constitutes assisting the private enterprise before the agency by which the State employee is associated. *Commission Op. No. 06-38.* Ideally, NBN should not assign you clients from your State agency to avoid a violation. We discuss below, the waiver granted so you can continue to deal with the one client who is assigned to you.

(3) Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(c). One purpose for not representing or assisting a firm before one's agency is to ensure your colleagues and co-workers do not base their decisions on the fact that you are involved with the private enterprise. The other reason is to insure that State employees do not use their public office to secure unwarranted privileges for themselves or the private enterprise. Here, nothing suggests these purposes could not be served. Regarding decisions by your immediate colleagues and co-workers, no decisions are made about your NBN client(s) because NBN will not assign you clients from your Division. Thus, the possibility of loyalty or favoritism toward you is more remote. As far as decisions made by DPBHS employees, they do not make direct decisions about your work. Rather, your interactions and observations pertaining to the child are evaluated by a professional therapist at NBN so that the therapist can decide on the approach to, and success of, therapy. How, and whether, that approach or its effectiveness fits into NBN's contractual obligations—not whether your reported observations are correct or incorrect—is what DPBHS determines.

Regarding using your public office to obtain special benefits for NBN that is not likely to occur as you do not draft, write, approve, manage, etc., the DPBHS contract, nor does anyone in your Division. Also, you said that in performing these same functions for your prior employer, you never had occasion to deal with DPBHS. Finally, at present, you only have one client. You explained that during approximately 2 years with this client, the client has been relocated with different family members several times; has had several different therapists; and as a result you have been the only stable feature in the client's life. At its meeting with NBN Director Brenda L. Farside, ICSW, and Case Manager Raychel Bouchat, they confirmed the need for such stability in a client's life, whenever possible. We weigh that against the remote possibility that your input on a single client to the NBN therapist will influence the decisions of State employees in another Division, and the even more remote possibility that you could use your public office on behalf of NBN to influence DPBHS decisions, and conclude that a literal application is not necessary under the particular facts of this case.

(4) State employees may not misuse public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e). We noted above the remoteness of misusing your public office to give NBN an advantage. Also, under this restriction, you may not use State time and/or State resources (e.g., phone, fax, computer, e-mail, etc.) to perform your private work.

II. Conclusion

We find compliance with most of the rules and waive one provision because of the remoteness of possible misconduct. This waiver is limited solely to these particular facts. Should your situation change, contact the Commission.

FOR THE PUBLIC INTEGRITY COMMISSION

William Dailey, Vice Chair

12-22 – Outside Employment: A private citizen wanted to serve on a State Board. He asked if his private business would create a conflict if he served on the Board under the restrictions on outside employment. A conflict may arise if the other employment 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 its government. 29 Del. C. § 5806(b).

His company focused on State employees who would be under the Board's purview. Most of his companies advertising would not reflect his name, and would give an out-of-State address for the company. However, he wanted to use bulletin board space and put materials out on tables in the State facilities under the Board's jurisdiction. He also offered classes on certain retirement aspects, and those materials would identify him as the specialist offering the program and would be in State facilities. He said that if one of his clients appeared before him at a Board meeting, he could recuse, so that he would not be reviewing or disposing of matters where he had a personal financial interest. 29 Del. C. § 5805(a)(1). However, the agency was filled with people that he would be targeting as potential clients, so he had a very specific personal interest in everyone under the Board. It was particularly so since he just started his business within the past 2 years, and was trying to grow the business. The effect could be that he may have to constantly recuse. The Commission has previously held that if the person must constantly recuse because of a conflict, then they are not performing their public duty. The law requires that public duties command precedence over personal or private interests. *In re Ridgely*, 106 A.2d 527 (Del., 1954) (outside employment was personal or private interest; State officer obtained private client through his State office). The Commission found there was a conflict because of his personal and private interest in all of the employees under the Board's purview, and his use of its facilities for his private business could be seen by the public, and by competitors, as using public office for personal benefit or gain. 29 Del. C. § 5806(e).

12-20 – Concurrent Employment: A State employee had a part-time job with a private company that did business with her State agency. As the private company contracted with her Department, she filed a disclosure. 29 Del. C. § 5806(d). In her State job, she had no duties requiring her to review or dispose of matters pertaining to the private company, e.g., contracts, referral of clients, etc., which would be prohibited. 29 Del. C. § 5805(a)(1). Further, no facts suggested that in her State job she dealt with any of the company's clients. Thus, she would not review or dispose of matters in her State job pertaining to the company or it is clients. *Id*. Also, no facts suggested that in her private job she dealt with any of her agency's clients. Thus, she would not be representing or otherwise assisting the private enterprise before her own agency. 29 Del. C. § 5805(b)(1). The Commission found there was no conflict as long as there was no overlap in private and State clients in the two jobs. If so, she would have to recuse from those matters.

12-17 – Outside Employment: A State employee wanted to work part-time for a contractor that did business with his State agency. Thus, he filed the required disclosure. 29 Del. C. § 5806(d). His State duties did not entail reviewing or disposing of matters pertaining to the contractor. Thus, he did not review or dispose of the contract matter. 29 Del. C. § 5805(a)(1).

As far as taking care of clients from the private company in his State job, he would refer them to another employee. He also said he would not represent or assist the private company on any matter before his own agency, 29 Del. C. § 5805(b)(1), e.g., assisting them with contract renewal, etc. Nor would he accept any clients at the private company from his State agency. Under those circumstances, the Commission decided there was no conflict.

12-14 - Outside Employment - A State employee worked for a State educational institution, and worked part time for a vendor who contracted with a totally separate Department. The law mandates a full disclosure under those circumstances. 29 Del. C. § 5806(d). In her State job, she worked with adults who attended the education institution. She had no involvement in the contract awarded to the vendor, as it is handled by a totally separate agency. Thus, she did not review or dispose of the contract matters. 29 Del. C. § 5805(a)(1). Also, because any work done by her in her private capacity would not be reviewed by her agency, she was not representing or otherwise assisting that private enterprise before her own agency. 29 Del. C. § 5805(b)(1). It was very unlikely, but possible, that an adult she worked with in her State job, could have children involved in the program where she worked in her private capacity. The Commission found there was no violation as long as she recused from accepting a client in her private capacity if she was dealing with the parents in her State capacity, and vice versa, and she should not use State time or resources to perform the private work.

12-13 – Outside Employment – A State employee worked for an education institution and had a part time job with a vendor who contracted with a totally different Department. She filed a disclosure. 29 Del. C. § 5806(d). In her State job, she had no decision-making authority regarding her private employer. Thus, she did not review or dispose of that matter. 29 Del. C. § 5805(a)(1). As far as her private work, if it were reviewed by a State agency, it would not be her own agency, but the contracting agency. Thus, she was not representing or otherwise assisting a private enterprise before her own agency. 29 Del. C. § 5805(b)(1). Again, there is a very unlikely possibility that families in her State job, might also receive services from that private vendor, and vice versa. The Commission decided that as long as she did not use State time or resources for her private work, and recused from matters if there was an overlap in clients, it was not a conflict.

11-51 - Outside Employment: A State employee worked for an organization that was regulated by a different State agency than where he worked. As it was regulated by the State, the law requires a full disclosure of the financial interest (employment) with the company as a condition of commencing and continuing State employment. 29 Del. C. § 5806(d). He filed a disclosure as required.

State employees may not accept other employment if acceptance may result in: Impaired judgment in performing official duties: His official duties were as a direct support professional. He did not make any decisions about the private organization, nor did it have any dealings with his State agency. Thus, he would not be reviewing or disposing of matters in which he had a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

Preferential treatment to any person: As the organization had no dealings with him or his State agency, he was not in a position to show preferential treatment or to influence co-

workers or colleagues to show preferential treatment because he would not be representing or assisting the organization before his agency. 29 Del. C. § 5805(b)(1).

Official decisions outside official channels: No facts suggested this would occur because the organization was not seeking any official decision from him, or his State agency.

State employees may not use public office for personal gain or benefit: 29 Del. C. § 5806(e). The employee stated he would not use State time or resources for his private work. He worked on evenings and weekends assisting clients of the organization.

11-50 - Outside Employment – Limited Waiver Request – Granted
NOTE: When a waiver is granted, the decision becomes a matter of public record. 29 Del. C. § 5807(b)(4). The Commission's full opinion granting a limited waiver request follows.

STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION
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October 27, 2011

Dr. Craig A. Porterfield
109 N Main ST
Camden, DE 19934

11-50 – Outside Employment
Hearing and Decision By: *Barbara Green, Chair, Vice Chair William Dailey; Commissioners: Mark Dunkle, Lisa Lessner, Jeremy Anderson, Wilma Mishoe and Andrew Gonser*

Dear Dr. Porterfield:

The Public Integrity Commission reviewed your request to maintain a small private practice as a Psychologist with clients including children and adolescents. As discussed below, we grant a waiver so that you may have such clients.

I. Applicable Law and Facts

You recently accepted employment with the State as a Psychologist Supervisor. You work for the Department of Services for Children, Youth and Their Families, Division of Prevention and Behavioral Health Services. It provides behavioral health services to children up to the age of 18 and their families. Part of your credentials related to that job were that you have a long established private practice in dealing with children and adolescents. You wish to keep a small private practice and have children and adolescents as clients.

Under *29 Del. C. § 5806(b)*, State employees may not have other employment if acceptance may result in:

(1) impaired independence of judgment in performing official duties. To insure this does not occur, the law precludes you from reviewing or disposing of matters where you have a personal or private interest that may tend

to impair judgment in performing official duties. *29 Del. C. § 5805(a)(1).* Your State duties would not include making decisions about your own private practice or its clients. For example, your private practice will not be contracting with your agency, so you would have no occasion to draft, review, or oversee a contract with your own business. Also, in your State job you would not be referring clients to your private practice. Further, you do not have any clients from your State agency, so you would not be reviewing your own private treatment of the clients in your State job.

(2) preferential treatment to any person. The rule above is meant to preclude you, personally, from showing preferential treatment to your own private interest in your State job. Additionally, the law precludes you from representing or otherwise assisting your private enterprise before your own State agency. *29 Del. C. § 5805(b)(1).* That rule is meant to preclude your State colleagues or co-workers from making preferential decisions pertaining to you in your private practice. Your private practice does not accept Medicaid. Your Division's clients, among other things, must have Medicaid, according to its criteria. http://kids.delaware.gov/pdfs/pol_pbh_cs001_ServiceEligibility.pdf. Thus, your clients would not be connected to your Division.

However, if you have children and adolescents in your private practice, it is possible you may have to report a case of child abuse. If that situation arose, you must report it to the Division of Family Services, in your Department. Thus, you would not deal directly with your immediate co-workers and colleagues, and persons you supervise.

The problem of having any dealings with your Department could be eliminated if you had only adult clients. You do have some. However, we discussed the fact that you believe that continuing work with children and adolescents would make you a better regional supervisor of children's mental health services. You also said it has been about 5 years since you had to report a case of child abuse. Thus, only rarely, would you have to deal with another Division in your State agency. We discuss below the waiver granted so that you may continue your private practice with children and adolescents.

(3) official decisions outside official channels. No facts suggested this would occur since your private practice is not seeking decisions from your agency pertaining to the practice.

(4) any adverse effect on the public's confidence in the integrity of its government. This is basically an appearance of impropriety test. *Commission Op. No. 97-23.* The test is whether a reasonable person, knowledgeable of all relevant facts, would still believe a State employee could not perform their State duties with honesty, integrity, and impartiality. *In re Williams, 701 A.2d 825 (Del., 1997).*

In addition to the facts above, we also consider if your outside employment would substantially conflict with performing your State duties. *29 Del. C. § 5806(b).* You said that as far as scheduling your clients, and other administrative duties, your spouse would handle those matters. Also, you are reducing your client base so the number of clients is limited, meaning fewer hours at that practice. You anticipate performing the work during non-State hours. This ties into the provision that precludes you from using public office for private benefit or gain, *29 Del. C. § 5806(e)*—in other words, using State time or resources for your private work.

We are aware that an emergency could arise with a private client during your State work hours. Because of the limited number of clients, and the type of clients you have, we do not expect you would receive so many emergency calls that it would substantially conflict with performing your State duties. Further, we presume that like other doctors, if you cannot be reached, you have a means of letting them know what to do in your absence, e.g., call 911, alternative doctor to contact, etc.

Also, your practice with children and adolescents deals primarily with ADHD clients. You do not work with children who have serious psychological problems, which could entail more emergencies. As you just started with the State on October 8, 2011, we remind you that if emergency calls occur, you are required to take approved leave when you perform private work. Also, because you are just beginning with the State, we point out that if the emergencies are of a greater number than expected, or if for some other reason your private practice limits your ability to perform your State job, Courts have ruled that as between outside employment and State duties, the State duties must command precedence. *In re: Ridgely, 106 A.2d 527 (Del., 1954).*

II. Waiver

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

In this case, the provision that needs to be waived is the provision restricting you from "representing or otherwise assisting a private enterprise before your State agency." *29 Del. C. § 5805(b)(1).* "State agency" includes "Department." *29 Del. C. § 5804(11).* If you had to report child abuse, you would be acting as a representative of your private practice, dealing with a Division in your Department. Thus, a literal reading would preclude that activity even though you would be required by law to make such reports, and even though it would be an extremely rare possibility.

While that problem could be eliminated if you only accepted adults, we acknowledge that continuing to work with children lends additional credibility to

your State job. Moreover, the Code 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).*

Beyond that, as noted, the purpose of the restriction against dealing with one's own agency is to preclude preferential treatment by colleagues and co-workers. Aside from dealing with persons in a different division, by law, they are to make decisions about child abuse "in the best interest and safety of the child" and "are to provide a prompt assessment of the child and the child's family and the circumstances of the reported incident." *16 Del. C. § 901.* Thus, their focus is not on making decisions about a trained professional required by law to report alleged abuse. This differs from situations where they would make a decision about you, e.g., awarding a contract to you, etc., where you would obtain some type of advantage over competitors, or a financial benefit, etc., as a result of preferential treatment.

As your dealings with another Division would be extremely rare, and as those dealings are not of the type where employees in that Division would render preferential treatment to you, we waive a literal reading of the statute.

III. Conclusion

Based on the above facts and law, we grant a waiver so your private practice can include children and adolescents as clients.

Sincerely,

Barbara Green, Chair
Public Integrity Commission

11-48 - Outside Employment: A State employee asked if she could work part-time for a private company that contracted with her agency. State employees with a financial interest in a private enterprise that does business with, or is regulated by the State, must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). The individual filed the required disclosure.

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). Her State work did not involve any connection to the company's contract with her agency; she made no decisions about it; and did not refer State clients to the organization.

State employees may not represent or otherwise assist a private enterprise before the agency with which they are associated with employment. 29 Del. C. § 5805(b)(1). In her private job, she had no State clients, so would have no occasion to deal with her own agency.

State employees may not use public office for personal gain or benefit. 29 Del. C. § 5806(e). The employee stated she would not use State time or resources for her private work.

The Commission found no conflict of interest as long as she did not use State time and resources for her private work.

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

He also asked the Commission if some of the work would violate the concurrent employment law, and if some would violate the post-employment law. State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

In his State job, the employee was largely responsible for media relations, communications, writing op-ed pieces and grants, drafting and researching op-ed pieces, speeches, and anything related to mass media. He asked if, while employed by the State, he could work on a book for a potential client who lived out of State. In dealing with her, he learned she has a problem with a private company regulated in her State, of the same type regulated by his State office. He said she had not been able to get a response from that State's regulatory agency. He said that in his official capacity he normally acted as a "proxy" for persons over whom his office had no jurisdiction, to help them with calls similar to this situation. He planned to go to a national conference and wanted to approach the head of that State's regulatory body to discuss his potential client's problem, and let that State office take it from there. He normally attended those conferences in his official capacity. He said he could contact the head of that State's regulatory body to discuss his potential client's problem in his official capacity, or in leave status.

The Commission found that it would not violate the Code if the employee wrote a book that was not in any manner related to his State job, as long as it was not during State hours, or using State resources, but it would violate the Code for him to intervene on behalf of his potential client with the head of another State's regulatory agency, whether he attended the conference in an official capacity, or was on leave status. In his official capacity, it may raise the appearance he was using his public office to obtain preferential treatment for a potential client, which could result in a financial benefit to him in the form of a contract. 29 Del. C. § 5806(e). In his private capacity, it may appear he only switched to that capacity to avoid a violation if he acted in his official status, and it would be difficult for the public to discern the difference in his roles.

11-41 - Outside Employment: A State employee worked part-time for a private enterprise. The private enterprise contracted with a State agency. Employee filed the required disclosure of her financial interest in the private company. 29 Del. C. § 5806(d). She did not

deal with, and was not involved in the contract, the company. Thus, in her State job, she did not review or dispose of matters related to that company. 29 Del. C. § 5805(a)(1). In her private job, she did not get involved with, nor did she have, any clients from her own agency. The contract was with a different Department. Thus, she was not representing or assisting the private company before her own agency. 29 Del. C. § 5805(b)(1). She was not using State resources or State time to perform her private work which is barred by the provision against using public office for personal benefit or gain. 29 Del. C. § 5806(e). The Commission found there was no conflict at present, but if anything changed, she should contact the Commission.

11-40 – Outside Employment: A State employee was an investigator for a State agency that contracted with his part-time private employer. He filed the disclosure required by law. 29 Del. C. § 5806(d). He was told by his agency that he could no longer work for the private company, so he asked the Commission if a conflict existed. The State contract for services from his private employer was not related to his State job. He was not, and is not, involved in putting together or overseeing the contract. Thus, he is not reviewing or disposing of those matters. 29 Del. C. § 5805(a)(1).

The employee worked for the State agency for about 3 years and worked at the private company for more than 2. In that time, he never dealt with his own division, or any other division in his agency. He, and representatives from the private company, said he was not assigned any State clients. He only had one client, who did not receive services from his State agency. Thus, he did not represent or assist the private company before his own agency. 29 Del. C. § 5805(b)(1). The private work was performed during non-State hours. He, and representatives from the company, said that while his hours conducting State investigations can vary from normal work hours because of the nature of his work, they were able to schedule his private work around those hours because he only has one client, and usually worked 8 hours in a week. If he needed to contact the company during his normal workdays, he used his 15 minute break or his lunch break, and his own phone. Thus, he was not using State time or resources for his private work. 29 Del. C. § 5806(e). The Commission decided there was no conflict of interest under these particular facts, and the employee should notify the Commission of any changes.

11-39 - Outside Employment: A State employee worked part-time in sales for a private enterprise. He filed a disclosure of his outside employment, but was not mandated to do so. It is only required if the private enterprise does business with, or is regulated by, the State. 29 Del. C. § 5806(d). No facts suggested the company did business with any State agency. Specifically, it did not do business with his agency. Thus, he would not review or dispose of matters related to the company, nor represent or assist it before his agency. 29 Del. C. § 5805(a)(1) and (b)(1). He did not use State time or resources to perform the private work. 29 Del. C. § 5806(e). There was no conflict as the company has no relationship with the employee's agency, and he was not required to file.

11-34 - Concurrent Employment: A State employee recently accepted a new job with a State agency. Before that, she worked for a different agency. Her old agency asked if she would privately contract to work part-time training her replacement. The Code of Conduct places certain restrictions on other employment. 29 Del. C. § 5806(b). Accepting the work cannot result in:

(1) impaired independence of judgment in performing official State duties. Her part-time work would not have anything to do with her work in her current agency. However, the former employer did have dealings with her current State office. State employees 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). The part-time work had nothing to do with the State agency where she was now employed, so she would have no occasion to review or dispose of matters pertaining to her private work. Her former employer did have dealings with her current agency. However, she said that she expected there would seldom be contact, and if a matter arose, she could recuse.

(2) preferential treatment to any person. As she would recuse from matters pertaining to her former employer, she would not be able to show them preferential treatment. To avoid preferential treatment to State employees who contract with the State, the law requires that if the contract is for less than $2,000, there must be arms' length negotiations. 29 Del. C. § 5805(c). Arms' length negotiations means there must be distance between the contracting parties, and that the amount paid is a fair market value. *Commission Op. No. 98-23.* Distance is established by the restriction against reviewing or disposing of matters related to her part-time employer. 29 Del. C. § 5805(a)(1). The employee expected she may make as much as $400 depending on the number of hours it took to train her replacement. She would be paid somewhere between $15-20 an hour—about the same amount she was paid while in the job. As that is the market for that skill, it comported with the law. Also, she was not hired out of preferential treatment. Rather, no one else at the agency had the same knowledge because it had a very small staff, and each had dedicated tasks, and her specialty was in the particular area where she would train. That means she was the only one with complete knowledge of the particular system. She did prepare a notebook for her replacement, but two events, with specific deadlines, would require that her replacement have the training to insure they could meet the deadlines.

(3) official decisions outside official channels: No facts suggested this could occur.

(4) any adverse effect on the public's confidence in the integrity of its government. This is basically an appearance of impropriety test. The test is whether a reasonable person, knowledgeable of all relevant circumstances would still believe that she could not perform her duties with impartiality, honesty and integrity. *In re Williams, 701 A. 2d 825 (Del. Super., 1997).* Beyond the fact that the above Code provisions are being complied with, she also would not use her public office for personal benefit or gain, which is barred by 29 Del. C. § 5806(e). She would not use State time and resources to perform her private work. She gave the training at night and on weekends. She did not expect the training to run past December 2011, and probably not even that long. It would more likely be during August and September, depending on the availability of the person she needed to train. She said that while she was working part-time for her former employer, she would recuse from handling anything related to them in her current State job. She also pointed out that the two jobs are "like apples and oranges." The persons needing the services from each entity were not collocated; the services offered by each entity were totally different; the clientele for each agency was totally different. Recusal would not be difficult because she would rarely have to deal with her former employer, as it would be one of just many things she does. Thus, she would not be constantly recusing for a significant portion of her State job. She said that if it was necessary to avoid a conflict she would do it on a voluntary basis so that their program would not suffer. She asked if she could not work for them in a paid capacity, she would like confirmation that she could do it as a volunteer. The Commission found that it would not be a conflict, whether paid or not, for her to accept the

short-term employment, as long as she recused herself from matters pertaining to the former employer while holding the part-time job.

11-25 - Outside Employment: State employees must file full disclosures if they have a financial interest in a private enterprise that does business with the State. 29 Del. C. § 5806(d). "Financial interest" includes employment. 29 Del. C. § 5804(5). A State employee held outside employment with a company that contracted with his Department. He filed a disclosure as required.

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). In his State job, he did not draft, write, oversee, etc., the company's State contract. The company contracted with a totally separate division. He said if the company's clients came to his State office, he would not get involved. Also, he did not refer State clients to the company because those needing providers for the services offered are given a list of providers and the clients make the choice.

State employees may not represent or otherwise assist a private enterprise before the agency by which they are associated with employment. 29 Del. C. § 5805(b)(1). The employee did not have any of his State clients as private clients. He did have private clients that were State clients of his coworkers and colleagues in his State office. As a result, if his coworkers needed to review the records of their clients, he would be assisting the private enterprise before his own agency. He is asked the company to re-assign any client that he had that was active with his agency. The company complied with that request and clients were reassigned.

State employees may not engage in conduct that would raise public suspicion that they are acting in violation of the Code. 29 Del. C. § 5805(b)(1). This is basically an appearance of impropriety test. The test is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code is being violated. *In re Williams,* 701 A.2d 825 (Del., 1997). To decide if the conduct would create an appearance of impropriety, the Commission looks to the totality of the circumstances. *Commission Op. No. 96-78*. Here, the only actual conflict is that the employee had State clients from his own agency as private clients. However, that was rectified.

The Commission also considers the following provision: A State employee may not use public office for personal benefit or gain. 29 Del. C. § 5806(e). That can occur if the State employee uses State time or resources, such as phone, fax, computer, etc. The employee indicated he was not engaging in such conduct. He is 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) *affd,* Del. Supr., No. 304 (January 29, 1996).

With the reassignment of clients, the Commission decided there was no conflict of interest.

11-24 – Outside Employment: State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with the State. 29 Del. C. § 5806(d). "Financial interest" includes employment. 29 Del. C. § 5804(5). A State employee filed a written statement because she wanted to work for a private enterprise that contracted with her State agency. 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 State employee's job entailed reviewing and disposing of matters dealing with the private enterprise, in terms of recommendations, etc. She had referred State clients to the private enterprise in the past.

If she accepted the job, it would create a financial interest in the private company. 29 Del. C. § 5804(5). In her State job, if there were an option for referral of clients to the private company, she would have input into the final decision. If she recused from such referral, the client could be denied an opportunity or option of being placed with that company. The facts differed from cases where State employees worked with a different clientele in their State job than in their private job. Aside from reviewing or disposing of such matters, her State position placed her in a potentially adversarial role where her recommendations could differ from the client's desires. If she did not recuse, it could appear that she was making her recommendations based upon her financial interest. If she did recuse, then she would not be performing an on-going and vital function of her State duties. Thus, recusal would not cure the problem because her State duties were to "command precedence" over her personal or private interest. *In re Ridgely,* 106 A.2d 527 (Del., 1954) (holding that State employees private interest in other employment must yield to his public duties).

State employees may not represent or otherwise assist a private enterprise before the agency by which they are associated with employment. 29 Del. C. § 5805(b)(1). Even if the above conflict could be cured, a conflict arises from the fact that other employees from her State agency refer their clients to the same private company. In her private job, she would be handling those clients in a representative capacity for the company. Her colleagues and co-workers who refer clients to that company may need to confer with her on the client's progress. As a result, they would be reviewing and evaluating her private performance. The reason for this rule is to insure that colleagues and co-workers do not have impaired judgment in making decisions over a co-worker in their private capacity, and are not unduly influenced by that relationship. Again, there is no cure for the conflict because the company does not have other clients she could work with.

State employees may not engage in conduct that would raise public suspicion that they are acting in violation of the Code. 29 Del. C. § 5805(b)(1). This is basically an appearance of impropriety test. The test is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code is being violated. *In re Williams,* 701 A.2d 825 (Del., 1997). To decide if the conduct would create an appearance of impropriety, the Commission looked to the totality of the circumstances. *Commission Op. No. 96-78*. Here, actual conflicts were identifiable and recusal would not resolve the conflicts, or the negative effects that the employment could have on the process of handling these clients.

A State employee may not use public office for personal benefit or gain. 29 Del. C. § 5806(e). Aside from the actual conflicts, it could appear that she could use her State position to refer State clients to the facility because the more clients it had, the more it stabilized employment for her. Added to that appearance is the fact that the facility was paid more under the contract for each client that was accepted.

The Commission found the private employment was a conflict that would have a direct effect on her job performance and it would not instill public confidence in her conduct because of the appearance issues.

11-21 - Outside Employment: A State employee contracted with a State agency, but not his own agency. Thus, he was not representing or otherwise assisting a private enterprise before his own agency, which is barred. 29 Del. C. § 5805(b)(1). The contracting decision was made by an agency which he was not associated with by employment. Thus, he did not review or dispose of the contracting matter in his State job. 29 Del. C. § 5805(a)(1). The contract was performed during non-State hours. 29 Del. C. § 5806(e). The contract was for $1,900 so the law did not require public notice and bidding. 29 Del. C. § 5805(c). However, he did not realize he must file a disclosure with the Commission because he had a financial interest in a private enterprise that did business with the State. 29 Del. C. § 5806(d). His supervisors alerted him and he immediately filed the disclosure. He said he knew "ignorance of the law is no excuse" and apologized. The Commission found there was no conflict of interest, and that he complied with the disclosure requirement.

11-16 – Outside Employment: Applicant could not appear due to illness. By law, the Commission may render a decision on a written statement if there is sufficient information. 29 Del. C. § 5807(c). The State employee was employed by one State agency, and wanted to work part-time for a private company that contracted with a different State agency. By law, she must file a disclosure. 29 Del. C. § 5805(d). Regarding the other elements of the law that applied, State employees cannot seek State contracts for more than $2,000 unless they are publicly noticed and bid. 29 Del. C. § 5805(c). She was not seeking the State contract but wanted to work for the company that was awarded the contract which was publicly noticed and bid. State employees cannot review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). Outside employment is a financial interest. 29 Del. C. § 5804(5). In her State job, she made no decisions about the private company. In her State job she dealt with certain State clients. In her statement she said if one of her private clients came to her State office for assistance, someone else would take care of that person. Similarly, if one of her State clients was referred to her in her private job, they would be referred to someone else at the private company. Her statement also said she would not use State time or resources for her private work. The Commission decided that under those circumstances, there was no conflict of interest.

11-15 - Outside Employment: A State employee also had a private business. On behalf of her company, she wrote the response to her own agency's publicly noticed request for proposals. She also went to the pre-bid meeting to represent the company, and bid on the contract.

State employees with a financial interest in a private enterprise that does business with the State must file a full disclosure. 29 Del. C. § 5806(d). She filed a written disclosure and appeared before the Commission. State employees may not review or dispose of State matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). She was not involved in any manner in preparing the State contract, nor would she have compliance oversight. State employees may not represent or otherwise assist a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). She had already represented her private company before her own agency by preparing the response to the request for proposals and attending the pre-bid meeting. If awarded the contract, she would be continuing to represent or assist her private company before her own agency.

She said several years ago the Commission let her contract with her own agency as long as her employees did not work at the State facility where she worked. She, nor the

Commission's staff, could find that opinion. The Commission assumed she was permitted to do so in the past. She said when her company was allowed to contract with her agency, she had a business partner. She no longer does. She did not seek the contract in the intervening years after the Commission's opinion because she did not know she had to attend mandatory pre-bid meetings. Failing to attend meant no contract. The Commission must base its opinion on the particular facts of each case. 29 Del. C. § 5807(c). The Commission found it violated the Code of Conduct for her to contract with her own agency, and no facts substantiated a waiver.

11-15 Reconsideration – Contracting with own Agency: The Commission previously found a State employee violated the Code by representing or assisting her private enterprise before her own agency by preparing the response to proposals and attending a pre-bid meeting with her agency, and it would be a continuing violation for possibly 3 years if she were permitted to contract with her own agency. 29 Del. C. § 5805(b)(1). It denied a waiver because she had other options of obtaining income without contracting with her own agency, and the hardship imposed on her—not contracting with her own agency—was not an undue hardship because it is the same hardship imposed on all State employees and officials. 29 Del. C. § 5807(a). She requested reconsideration and submitted some additional facts. Among them, she said her private business had lost money because she could not contract with her own agency. She could not pinpoint any exact amount. However, she said again she had found other jobs. Moreover, she previously told the Commission she had kept her private company running for 3 years without a State contract. She also said she had not gotten a pay raise with the State in years, and in fact had a pay cut. However, that was the same hardship suffered by all State employees. The Commission did not change its original decision because contracting with her own agency is a conflict, and the facts still did not support a waiver when she had other options for obtaining additional income, and was doing so, in the private sector.

11-12 - Outside Employment: A State employee asked if her outside employment would violate the Code of Conduct. She was required to file a disclosure about her private and State employment, because the private company contracted with another State agency. 29 Del. C. § 5806(d). In her State job, she did not make any decisions about her private company's State contract as that was handled by a totally different agency. Thus, she did not review or dispose of those matters. 29 Del. C. § 5805(a)(1). Regarding the substance of her work, in her State job, she dealt primarily with adults. In her private job, she dealt primarily with youth. However, there were a few occasions where it might be possible that one of her private clients would come to her agency on certain matters. As she cannot, in her State capacity review or dispose of matters where she has a personal or private interest, 29 Del. C. § 5805(a)(1), she said if that occurred, she would recuse.

Her private job only dealt with the Child Mental Health Division of the Kids' Dept., not the State agency. Thus, she was not representing or assisting the private enterprise before the agency by which she was associated by employment. 29 Del. C. § 5805(b)(1). She performed the work during non-state hours, and would not use State time or resources for the work, to avoid using public office for personal gain. 29 Del. C. § 5806(e).

The Commission decided that based on these facts, there was no conflict of interest, as long as she recused as discussed.

11-07 - Outside Employment: A State officer asked if his private employment, in a regulated field, complied with the Code. He said he was able to perform his private work during non-State hours; and did not use State resources or time for that work. That is consistent with the law that provides that State officers may not use public office for personal gain or benefit. 29 Del. C. § 5806(e).

He said 95% of the private work was reviewing written material and research, etc., in preparation of contracts which could be done during non-State time. All of this work pertained to private entities, not any State agency. Aside from that work, there was a small percentage dealing with small private matters that did not involve any State regulatory authority. In the unlikely event it would involve any State regulatory authority, he would not be involved, as the private entity would handle those matters. The work in that area had been reduced because some of it was time sensitive; but the change meant he did not have to respond immediately on that work. The company had a third area of work, which normally would require filings with a State office. However, he is not involved with that work. Other persons in the company handle it. Moreover, a third-party company handled any filings. Therefore, he was not representing or otherwise assisting his private enterprise before his own, or any other State agency on those matters. 29 Del. C. § 5805(b)(1) and (2). He did not expect to deal with any State agencies in his private work, except that as a licensed professional, yearly filings were made with the State agency that regulated his profession. The filings were primarily, ministerial, e.g., name, address, identification number, etc. Some information had to be reported about the firm's accounts, which could be audited. To the extent the filing was purely ministerial, Delaware Courts have held that participating in such matters is not a conflict because ministerial matters do not require any judgment. (cite omitted). However, in the event that information were audited, and questions were raised, he should recuse if possible, and if he could not he should file a full disclosure with the Commission explaining the conflict and why it could not be delegated. 29 Del. C. § 5805(3).

As far as reviewing or disposing of matters pertaining to his private employment in his State job, which is barred by 29 Del. C. § 5805(a)(1), he said neither his company nor the customers they served dealt with his State office. Thus, he would not be reviewing or disposing of those matters. He said it was possible, in the future, that one of his creditors might seek to do business with his State office. However, he said he would not get involved. While the Commission would need the particular facts to render a decision on that issue, 29 Del. C. § 5807(c), it discussed with him several methods of resolving a conflict if one did arise: (1) the agency had a DAG assigned who did not report to him; (2) sometimes committees with people who do not work for him could render a decision; and (3) it was possible other State officials would be able to render a decision, if the law did not bar such activity. Because the only potential conflict was that a creditor may sometime in the future want to do business with his office, nothing suggested he would have to constantly recuse. Again, the Commission explained that if he could not delegate, the law requires him to file a full disclosure of the conflict and explain why he could not recuse.

The Commission also discussed with him that his career field has its own set of regulations, and PIC is not authorized to interpret those. However, it suggested a couple of areas where he may want some clarification on those regulations. He said he already had those plans, but meeting with the Commission was his first step in the process.

The Commission found there was no conflict as long as he performed the work during non-State hours; did not use State resources, e.g., phone, fax, e-mail for private work; recused as required or filed a full disclosure where required if a conflict did arise; and may come back to the Commission if his circumstances changed. Further, that he may file the regulatory filings

with the State agency regulating his profession, but if any questions arose he should either have someone else at the company address those concerns, or file a full disclosure with the Commission about the conflict and why he could not delegate.

11-06 – Outside Employment: A State employee filed a disclosure that she was seeking outside employment with a vendor contracting with her own agency. In performing the private work, she would have to deal with another Division in her agency, e.g., reporting to it about her private clients; meeting with members of that Division to review cases, etc. The Code bars State employees from representing or otherwise assisting a private enterprise before their own agency. The Commission dealt with a prior case where another employee from this same Department also had private employment with this same vendor and the Commission found it violated the Code. The Commission is required to strive for consistency in its opinions. The Commission decided that it would violate the Code of Conduct for this employee to accept outside employment with this vendor.

10-40 - Outside Employment: A State employee investigated certain claims of fraud in her Division, and also held a license as a medical professional. A second State agency wanted to contract with her part-time to use her medical skills. Before her present State job, she had contracted with that agency for such work. Full Disclosure**:** State employees with a financial interest in a private enterprise that does business with any State agency must file a full disclosure. 29 Del. C. § 5806(d). Her private contract constitutes a private enterprise. 29 Del. C. § 5804(f). She filed a disclosure. Contracts with State: If for more than $2,000 must be publicly noticed and bid. 29 Del. C. § 5805(c). While the agency's contract could go as high as $10,000, the particular projects she would work on would be for less than $2,000. Contracts for less than $2,000 must show "arm's length negotiations." Id. That means distance between the parties, and fair market value. She cannot accept if accepting may result in: (1) impaired judgment: she cannot review or dispose of matters where she has a personal or private interest. 29 Del. C. § 5805(a)(1). She has no occasion to review the 2nd agency's matters in her State job. (2) preferential treatment: As she has no State involvement with the 2nd agency, she could not give it preferential treatment. No facts suggested that agency gave her preferential treatment in offering her the job, e.g., to obtain some type of benefit or because she is a State employee. Rather, contracted for this type of work with the 2nd agency before being hired by her present agency; (3) official decisions outside official channels: as no overlap exists between her private and State activities, no facts suggest this could occur; and (4) any adverse effect on the public's confidence. No facts suggested an appearance of impropriety, but consistent with the Commission's prior rulings, she was reminded that she cannot use State time or resources to perform her private work. She was also advised, consistent with the law, that if the 2nd agency offered to expand her work on the particular projects she would be assigned under the contract, and it would exceed $2,000, she cannot proceed with that work as the contract was not publicly noticed and bid.

10-35 - Outside Employment: A State employee wanted to accept private employment as a sales representative for a private company. The company did not do business with his agency. However, he would be selling to professional organizations of which his bosses were members, and they could be involved in decisions about purchasing. This could result in State time being used to discuss private business. Also, as part of his official duties, he had responsibilities to contact those professional organizations about State matters. That also could lead to work time discussions about his private work. He said he could envision a scenario

where he is at his State job and making calls to the organization about State business, and he would be speaking to someone to whom he was trying to make a sale. The sale would be for a product that would result in a *very* significant commission. He asked if he could not sell to the Delaware organizations that the Commission consider if it would be a conflict to work in Maryland. The Commission found that he could take the job in Maryland, but it would be too much of an overlap for him to concurrently work in Delaware because of the potential contracts with his own bosses; official decisions regarding organizations where he might be trying to make a sale; etc. Also, he could not use State time for his private job.

10-28 - Motion for Reconsideration – Outside Employment: A State employee asked the Commission to reconsider its opinion which concluded that it would be contrary to the Code of Conduct for him to a business when, in his State job, he would be in a position to review or dispose of matters related to that type of business; in his private capacity, he would be in a position where he may have to represent or otherwise assist his private enterprise before his own agency; and, at a minimum, it could appear he used his public office for personal benefit. In the motion to reconsider, he asked if he limited his business to just a certain aspect would it be contrary to the Code; if he recused from any work on his State job related the matter, whether that would solve the conflicts; he disagreed with how portions of the opinion were phrased; and believed the Commission was overly concerned about appearances of impropriety. He did agree that the aspect he now suggested pursuing was regulated by his agency, meaning he would still be representing or assisting his private enterprise before his own agency, so even if he recused in his State job on all yard waste matters, he would still have a conflict. The Commission affirmed, without changing, its prior opinion; that the business is regulated by his agency; that recusal on everything related to the matter would not cure the conflict of dealing with his own agency or the appearance issues.

10-23 - Outside Employment: A State officer privately contracted with a private enterprise. While the company contracted with the State, it does not contract with his agency. Full disclosure is mandated. 29 Del. C. § 5806(d). He does not use State time or resources to perform the private work, but works week-ends or evenings. He has no State clients. He is updating his 2004 disclosure when he worked part-time for three private companies that contracted with the other State agency. The Commission approved the outside employment on the condition he would advise the Commission of any changes. It was also reinforced that he could not complete his private work using State time and resources.

10-18- Outside Employment: A State employee worked for a regulatory agency that handled documents that must be filed to comply with the regulations. She had a part-time job with a company that is regulated by her agency and files documents with it. State employees may not review or dispose of matters where they have a financial interest. 29 Del. C. § 5805(a)(1). She recused herself from working on any paperwork from her private employer in her State job. State employees may not represent or otherwise assist a private enterprise on matters before their own agency. 29 Del. C. § 5805(b)(1). In her private job, she was not involved in putting together the paperwork that goes to her agency. She did, on occasion, sign the checks that went with the paperwork when her boss was absent. However, she spoke with him, and he said he or someone else could sign the checks. She also provided notary service for clients of her private employer. However, that is only for purposes of identifying the individual and does not in any way validate the information in the paperwork that goes to her agency. The Commission decided that she could continue working at the private company, as long as she recused herself

from working on its documents in her State job, and did not prepare any documents for her private employer to be sent to her agency, or sign checks that go with the documents. She may notarize signatures of clients, as long as she is not certifying the validity or accuracy of the papers.

10-16 - Outside Employment: A State employee worked for a company that contracted with a Department other than the one where she works. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by the State. 29 Del. C. § 5806(d). The employee properly filed the disclosure so that the Commission could decide if any overlap between her State job and the company was sufficient to create a conflict. State employees may not review or dispose of matters in which they have a personal or private financial interest. 29 Del. C. § 5805(a)(1). In her State job, she had no reason to make decisions about the company. The awarding of the contract was done by a completely different agency. State employees may not represent or otherwise assist a private enterprise before their own agency. 29 Del. C. § 5805(b)(1). As far as her private work, she said there was a possibility for a potential client overlap between her State clients and the private clients. However, if one of her State clients came in she would refer them to another counselor. The Commission found there was no violation as long as she did not accept clients from her own agency.

10-10 - Outside Employment: A State agency publicly noticed and bid a contract and once the contractor was selected, it wanted to privately contract with a State employee from a different agency to work part-time. As the company did business with a State agency, the employee must file a written disclosure. She and representatives from the contracting agency and the vendor appeared before PIC. In her State job, she had no official duties that required her to review or dispose of matters related to the contracting agency or the vendor. As the job is with a different agency, she would not be representing or assisting the private company before her own agency. She would not have any client overlap because her State clients are adults and her private clients are children. She would work in the private job during non-State duty hours. She would not perform any work related to her private clients during State duty hours or use State resources, e.g., working on her case notes, etc. The Commission found there was no conflict.

09-53 - Outside Employment: A State employee worked on web sites for a State agency. Part of her duties was to take photos and maintain the site. As a private activity, the employee also took photos and wanted to offer them for free to the agency for its web site. A personal camera was used in both instances, and it had a copyright embedded into all the photos. The employee wanted to expand the private photography business for outside employment. The employee asked if it would be a conflict to take official photos, and to offer free photos to the agency for its web site. The employee was contacted while on State duty, and was asked for reprints of photos taken as part of the State job. The employee's opinion was that the agency should not give reprints. She also would like to sell those private photos to others. The law precludes State employees from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment, and/or representing or otherwise assisting a private enterprise before their own agency, whether paid or not. The Commission moved it could, at a minimum, appear improper if the employee gave private photos to the agency to use for its web site. First, she was the one responsible for taking the photos as part of her State job, and if she maintained the web site with her own private photos, it could appear that she was using her

State job for personal benefit. Second, whether her agency paid her or not, she cannot represent or otherwise assist a private enterprise before her own agency. As she is expanding her business into photography, if she offers those photos to her own agency to use on the same web site she maintains, it could appear that she is representing or otherwise assisting her private business before her own agency. Even without pay, she would privately benefit from the exposure of having her personal work on the website. Further, she would be in the position to decide which photos would go on the web site—her official photos or ones taken privately, and it may appear she would get a leg up on other photographers who might be interested in having their work displayed. There was such a significant overlap between the State work and the proposed private work, (even though not paid), that the public may not be able to make the distinction and suspect she was using State time for private work, and/or that she may personally benefit from her public position by the exposure for her personal photographs on the website and then sell them, etc.

09-33 – Outside Employment – Employer Contracts with Employee's Agency: A State employee disclosed that she wanted to privately work for a firm that contracted with her State agency. 29 Del. C. § 5806(d). However, it was not within her section, and she had no responsibility for the State contract, nor did she make referrals to the private firm. Thus, she did not review or dispose of matters related to the company as part of her official duties. 29 Del. C. § 5805(a). Also, she would not accept any State clients as part of her private work. Thus, she would not have occasion to represent or assist the private enterprise/its clients before her own agency. 29 Del. C. § 5805(b)(1). Further, she performed a different function in her State job. While not expected to occur, she said if a matter was referred to her in her State job by the private firm, she would recuse, and vice versa. She was on a four-day work week with the State, and would work for the firm on her day off, and in the evening. Thus, she would not be using State time to perform her private work. 29 Del. C. § 5806(e). She also said she would not use State resources for her private job. *Id*. The Commission found no conflict.

09-29 – Outside Employment - Private Work With State Supervisor: Two State employees who worked in the same office wanted to start a private business doing the same work for private enterprises as they did in their State office. One of the State employees supervised the other. The Code bars accepting other employment if it may result in, or appear to result in:

(1) **Impaired Judgment in Performing Official Duties**. Courts have noted that where the official had supervisory control, and then had a personal relationship with an employee, it could raise concerns that the supervisor may be favorably biased in official decisions related to that employee, e.g., evaluations, working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto,* 549 A.2d 1267, 1274 (N.J. Super., 1988)). Conversely, the supervisor may "bend over backwards" to avoid showing favorable bias, and as a result, the judgment would still be impaired. 29 Del. C. § 5806(b)(1) and (2). The doctrine arises out of the public policy that an officeholder's performance not be influenced by divided loyalties. *63C Am. Jur. 2d Public Officers and Employees § 62.* Here, as the supervisor and employee had the same "personal or private interest," the supervisor may be divided between that interest and the supervisory duties to fairly evaluate the employee's State work. Even if the supervisor recused from supervising the State employee who would be a private business partner, it would not cure other issues discussed below.

(2) preferential treatment to any person: Preferential treatment can come from several directions. By law, State employees may not "represent or otherwise assist" a private firm before your own agency. 29 Del. C. § 5805(b)(1). "Agency" includes "Department." 29 Del. C. § 5804(11). This helps avoid impaired judgment of colleagues and co-workers who may tend to give preferential treatment to the State employees' firm. Here, the private work would not only go to the State employees' Department, it would go to their own Division. That is literally contrary to this law. To avoid formally representing their firm before their agency, they said they would not go to the facility in their County. Rather, a relative of one of them would take the paperwork to a different facility. However, that did not cure the "otherwise assisting" aspect. The State employees' would prepare the documents reviewed by co-workers and colleagues. Again, this would directly violate this law.

Appearances Issues: Aside from these direct violations, the State employee who worked privately for his State supervisor would have his own "personal or private interest" in insuring job security in his State job. Preferential treatment could arise in that it could appear that an employee might give preferential treatment to a supervisor's wants and needs because the supervisor could hire, fire or promote the employee. *See, e.g., People Ex. Rel. Teros v. Verbeck,Ill.* App. 3 Dist., 506 N.E. 2nd 464 (1987).

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

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

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

Appearance Issues: Even if both State employees recused from officially reviewing or disposing of matters related to their firm, it could appear they would unofficially influence the State employee making the official decisions, because of the strong working relationship discussed above. Another potential conflict was that even if the supervisor recused from supervising the other employee, it may appear that the supervisor would be in a position to unofficially influence the official who would make the decisions to give the State employee, who works for the private firm, favorable evaluations.

(4) any adverse effect on the public's confidence in its government: As noted above, there need not be an actual conflict, nor does it require that the public servant succumb to the temptation; rather it is if there is a potential for conflict. *63C Am. Jur. 2d Public Officers and Employees ' 252*. In the paragraphs above, we identified some appearance concerns. However, other relevant facts and law showed other potential conflicts.

Appearance Issues: Courts have held that even if an employee recused in a State job, a ban on accepting the private job "insures that there be the appearance as well as the actuality

of impartiality and undivided loyalty." *People Ex. Rel. Teros v. Verbeck,Ill,* App. 3 Dist., 506 N.E. 2nd 464 (1987); *See also, O'Connor v. Calandrillo,* N.J. Super., 285 A.2d 275, *aff'd.,* 296 A.2d 325*, cert. denied.,* 299 A.2d 727*, cert. denied.,* U.S. Supr. Ct., 412 U.S. 940. *Sector Enterprises, Inc. v. DiPalermo,* N.D. NY, 779 F. Supp. 236 (1991). In *Sector*, the Court said multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture if their private business offers the same services as they do for the State. One concern was:

> the exigencies of private practice and the convenience of private clients require communication and sometimes actual representation, with concomitant distraction, during the regular duty hours...required to be devoted to the employment; and occasionally the incidental use of an official library, telephone and other facilities to accommodate the temporal and other necessities of private practices.

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

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

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

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

09-28 – Outside Employment—Consulting with Private Clients: A State employee asked if he could create his own consulting firm to aid private clients in matters for which he was not

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

09-27 – Outside Employment—No Dealings with Own Agency: A State employee asked if she could take a part-time job in the private sector. The firm had no contracts with her agency. It was unlikely, but if the firm came to her agency, she would recuse in her official capacity, and would not represent or assist it before her agency. 29 Del. C. § 5805(a). She would not take State clients from her agency as her private clients. That meant she would not be representing or otherwise assisting the private enterprise/its clients before her own agency. 29 Del. C. § 5805(b)(1). The Commission found no conflict as long as she recused if required.

09-14 – Outside Employment - Private Consulting on Duties Connected to State Job: A former contractor with an agency was later hired as a full-time State employee. Her private consulting business dealt with the same issues as her full-time State job. She asked if she could continue to privately consult with local governments, private entities, or other private clients if they did not come before her agency. Some of those entities had approached her after she has given classes—an official duty--and asked if she could consult with them. They are not Delaware entities. She said she did not develop a long client list because she established it with no reason to think the agency would hire her. If she consulted, she would not seek or advertise for clients. She said it is not unusual for her to use her State work as part of the training, and after that training she had been approached to consult. In the prior two years, she spoke at national conferences. At the first conference she was not asked if she would consult. This year, two entities approached her. She had not yet pursued them as clients. She had been asked to speak in other States, and did so. She was occasionally paid but had also provided services pro bono. She used her agency's "best practices" in handling her private clients. She said her agency supported her on that. Her supervisor said she was the only one on a National Board related to her State work from the Mid–Atlantic area, and some other States.

He said she is asked to speak at its conferences because of her expertise and wide understanding of regional and national needs. He said Delaware's program model was to share good ideas as seeds for the program, but implementing the ideas and process were the vital part for her private clients. He said the "best practices" she provided for them was part of her State duties. Opportunities for non-Delaware clients were outside the scope of her State duties. He said she was empowered by the agency to work with non-Delaware clients, even though it was not within her State job. However, she would consult in her private status. Her agency would approve what she would share with them, and it would have to be distinctly different from her State work. The Commission found that it would be a conflict as the two jobs were so intertwined that it would be difficult to distinguish whether her role was in her official or private capacity, and it may appear she would be using public office to obtain private clients.

09-14 - Reconsideration for Outside Employment: The Public Integrity Commission (PIC) reviewed a request to reconsider its advisory opinion on out-of-State private consulting on the same matters as a State employee's official duties.

I. **Standard for Reconsideration**

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

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

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

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

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

Regarding the State employee's statement that they would be honest, Delaware Courts, in a decision on State duty and private practice before an independent Commission, said if the result was to cast upon the official the burden of determining the limits which must be circumscribed for a private practice, it was easy to say that in a doubtful case the official should decide against their own interest. It went on to say that while that is true, officials are subject to human weakness, and the inevitable result is that in some cases considerations of self-interest may entice the holder of the office away from the performance of their duty. *In re Ridgely,* 106 A.2d 527 (Del., 1954).

The legal principle of honesty was not overlooked.

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

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

Moreover, the record shows the State agency used the term "vet." The State employee even used the term "vet" in this request, e.g., the State employee would refer potential clients to the agency to "vet the opportunity." *p. 2, last ¶; p. 4 ¶ 2.* That is not "vetting" PIC's process; it is

"vetting" the State employee's private work, by co-workers on State hours—an "inherent" conflict.

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

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

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

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

This argument did not change the outcome. It was contrary to the law, and the facts did not determine if a conflict, or the appearance thereof, existed.

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

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

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

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

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

opportunities for outside employment that may arise beyond the agency sponsored activity.

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

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

This raised "vetting" again, but now adds to the appearance of using public office for personal gain and/or official endorsement. If the agency declined a request, "only then would I be allowed to pursue those opportunities….", which to the public may create the appearance that the agency would be identifying projects, on State time, for the State employee's private business.

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

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

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

This argument did not change the outcome.

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

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

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

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

CONCLUSION:

Reconsideration is denied. Neither controlling precedents nor legal principles were overlooked, nor was the law or facts misunderstood.

09-04 - Outside Employment and Lobbying: A State employee asked if she could lobby on behalf of a non-profit organization, where she was the Director and Board President. The organization submitted its budget to the Department where she was a State employee. The Commission found it would be a conflict because she would be representing or otherwise

assisting the private enterprise before her own agency. 29 Del. C. § 5805(b)(1). It found that a waiver should not be granted because there were many other Board members, and a registered lobbyist for the organization, who could act on the areas where she was not to participate, so there was no undue hardship, and literal application of the law was necessary to serve the public purpose. 29 Del. C. § 5807(a). In such situations, the public purpose was to insure that State employees did not use their public position within their own agency to benefit their private interest, and that they did not use their public position to unduly influence their coworkers and colleagues. 29 Del. C. § 5806(e),

09-03 – Outside Employment - Licensed Professional Needs Job for Certification: A waiver was granted so the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).

09-03 – Outside Employment

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

Dear Ms. Scott:

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

I. Background

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

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

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

II. Application of Law and Facts

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

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

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

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

(c) Waivers may be granted if there is an undue hardship on the State employee or State agency, or if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). First, we note that State employees are entitled to a strong legal presumption of honesty and integrity in performing official duties. *Beebe Medical Center v. Certificate of Need Appeals Board,* Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd.,* Del. Supr., No. 304 (January 29, 1996). Here, the presumption is reinforced because you advised your colleagues, your immediate supervisor, your team leader, etc., of your proposed endeavors to obtain your certification, and that you are properly filing with the Commission for advice. They support your academic endeavors.

The hardship could occur effect both you and your agency. First, you are limited in sources where you could receive the certification from an entity that would give you the possibility of working with clients (non-State clients), who have the same areas of counseling needs as the clients you work with who are part of the drug court program. Second, because your sources for working with similarly situated clients are limited, if

you could not work with your agency's provider, then your agency could miss the opportunity for you to gather more education and experience in a more closely job-related client environment.

Aside from these hardships, the public purpose is meant to insure that officials are making decisions based on merits, not bias, favoritism, conflicts and the like, which could impair judgment. Those concerns are diminished in several ways:

(1) Crossroads does not even screen for alcohol abuse. Thus, it could not generate, through such screening, a list of non-insured clients whom it could refer to you as needing CMH assistance, and have you then recommend those as clients for Crossroads.
(2) If a client uses alcohol, they will be sent only to Aquila. Courts have held that when the action is "ministerial"—meaning the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment—then judgment cannot be impaired. *Darby v. New Castle Gunning Bedford Education Assoc.,* Del. Supr., 336 A.2d 209, 211(1975).
(3) In matters where there is a choice between Aquila and Crossroads, you said that your colleagues, or supervisor, or others could make the decision. 29 Del. C. § 5805(a).
(4) As noted, your recommendations in your State job are valued. However, your team, the team leader, Dr. Charles Webb, and Martha Gregor, Program Director scrutinize your recommendations. Also, as you must consider the family's desires, they will monitor your referrals for the results.
(5) The waiver becomes a matter of public record. 29 Del. C. § 5807(b)(4). That way, the public will know why we granted a waiver, and can see the steps taken to avoid even appearances of impropriety.

III. Conclusion

Based on the above, to avoid the potential conflict of representing or assisting the Crossroads before your agency, in your private capacity, you must not work on any matters related to your State clients, your agency, etc. As far as reviewing or disposing of matters that may tend to impair judgment in your State job, we grant a waiver, under the above conditions.

Original Signed by Chair Terry Massie

08-60 – Private Employment of Elected Official: Confidentiality of the following opinion was waived by the Applicant, who authorized, in writing, release by PIC. 29 Del. C. § 5807(d). (Note: Footnotes have been removed for ease of publication)

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

Dear Lt. Gov. Elect Denn:

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

I. Background to the Decision

(a) As Lieutenant Governor, you will continue to be subject to the Code of Conduct and Financial Disclosure laws. 29 Del. C. § 5804(13) and 29 Del. C. § 5812(n)(1).

As a lawyer, you are subject to the Delaware Lawyers' Rules of Professional Responsibility (DLRPR). We do not interpret the DLRPR as the Delaware Supreme Court regulates the practice of law. However, the DLRPR addresses special conflicts for lawyers who are current or former government officers. *Rule 1.11.* It says such attorneys may be subject to government conflict laws. *Rule 1.11(e)(2) and cmt. [1].* That is to circumscribe the State's consent to the conduct of its officers under its conflict laws. *Id. at cmt. [1].* The Court chose not to rule on the lawyers' canons, saying when State officers have a "personal interest" in private employment, that as between the State and the private practice, "the public duty commands precedence." That does not mean public officers may never hold outside employment; only that they comply with State conflict laws. Delaware Courts have addressed State ethical concerns:

(A) Both Codes have similar purposes:

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

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

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

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

II. Application of Facts and Law

As you said, the State Constitution prescribes the Lieutenant Governor's duties:

(1) preside over the State Senate, voting only to break ties; (2) preside over the Board of Pardons, which under its rules normally meets 10 times per year, and pays no compensation; (3) perform other duties as may be provided by law. Del. Const. art. III, § 19 & § 20. Senate Presidents are compensated the same as the House of Representatives' Speaker—a part-time position. Del. Const. art. III, § 19 & § 20; *The Delaware State Constitution: A Reference Guide*, pp. 118 & 119, Holland, Randy J. (2002). We do not interpret the State Constitution, as that is the Courts' expertise, not administrative agencies. *Hayes v. Cape Henlopen School District*, 341 F. Supp. 823, 833 (D. De1., 1972); *Plano v. Baker*, 504 F.2d 595, 599 (2d. Cir., 1974);

Matters v. City of Ames, 219 N.W.2d 718 (Iowa, 1974). However, the plain language gives relevant facts on your official duties in ascertaining how they relate to your proposed private acts. You said the limited Lt. Governor's duties would give you non-government time to practice law, particularly after the Legislative session ends. Your concern is the salary and its possible impact on your participation in government service. You were aware of the salary before being elected, and asked the State Bar Association if any DLRPR rules barred you from a concurrent private practice. You learned that your's is not a unique situation, and provided PIC with Bar Associations' advice on public officers also having a private practice. The DLRPR and the Code of Conduct restrict, but do not completely bar other employment. Rule 1.11; 29 Del. C. § 5806(b). We address the Code restrictions:

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

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

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

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

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

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

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

(2) If you cannot recuse, you must file a full disclosure with PIC explaining why. *Id*. at § 5805(a)(3). Courts have held that even if the officer, nor his family, have a private interest, some conflict concerns suggest it may still be "prudent" to recuse, except if recusal is impossible. *Harvey v. Zoning Board of Adj. of Odessa*, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000), *aff'd*., Zoning Board of Adj., of Odessa v. Harvey, Del. No. 590, 2000 (May 23, 2001). In essence, exercising "prudence" relates to appearances of impropriety." 29 Del. C. § 5806(a). *Harvey* essentially applied the judicial standard for these other public officers: "the rule of necessity." Executive Branch officers, by filing the required disclosure in that situation, again insures PIC's independent review of those particular changed facts.

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

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

"State agency" means any office, department, board, commission, committee, court, school district, board of education, and all public bodies existing by an act of the General Assembly or the State Constitution. 29 Del. C. § 5804(11).

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

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

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

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

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

(4) any adverse effect on the public's confidence in its government's integrity. This is basically an appearance of impropriety test. The standard is if a reasonable person, knowledgeable of all relevant facts, would still believe the Code was being violated. *In re*

Williams, 702 A.2d 825 (Del., 1997).

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

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

III. Confidentiality

The DLRPR and the Code bar misuse of confidential government information. Rule 1.11; 29 Del. C. § 5806(f) and(g). As to advisory opinions, generally, if no Code violation exists, the opinion is confidential. 29 Del. C. 5807(c). You plan to provide the opinion to firms where you seek employment. As the confidentiality belongs to you, you are free to release it to anyone. However, if you desire that PIC provide the opinion, you must authorize us in writing. 29 Del. C. § 5807(d)(1).

IV. Conclusion

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

Original Signed by Chairman Terry Massie

08-43 – Private Employment with Agency Contractor: A State employee asked if she could accept a private job which did business with her State agency. 29 Del. C. § 5806(d). She would not deal with her own agency; or its clients 29 Del. C. § 5805(b)(1). She would have no occasion to make decisions about the private firm in her official capacity. 29 Del. C. § 5805(a). She would recuse if her private clients came to her for State services, and refer them to another employee. In her private capacity, if her State clients came to the firm, the matter could be given to another of the firm's employees. The Commission found no conflict if she did not deal with her State clients in her private capacity, and vice versa.

08-42 – Outside Employment With State Agency Certified Company: A State employee asked if outside employment with a private firm, complied with the Code, when the firm had been State certified to provide certain services. 29 Del. C. § 5806(d). It was not certified by her agency. In her private capacity, she had no State clients as she dealt primarily with grants. The private company had no grants from her agency. She would not deal with her own agency. 29 Del. C. § 5805(b)(1). Her State section did not deal with the type of services offered by the

private firm, or decide if the firm should be certified. Thus, she had no occasion to review or dispose of matters related to the company. 29 Del. C. § 5805(a). The Commission found no conflict.

08-41 – Outside Employment—Company Did Business with the State in the Past: A State employee asked if he could accept a private job with a firm that several years ago did business with his agency. He would not represent or assist the firm on any State matters, but would work on matters outside the State of Delaware. The Commission approved a prior request from him on outside employment. In that case, as in this one, he said he would not deal with *any* State agency, even though the law only required he not represent or assist a private enterprise before his own agency. 29 Del. C. § 5805(b)(1). He ended up not accepting that job, but wanted to know if the fact that this firm had previously done business with his agency would change PIC's guidance. The Commission noted that he was self-imposing a greater restriction than required by law. The only difference here is this firm previously did business with his agency, but was no longer. The Commission found no conflict as long as he followed the prior advice.

08-37 – Outside Employment of Licensed Professional: A State employee, who was a licensed professional, asked if her outside practice would create a conflict as some of her clients may later qualify for some benefits administered by her agency. There was a very remote possibility that persons approved for the State benefits, might come to her private practice, as they select their own provider. Such State clients had not come to her in, at least, a 7-year period. In her State job, she dealt with children. Her State job focused on children who were State clients. Her outside clients were not clients of her Department, Division or Section. Thus, she did not review or dispose of matters pertaining to her private clients in her State job. 29 Del. C. § 5805(a). Nor did she represent or otherwise assist her private enterprise before her own agency. 29 Del. C. § 5805(b)(1) . She also was not referred clients by the State Courts. Although it was a very remote possibility, if her private clients came to her State job, she would recuse. 29 Del. C. § 5805(a). In her outside job, she would not accept agency clients. 29 Del. C. § 5805(b)(1). The Commission found no conflict at the time. It held that a waiver may be granted if such clients came to her and for some reason she could not recuse, but she would need to file a disclosure of her inability to delegate. 29 Del. C. § 5805(3).

08-18 – Outside Employment – Tutoring: A State teacher wanted to contract with a private firm to tutor students. She did not participate in any State decision regarding any contracts with the firm; would not be tutoring her own students, or students in her school, etc. PIC previously ruled on a very similar situation and found no conflict as long as those teachers complied with certain restrictions (e.g., no tutoring of own students or students in her school). PIC is to strive for consistency in its opinions. Accordingly, it found she would have no conflict if she complied with those same restrictions, which are detailed in the redacted *07-30* opinion below.

08-03 and 08-16 – Outside Employment - Two Tutors: Two teachers sought outside jobs as tutors with a private enterprise which contracted with the State. They filed disclosures as required. They would not tutor their own students or students from their educational facility; they did not make decisions on the State's tutoring contract; and would not represent themselves or the company before their own agency. As several such opinions have been issued, the language of the prior opinio0ns was adopted as the circumstances were the same, and the

Commission is to strive for consistency in its opinion. 29 Del. C. § 5809(5). The sample language without identifying information is below in *Commission Op. No. 07-30.*

07-68 - Outside Employment Disclosure - Waiver Denied: The requester wanted a part-time job with a company that is regulated by the State Office in which she worked. By law, she disclosed that relationship to the Commission as a condition of commencing and continuing State employment. 29 Del. C. § 5806(d). Her State duties involved responsibilities for licensing, certification and surveying such facilities, including the private employer. Her public and private duties differed to some extent. Her interest in the part-time job was because she suffered a significant loss in State over-time pay when she left her last State job to accept this State position. She and her supervisor said she would be screened from any State involvement in decisions about that company, re: licensing, etc. Thus, she would not review or dispose of matters pertaining to her private employer. 29 Del. C. § 5805(a). She said that in her private capacity she would not represent or otherwise assist the company on State matters before her own Office. 29 Del. C. § 5805(b)(1). As far as confidential information, she said she believed surveys, licensing, etc., of such facilities were public records. She and her agency said that if she did have access to confidential information about such facilities she would be blocked by screening and would not use it to assist the facility. 29 Del. C. § 5806(f) and (g).

Her supervisor expressed the economic need for her to work part time. Her opportunities were limited as most part-time jobs would be at facilities regulated by her Office. However, the supervisor said her Office did not regulate some facilities that could use her professional services. The Commission found there was a conflict, or at least the appearance thereof, due to the overlap between her State duties and the private job. She would be in a position to assist the facility, and unable to ignore non-compliance with her State Office's regulations, etc. 29 Del. C. § 5806(b)(1)(2) and (4) (impaired judgment; preferential treatment, or the appearance thereof). Other regulated facilities and the public could suspect she was violating the Code.

07-61 – Outside Employment – Subcontractor on Federal Rule Proposal: A State employee asked if he could accept an outside consulting subcontract on a Federal rule proposal. As a contractor he would serve as a communications consultant, working with web platforms and other communications tools, e.g., media, etc., to publicize the opportunity for people to comment on the rule. None of the work is within the purview of his State job. Thus, he would not review or dispose of the matter in his State job. 29 Del. C. § 5805(a)(1). His name would not appear on the web site, but if people ended up contacting him through such things as a "contact us" link, he would not deal with any Delaware organizations or persons who did business with, or were regulated by, his agency. Someone in his agency might choose to comment on the rule, but he would not be involved in that activity. 29 Del. C. § 5805(a)(1). The Commission found no conflict as long as the
facts did not change and if he followed the same restrictions identified in *Opinion No. 07-58.*

07-60 – Outside Employment - Newly Hired Disclosure: A newly hired State employee filed an ethics disclosure because as a condition of commencing employment she must file a full disclosure because she has a financial interest (employment) in a private business that did business with the State. 29 Del. C. § 5806(d). She worked in a completely different Department, and would have no occasion to make decisions about the private enterprise, nor did she have oversight of them or the contract. Thus, she did not review or dispose of matters

pertaining to the company. 29 Del. C. § 5805(a). She would also have no occasion to go before her own agency and personally help the private enterprise in terms of getting contracts. 29 Del. C. § 5805(b)(1). The contracts that the company had with the other Department were publicly noticed and bid. The employee discussed information about the State contract and a description of her duties within her Department. Those duties did not involve the same State clients. In fact, they were not even in the same zip code as any of her clients. There also was no other overlap with the company. Her supervisors were both aware of their employee's private obligations and both they, and the filer, knew she could not and would not use State time or resources for her private job, 29 Del. C. § 5806(e), or misuse any confidential information about clients. 29 Del. C. § 5806(f) and (g). The Division Director checked to make sure that there were no contracts with her Department. The Commission found no conflicts.

07-58 – Outside Employment—Private Consulting with Out-of-State Clients: A State employee asked if he could accept an outside consulting contract for out–of-State clients, both public and private. He had no State duties related to the prospective clients. The Commission found there was no conflict as long as he complied with the following restrictions; (1) if any of his clients should ever do business with his agency, whether directly or indirectly, he must recuse, 29 Del. C. § 5805(a)(1); (2) if any of his private clients do business with, or are regulated by any State agency, he must file a full disclosure with PIC as a condition of continuing State employment, 29 Del. C. § 5806(d); (3) he may not use any State resources or time for his private business (he will be consulting by phone after his normal work day, and will not use State resources or time), 29 Del. C. § 5806(e); (4) he may not use his State position in any way connected to his private job: e.g., not advertised to or discussed with clients, or used on stationery or other communications such as e-mail, business cards, etc.; *Id*. (5) he must follow any agency policy if it is more stringent; (6) he may not represent or in any way assist any of the private clients before his agency, if they ever have any dealings with it, 29 Del. C. § 5805(b)(1); (7) he may not improperly use or disclose State confidential information to his clients, e.g., proprietary technical information, etc., 29 Del. C. § 5806(f) & (g); and (8) he must screen for conflicts in his State job and private work. He is entitled to the strong legal presumption that he will follow these limitations. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd***.,** No. 304 (Del. January 29, 1996)**.**

07-51 – Outside Employment with Company Doing Business with the State: A State employee wanted to accept a part-time job with a private employer which had been awarded a State contract. The contract was not with his State agency. He filed a full disclosure as required. 29 Del. C. § 5806(d). The employee's State clients were not the same as the ones he would have in the part-time job. Thus, he would not review or dispose of matters in his State job where he had a personal or private interest. 29 Del. C. § 5805(a)(1). He would not perform the private work during State hours or using State resources. 29 Del. C. § 5806(e). PIC found no violation, but if the employee's situation changed he was to notify PIC.

07-41 – Outside Employment in Regulated Practice: A State employee filed a disclosure for 2 reasons; (1) he was a licensed professional with a private practice that was regulated by a State agency; and (2) he had a financial interest (employment) in a private enterprise that did business with the State. 29 Del. C. § 5806(d). Regarding the first reason for filing--a professional practice regulated by the State--in his State capacity, he made no decisions, nor had any other involvement in the regulatory board. 29 Del. C. § 5805(a)(1). Regarding his private employment, while he worked with others in his profession, his State job did not require

him to make decisions on any of the professionals he would work for, or with, in his private job. Also, he had no involvement in his Department's contracts for licensed professionals in his field. Id. His State job was primarily working with adults. His private job would deal with adolescents. Thus, he would have no occasion to represent or otherwise assist the private enterprise on matters related to his adolescent clients. 29 Del. C. § 5805(b)(1). If his State clients came to his private job, he could recuse and let other professionals take them as clients. However, there was a very remote chance that he might not be able to refer such clients to another professional is there was an emergency. As he was only working very limited hours in the private job, the possibility he would deal with an emergency situation was also remote. The Commission found no conflict at this time, and he could return to the Commission if his circumstances changed.

07-35 - Outside Employment - Waiver Granted; opinion becomes public record. 29 Del. C. § 5807(b)(4).

Advisory Op. No. 07-35- Outside Employment

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

Dear Mr. [Ivan] Edmunds:

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

I. Law and Facts:

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

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

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

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

Here, other relevant facts are: (1) you are technically complying with the law; (2) your private work is screened so you do not get State clients; (3) you are entitled to a

strong legal presumption of honesty and integrity; (4) to further instill public confidence in its government, waivers are made public so the public will know *all* the relevant facts for the waiver; and (5) the public purposes of the restrictions are to prevent preferential treatment for the private firm by you in your State job, or from your colleagues if you represented or assisted the firm before your agency; those purposes are served here.

II. Conclusion:

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

Original Signed by Chair Terry Massie

07-30 – Outside Employment - Private Tutoring with Company that Does Business with the State: A teacher filed a disclosure of her outside employment as a private tutor with a private firm that contracted with the State, as a condition of commencing and continuing employment with the State. 29 Del C. § 5806 (b). The private vendor contracted with various school districts, but not her district. She made no official decisions about the State contracts with the firm by which she is employed. 29 Del C. § 5805(a)(1). The State contract was publicly noticed and bid. 29 Del C. §5805 (c). The contract value, as it related solely to this teacher, was less than $2,000. She tutored during non-State work hours. Counsel provided a prior Commission opinion from a similar situation, where the facts were essentially the same and no violation was found. Commission Op. No. 02-02. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5). The Commission found no violation.

RE: Advisory Op. No. 07-30 - **Disclosure- Outside Employment (Tutor)**

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

Dear _____

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

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

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

29 Del. C. § 5806(e).

Based on these facts, we find no violation. However, if there is a substantial change in your circumstances, you should review our opinion, the full disclosure requirements, etc., and, if necessary, submit the new information. For example, if your phone number changes, you need not file an update. However, any substantial change, e.g., in your official capacity you become involved in issuing contracts to private companies to tutor, should be filed so that we can determine if your changed status may result in a conflict.

07-27 – Outside Employment—Contractor of State Agency: A State employee expected to end a part-time job due to a promotion in a State job. However, an opinion was sought, for the time, at the private firm. A disclosure was filed, as required by law, if a State employee has a financial interest in a private firm doing business with, or regulated by a State agency. 29 Del. C. § 5806(d). The private firm had a contract with a State agency, but not the agency where the employee worked. Thus, the employee would not review or dispose of matters pertaining to the company. 29 Del. C. § 5805(a). The employee had no reason to represent or assist the private firm before her own agency. 29 Del. C. § 5805(b)(1). Totally different agencies refer clients to the private firm. The client had a choice of which private firm to go to. This firm was one provider. One job was with adult clients and the other was with adolescent clients. If any of the State clients were referred to the private firm, she would recuse. The Commission found no violation.

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

06-86 – Outside Employment - Vendor for Different Division; Different Clients
As a waiver was granted, the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).

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

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

Dear Ms. Gregor:

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

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

The contract is not with your Division--Children's Mental Health—where you are the Director of Drug and Alcohol Services. The private firm contracts with a separate Division--Alcohol Services and Mental Health. While the general work is the same--counseling clients with substance abuse problems,--the clients are not the same in your two jobs. Your State job deals with children and substance abuse. Your private job deals with adults and substance abuse. You have no involvement with the private firm's contract, nor any occasion to make other decisions about the firm in your State capacity.

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

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

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

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

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

Original signed by Chair Terry Massie

06-84 – Outside Employment - Job with Contractor of Different Agency; Different Clients: A waiver was granted so the opinion is a matter of public record. 29 Del. C. § 5807(b)(4).

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

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

Dear Ms. Harris:

The Public Integrity Commission reviewed your disclosure of your private job with Kent/Sussex Counseling, which contracts with the Department of Services for Children, Youth and their Families. You are employed by the Department. If a conflict exists, you

seek a waiver. Based on your written disclosure and comments at our meeting, to the extent your conduct would violate the Code, a waiver is granted based on the following law and facts.

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

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

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

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

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

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

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

Further, waivers may be granted if an employee has an undue hardship. 29 Del. C. § 5807(a). You accepted the job so you could get the required credits to be certified in this field. As your Department contracts with most of the firms who provide this service, you are limited in places to go to advance your certification.

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

Original signed by Chair Terry Massie

06-76- Outside Employment - Employer Contracts with Different Division; Waiver

Granted. Opinion is a matter of public record. 29 Del. C. § 5807(b)(4).

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

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

Dear Ms. McCormick:

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

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

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

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

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

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

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

Original signed by Chair Terry Massie

06-75 & 06-81 – Outside Employment - Agency Contractor: Waiver Granted. A waiver was granted so the following opinions are not confidential. 29 Del. C. § 5807(b)(4).

Advisory Op. No. 06-75 & 06-81 - Employment with Agency Contractor

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

Dear Ms. Barile and Ms. Short:

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

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

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

In your private job, you may not represent or otherwise assist a private enterprise on matters before your agency. 29 Del. C. § 5805(b)(1). In your private jobs, you are both Treatment Mentors. The Child Mental Health Division employees do not evaluate your private work and you will not have contact with that Division's caseworker. Neither of you will work with children who are, or were, involved in abuse investigations by you or anyone in your division. To the extent your activities in your private job might literally mean that you are otherwise assisting NBN before your own agency, you both sought waivers.

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

engaging in biased decisions in such matters as awarding a contract, etc., because of your private employment connection.

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

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

Original Signed by Chair Terry Massie

06-44 – Out-of-State Clients: State employees may not accept other employment if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del C. § 5806(b).

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

01-18 – Dual State Positions: A State employee asked if he could serve as an appointee to a Commission while holding a full-time State job. Based on the following facts and law, he could hold the dual State positions if he recused himself from the types of matters identified herein.

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

The Code of Conduct prohibits State employees from accepting other employment if it

may result in:

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

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

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

If a person holds a full-time State job and also a paid appointed position with the government, he cannot be paid more than once for coinciding hours of the workday. 29 Del. C. § 5821, *et. seq.* He was advised to review that subchapter, and if he had questions on its applicability to his situation, he should review our prior opinions interpreting that section and/or seek further guidance from us.

01-17 – State Nursing Specialists to Contract for Private Study: Several State nurses wanted to contract with a private company to provide services to test children who were part of a study being conducted by a private enterprise. Based on the following law and facts, the Commission concluded that the conduct would not violate the Code as long as the contract work was performed during non-State work hours.

(A) Applicable Law

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

(B) Application of Facts to Law

In deciding if the obligation to a private enterprise substantially conflicted with performing State duties, one fact we considered was when the outside employment would be performed. *Commission Op. No. 96-17.* At the time, the nurses had a backlog at their State job. As a result, they worked their regular State hours and also worked with clients and their families at night and occasionally on weekends. They received compensatory (comp) time for performing

State duties during non-regular work hours. If they contracted with the private company, they would conduct the study tests for the study during their evenings, weekends, holidays, vacation or comp-time.

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

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

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

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

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

(4) Any adverse effect on the public's confidence in the integrity of its government. This is basically an appearance of impropriety test. *Commission Op. No. 96-72*. As it did not appear that: (1) their judgment would be impaired; (2) they could give preferential treatment to the private organization or the children in its study; or (3) they were in a position to make official decisions outside official channels, there was no appearance of impropriety based on those facts. Further, to insure that approval of their outside work under the Code of Conduct would not violate or circumvent the Merit rule on outside employment, they obtained a decision from the Deputy Attorney General assigned to their agency stating that the conduct would not violate the Merit Rules. *See*, *e.g., Commission Op. No. 99-26* (conduct that would violate or circumvent Merit Rules would have adverse effect on public's confidence). Finally, we also discussed at length that the tests could only be provided by nurses who hold certain credentials and who had obtained a given number of hours of experience in performing the tasks involved. This limited the number of nurses who could give the tests and those nurses were primarily State workers. This fact reduced the possibility that they used their public office to obtain the private contract as there were objective criteria to establish the limited number of nurses available and the *bona fides* of the nurses seeking to contract.

(C) Conclusions

Based on the above law and facts, the private contracts would not violate the Code of Conduct as long as the nurses performed the contractual work during non-State work hours.

01-11 – Outside Employment—Part-time with Local Government: A local government asked if it would violate the Code of Conduct if the local government hired an engineer to work part-time to provide "certain internal management assistance" for approximately one year, while still employed by a private enterprise. Based on the following law and facts, we concluded that with the following restrictions, the employment would not violate the Code of Conduct.

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

(A) Jurisdiction

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

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

Having concluded that the promise of a future full-time job was within the Code's definition of "compensation," the particular payment plan becomes irrelevant. In fact, the Commission asked why the local government posed those two scenarios rather than just paying the individual from the start of the part-time employment. The local government thought the payment arrangement might have some impact on whether there was a violation of the Code of Conduct, and that by not paying or deferring the compensation there might not be a violation. As noted above, the local government's method of payment was basically immaterial to whether the employment violates the ethics law because, regardless of the payment plan, (no pay, deferred pay, or payment throughout the interim employment), the individual was being "compensated" as that term is defined under the Code of Conduct.

(B) Code of Conduct Restrictions

As noted above, it is not the method of payment that drives the issue of whether the

employment violates the Code. Rather, it is the individual's conduct once he begins work for the local government that must be considered and where necessary, curtained to avoid violating the Code.

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

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

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

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

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

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

As noted, the individual could not participate in decisions about the company and could not represent or otherwise assist the company before his own agency. This diminished the possibility that his judgment would be impaired or that he could give the company preferential

treatment or make official decisions outside official channels. Regarding whether the private employment may result in any adverse effect on the public's confidence in the integrity of its government, we have held that this is basically an appearance of impropriety test. To decide the issue, we look at the totality of the circumstances. *Commission Op. No. 96-76.*

Beyond the fact that he would not make decisions about the company in his official capacity, or in any way assist it before his own agency in his private capacity, we noted that the local government intended to publicly announce its decision regarding his employment. This would serve to diminish any appearance that the local government was trying to bring him in from the private sector without the public's knowledge while he was still working for that company. Without such information being disclosed, it may raise appearances that he, or the company, received preferential treatment. Additionally, if his private firm did business with the local government, the Code of Conduct requires that where an individual has a financial interest in a private enterprise which does business with their government, they must file a "full disclosure" of those business dealings with the Commission. 29 Del. C. § 5806(d). Such disclosure is a condition of commencing and continuing employment with the government. *Id*.

As indicated at the meeting, it was not possible to envision, at the time, every conceivable situation that may have the potential for a conflict because of the individual's concurrent private employment. However, as to those situations where his private enterprise did business with the local government, we address those aspects on a case-by-case basis. Also, if other situations arose involving the private company, which would not require a full disclosure under 29 Del. C. § 5806(d), but which may have required a resolution of whether there was a conflict under any other Code provision, the local government or the individual could seek further advice.

(C) Conclusion

Based on the preceding law and facts, the conduct of the individual, once he started to work for the local government, was curtailed in that he may not: (1) review or dispose of matters related to his private employer; and/or (2) represent or otherwise assist the private enterprise before his government agency. Additionally, the law mandates as a condition of commencing and continuing employment, if the private enterprise does business with the local government, he must file a full disclosure of that business dealing with the Commission so that it can decide if there is a conflict of interest. Aside from that mandated requirement, he or the local government could seek further advice as issues arose that may have the potential for a conflict.

01-08 – Outside Employment—Same Area of Responsibility: A State employee filed a request for an opinion on whether his proposed outside employment would violate the Code of Conduct. In the meantime, his agency was checking to ascertain if the outside employment would violate the Merit Rules, as he was a Merit Employee. The agency concluded that the outside employment would violate the outside employment restriction in Chapter 18 of the Merit Rules which restricts State employees from holding outside employment in their area of responsibility. Thus, the request to this Commission on whether it would violate the conflicts of interest restriction in the Code of Conduct was moot.

99-49 – Outside Employment—Driving for a State Contractor: A State employee asked if he could accept employment with a company which contracted with his agency. Based on the following law and facts, he could accept employment as a driver, but based on the company's State contract, if it again offered to hire him as a counselor, such employment would violate the Code of Conduct.

(A) Facts

Initially, a State employee was offered a job with a private company which contracted with his agency to make home contact with State clients as well as provide organized activities for them. However, at the Commission's meeting, he said that the company changed its employment offer and wanted to hire him to transport its clients to various locations. He said that the company's administrator also indicated that he might be used to make home contacts, etc., if he was needed as a backup. The company's clients were the result of a contract with his agency. In his official capacity, he had no decision making authority over the terms of the contract, selecting the contractor, etc. That was confirmed by his supervisor. The employee's supervisor provided a copy of the company's contract and spoke with the Commission's legal counsel regarding the company's contractual duties and the employee's State duties. Under the contract, the company worked with clients who were previously assigned to certain State centers. The employee's job was as a shift supervisor. As such, he supervised staff, maintained time records, wrote employee evaluations, etc. Additionally, he had some limited dealings with the clients at the center, but his primary responsibility was supervising the staff.

The employee's supervisor said that in performing his duties, the State employee was not responsible for referring any State clients to the company's program. He said that each client was assigned a case manager when they came to the facility. The case managers meet weekly to discuss what programs, treatment, etc., were appropriate for their assigned clients. That may include a decision that the client should be recommended for some of the contractual programs offered by private companies, including the one which offered the employee a job. If the case managers concluded a particular contract program offered an appropriate program, they could make the recommendation to the Court and the Court decided what program the client would follow. The State employee did not attend the case managers' meetings to discuss placement; did not make recommendations on placements; and did not participate in Court appearances where placement recommendations were made. Moreover, the employee's supervisor said the case managers were on a different shift than the employee.

(B) Applicable Law

The Code provides: No state employee shall have any interest in any private enterprise nor incur any obligation of any nature which is in substantial conflict with the proper performance of his duties. It restricts other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

To decide if the other employment substantially conflicted with performing official duties, the Commission looked first to see if the employee could perform his outside employment during hours other than those for which he was obligated to perform his State duties. Commission No. 95-39. He said he would perform the other employment when he was not required to be at his State job. His supervisor also believed he could perform the other job without it interfering with his normal duties.

Regarding whether the other employment would result in impaired independent judgment in performing official duties, as previously indicated, he had no involvement in making decisions over the terms of the company's contract, selecting the contractor, determining if it is complying with the contract, etc. Moreover, he did not make decisions or recommendations on what program a client would be placed in. He was not a case manager; did not attend their meetings; did not supervise them; nor did he work on the same shift. Thus, in his official capacity, he would not be in a position to make official decisions about the company's contract. Nor would he be able to give it, or the State client's, preferential treatment in such matters as recommending the company's program to the Court, or funneling clients to its program. In light of those facts, the Commission did not believe that employment with the company to transport its clients raised a problem. However, if he were involved in aspects such as home visits, etc., the Commission believed that conduct could violate the Code for the reasons below.

The contract stated that on a monthly basis, the agency's case managers were to review the clients' progress on identified service/treatment goals, and on an annual basis, the agency's contract administrator would review the performance measure data with the company. The information was also subject to review by another entity within his department. If he were involved in home visits, etc., to the extent that such work involved dealing with the clients' program, their service, and treatment, etc., it appeared that such work was the substance of the company's contract. Thus, his work, if he were a counselor, might be evaluated by his own agency. The Code prohibits a State employee from representing or otherwise assisting a private enterprise on matters before his own agency, 29 Del. C. § 5805(a)(1), and it restricts other employment if it may result in any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b)(4). To the extent that employment with the company in the capacity of conducting home visits, etc., would entail work in areas that were, in essence, the substance of the contract with his agency, it could appear that he would be assisting the company on matters involving his agency. This may result not only in a violation of 29 Del. C. § 5805(a)(1), but may also result in an adverse effect on the public's confidence in the integrity of its government, which is prohibited by 29 Del. C. § 5806(b)(4).

99-42 – Outside Employment—Representation of Private Employer Before Own Agency: A State employee wanted to privately contract with a firm and represent it on contract matters before her own agency. The Code specifically and clearly prohibits representing or assisting a private agency before one's own agency. Thus, the concurrent employment she sought would violate that provision. Moreover, such employment may result in an adverse effect on the public's confidence in its government because: (1) it is clearly contrary to the law; and (2) it could appear that she would be in a position to unduly influence her colleagues in making any contract renewal decision; could give the company preferential treatment; and could obtain official decisions outside official channels.

99-41 – Outside Employment—Contract with Company Contracting with Agency: A State employee asked if it would violate the Code of Conduct for her to privately contract with a firm to consult on another program, when she occasionally dealt with the firm several years ago. Based on the following law and facts, we conclude that such conduct would not violate the Code.

(A) Applicable Law

State employees are prohibited from having any interest which may be in substantial conflict with performing their State duties and from holding other employment if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

(B) Application of Law to Facts

As a State employee, she was responsible for operations and programming for a program run by her agency. For other employment, she wanted a 2-year contact with a private firm to consult on another State's similar program. She would consult on: organizational structure, training, program services, policy and procedures, pilot programming, and staffing. To insure there was no substantial conflict with performing official duties, the individual should not perform functions related to the other employment during the hours when the individual is supposed to be performing State duties. *See, e.g.*, *Commission Op. Nos. 95-13, 95-30, 95-39.* She said she would perform the work for the private company during non-State duty hours, e.g., weekends, annual leave.

We also apply the facts to the four criteria identified above.

(1) Impaired judgment in performing official duties - In her official capacity she had no decision-making authority over the company. It did not contract with her agency at the time. It did not expect to contract with her agency anytime within the next two years. However, it had subcontracted with a firm which had a contract with her agency. She did not participate in the decision in either putting together that contract or awarding the contract. Once the contract was undertaken, she dealt with the contractor and occasionally dealt with the subcontractor. Most of her dealings were with the contractor. The contract was completed in 1997. The Commission has given "some weight" to the lapse of time between when the government official last had dealings with the company to decide if an ethical issue is raised when a State employee contracts with a private enterprise which previously dealt with his agency. *Commission Op. No. 99-31*. Here, she was not involved in the contract decision; had few dealings with the subcontractor which now sought to hire her; and those dealings were more than two years ago. That reduced the possibility that in her few dealings with the company that her judgment was impaired as nothing indicated that two years ago she was entertaining any prospective contract with the firm.

(2) Preferential Treatment to Any Person - As the firm did not presently contract with her agency, and no other matters would be decided about the firm by her, it did not appear that she was in a position to give the firm preferential treatment. Moreover, the subcontract had expired more than two years before the company sought her as a consultant, again reducing the possibility that a potential contract may have resulted in preferential treatment at the time. Finally, since the firm would not seek to contract with her agency, at least for the length of her private contract, she would not be in a position to render preferential treatment to it. However, once the contract expired, if the firm decided to seek a contract with her agency, and she would normally participate in such decisions, she could return to the Commission for further advice.

(3) Official Decisions Outside Official Channels - As the firm had no contract or other matter pending with her agency, it did not appear that she could render any official decision outside official channels as the company was not in search of any kind of decision, officially or unofficially, from her agency.

(4) Adverse effect on the public's confidence in its government - The Commission looks to the totality of the circumstances to decide this issue. *Commission Op. No. 96-78*. It also must show consistency in its opinions. 29 Del. C. § 5809(11). Last month, the Commission ruled on a similar situation where a State employee, in a similar situation, sought to contract to consult for a company which was contracting with another State. *Commission Op. No. 99-34, "Scope of the Code when Working for State Contractor."* In that instance, the private company had an existing contract with his agency. Under those facts, the Commission held that to avoid an adverse effect on the public's confidence in its government, he should recuse himself from participating in his agency's decisions regarding the private enterprise. Here, that issue would not arise because the company she wanted to contract with had no contracts or other matters before her agency in which she would participate in her official capacity. Accordingly, to be consistent with our prior rulings, it did not appear that, under those facts, there was a violation of the Code.

99-35 – Outside Employment—Includes Dual Employment with the State: The Code of Conduct restricts the conduct of State employees when they hold "other employment." 29 Del. C. § 5806(b). The issue was whether a State elective office constitutes "other employment" when an individual holds a full-time State position. We have held that State employees, who also hold elective office in a local government, are subject to the "other employment" restriction. *Commission Op. Nos. 92-2; 96-02; 96-22; 97-06*. The jurisdictional basis was not specifically addressed in those cases.

At common law, it was incompatible for an individual to hold dual government positions if in one position the individual could act upon the appointment, salary and budget of his superior in the second position. *See, e.g., People Ex. Rel. Teros v. Verbeck*, Ill. App. 3 Dist., 506 N.E. 2d 464 (1987). The common law ban on holding two government positions under such situations was because of the potential for influencing their superior's salary and budget, and ultimately their own salary. *Teros*; *People Ex. Rel. Fitzsimmons v. Swailes*, Ill. Supr., 463 N.E. 2d 431 (1984); *People Ex. Rel. v. Claar*, Ill. App. 3d, 687 N.E. 2d 557 (1997); *Mead v. Board of Review,* Ill. App. 2d, 494 N.E. 2d 171 (1986). In such situations, Courts said there could be "conflict of duties" between the two offices and a "conflict of interest," or at least the potential for such conflict if the individual held both jobs. *Teros, Swailes, Claar*, and *Mead*. Some courts held that recusal from participating in such decisions was not a sufficient remedy; rather, one of the jobs must be relinquished. *Teros* at 466. It held that banning dual government employment under such situations "insures that there be the appearance as well as the actuality of impartiality and undivided loyalty." *Id.* (*citing Rogers*; *See also, O'Connor v. Calandrillo*, N.J. Super., 285 A.2d 275, *aff'd*., 296 A.2d 325, *cert. denied*., 299 A.2d 727, *cert. denied*., U.S. Supr. Ct., 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed. 2d 399). The common law rule also had application if the individual held a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees* § 62. The doctrine arises out of the public policy that an officeholder's performance not be influenced by divided loyalties. *Id*.

Subsequently, States began to change the common law by adopting statutes regarding concurrent employment in both the public and private sector. *63C Am. Jur. 2d Public Officers and Employees* § 62, et. seq.; Annotation: *Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5th 671. Regarding holding a second job in the public sector, the statutes identified certain positions where a government employee could not hold dual positions. In other situations, it permitted dual employment, but restricted the conduct of persons holding dual positions. 62 ALR 5th 671 and *63C Am. Jur. 2d Public Officers and Employees* § § 62 thru 70. Moreover, Courts

acknowledged the distinction between a "conflict of duties" and a "conflict of interest." *Claar* at 217; *Reilly v. Ozzard*, N.J. Supr., 166 A.2d 360 (1960).

A "conflict of duties" inheres in the very relationship of one office to the other; but a "conflict of interest" will not inevitably arise as an incident of the relationship of the two offices. *Reilly; Dunn v. Froehlich,* N.J. Super., 382 A.2d 686 (1978). "Conflicts of interest" could arise because of the "personal interests" of the officer in question. *Dunn*. It could depend on what legislation was being considered. *Reilly*. If there was a "conflict of duties," dual positions could be incompatible. But if there were a "conflict of interest," or the "potential for a conflict," they were "routinely cured through abstention or recusal on a specific matter." *Claar (citing 56 Am. Jur. 2d Municipal Corporations* § 172 (1971)); *Reilly* at 370.

This approach to dealing with concurrent employment was meant to allow citizens, including government employees, an opportunity to hold a second job to supplement their income and, in the case of dual government positions, permit them to more fully participate in politics. 62 ALR 5th 671 and *63C Am. Jur. 2d Public Officers and Employees* § § 62 thru 70. Delaware's General Assembly adopted the less restrictive approach. In some instances, it identified government positions where dual occupancy is prohibited by law. *See, e.g.*, 29 Del. C. § 5808 (b) (Public Integrity Commission members may not hold elected or appointed office under the government of the United States or the State or be a candidate for such offices; 15 Del. C. § 301(d) (Board of Elections Commissioner may not hold or be a candidate for office). Where dual government positions were not expressly prohibited, the General Assembly restricted the conduct of government employees. For example, when State employees also seek an elected office, the General Assembly restricted their conduct regarding political activity. *See, e.g*., 29 Del. C. § 5954 (no person shall use or promise to use, directly or indirectly, any official authority or influence, to secure or attempt to secure for any person an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration).

More significant to this Commission, is that the General Assembly, in enacting the statute we administer, said the purpose was to insure that the conduct of such persons holds the respect and confidence of the people, and therefore such persons are to avoid conduct which violates the public trust or which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1). However, it also recognized that 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 balance the protection of the public's interests and at the same time encourage citizens to take public office, it said that State employees must have the benefit of specific standards to guide their conduct. 29 Del C. § 5802(2). Among the "specific standards" is the restriction on "other employment." 29 Del. C. § 5806(b). That standard provides that: No state employee, state officer or honorary state official shall...incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment ... under circumstances where such acceptance may result in any of the following: (1) impaired judgment in exercising 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 its government. 29 Del. C. § 5806(b).

As noted, we have held that "other employment" restriction applies if a State employee also holds elected office. *Commission Op. Nos. 97-06; 96-02; 96-22*. Those holdings are consistent with: (1) the plain language of the provision; and (2) the statutory purpose and intent.

First, the plain language refers to "any" obligation in substantial conflict with performing official duties. The term "any" is all encompassing. *Commission Op. No. 95-06*. Also, the plain language does not refer to employment by a private enterprise, rather it refers to "other employment." Had the General Assembly desired to restrict the provision only to employment by a private enterprise, it could have said so because in other Code of Conduct provisions it clearly and specifically refers to standards to be followed where the individual is a State employee, and at the same time has an interest in a private enterprise. *See, e.g*., 29 Del. C. § 5805(a)(2)(b); § 5805 (b); § 5805 (c) and (d); § 5806(c) and (d). Reading those terms in the context of the whole statute, we note that the General Assembly inserted a specific subchapter addressing procedures to insure that persons holding elected positions and are "also employed" by the State are not paid by more than one tax-funded source for duties performed during coincident hours. 29 Del. C., subchapter III. Thus, the General Assembly is presumed to have been aware of such dual positions when it enacted Title 29, Chapter 58. To hold that "other employment" did not include elected positions would not only be contrary to the plain language but would mean that State employees with a second job in the private sector would be subject to having their other employment curtailed if there was a conflict, while State employees whose second job was with another government agency would not be so curtailed. Such interpretation would ignore the fact that the law recognizes that conflicts can arise when the "other employment" is another government job. *See, Teros, et. al, supra*. Where an interpretation would lead to an absurd or unreasonable result, such interpretation could not be the expressed legislative intent. *Commission Op. No. 96-08; 96-14.*

Accordingly, we hold that "other employment" in the Code of Conduct applies to State employees who concurrently are General Assembly members because to do so is consistent with the plain language and the expressed statutory purpose. The effect of this interpretation is that the Commission can decide if the person in their full-time State job has a conflict of interest on that job. However, it does not mean that the Commission can decide if the person in their capacity as a member of the General Assembly has a conflict because conflicts for members of the General Assembly are governed by other laws. *See*, *Commission Op. No. 96-11.*

Having concluded that we have jurisdiction, the next issue is whether participating in decisions regarding the salary of a superior creates an obligation "in substantial conflict" with performing public duties and/or whether the other employment may result in: (1) impaired judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b). Here, because of the dual employment, a State official was in a position to influence his supervisor's salary at hearings in the General Assembly. His supervisor had the authority to hire, promote, or fire him in his State position. Thus, actions he may take on the matter could impact on his own full-time employment. Consequently, it could appear that he had a "personal or private interest" in the matter. The statutory remedy under the Code of Conduct, 29 Del. C. § 5805(a)(1), if there is a personal or private interest which tends to impair independent judgment, is that the State employee not participate in the decisions. *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); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). The question of whether an interest is sufficient to warrant recusal is an issue of fact. *Prison Health*.

Applying the facts to the "other employment," we must decide if his participation "may result in":

(1) Impaired Independence of Judgment

Where an official makes decisions on his superior's salary, his independent judgment may be comprised in two ways. First, his personal or private interest in insuring his own job security has the potential of not only affecting his superior's salary, but ultimately his own because the supervisor has the power to hire, fire, and promote him. See, *Teros; Swailes*; and *Mead*. Second, it creates, at least the appearance, that the supervisor could use his supervisory role as leverage to influence the official or maybe take retaliatory action against the official if he did not vote as his supervisor desired. *Township of Belleville v. Fornarotto*, N.J. Super., 549 A.2d 1267, 1274 (1988).

(2) Preferential Treatment to Any Person

Preferential treatment could also arise in two ways: (a) it could appear that the elected official would give preferential treatment to his employing supervisor because he can hire, fire or promote at will; and (b) the supervisor could give the dual employment holder preferential treatment with respect to his employment conditions. *Fornarotto* at 1274. Under those circumstances, not only could it result in preferential treatment, but it could appear that either or both of them, were using public office to secure unwarranted privileges, private advantage or gain, which is prohibited by 29 Del. C. § 5806(e).

(3) Official Decisions Outside Official Channels

It could, at a minimum, appear that the dual employment holder could operate outside official channels to obtain the salary increase for his supervisor; or that the supervisor could use his authority and power over the employee to obtain such decision.

(4) Any adverse effect on the public's confidence in the integrity of its government

This provision and the one against raising suspicion among the public that a State employee is engaging in conduct violating the public trust, 29 Del. C. § 5806(a), are basically an "appearance of impropriety" test. *Commission Op. Nos.98-11; 98-23; 98-31*. That is not to say that, in fact, his judgment would be impaired, or that he would give or receive preferential treatment, etc. However, 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); *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). Courts have held that there is at least a potential for a conflict of interest when a government employee is a subordinate to another government employee, and in his other government position would have the opportunity to make decisions regarding his superior's salary. *See*, cases cited herein. Because of at least the potential for a conflict of interest, the remedy mandated under the Code of Conduct is that: No State employee may participate on behalf of the State in the review or disposition of any matter pending before the State in which he has a personal or private interest which tends to impair his independent judgment. 29 Del. C. § 5805(a)(1). *See, Beebe Medical Center v. Certificate of Needs Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996) (interpreting 29 Del. C. § 5805(a)(1) as requiring State official to recuse himself, where a conflict was "assumed," although his participation consisted of neutral comments and he did not vote on the matter); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett V.C. (June 29, 1993) (interpreting 29 Del. C. § 5805(a)(1) as requiring

that State official should not have participated in a meeting, even though he was not the final decision maker and did not vote on the matter).

99-12 – Outside Employment—Employment with Temporary Agency Contracting with State: To operate a 24-hour program, a Division sometimes needed temporary help to fill on shifts during weekends and nights. There was a State-wide contract with a private enterprise to provide all types of temporary employees to any agency. The private enterprise also provided temporary employees to non-State entities. This Division, like any other State agency, could call the private enterprise for temporary help. The Division was not involved in selecting the State contractor. However, some of its staff had signed up with the private enterprise for other employment. Thus, it was possible that the Division could call the company and end up with one of its full-time employees coming in as a temporary employee under the contract.

The Code restricts other employment 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 its government. 29 Del. C. § 5806(b).

Here, the State employees did not make any official decisions about which private company would contract with the State to provide temporary services. Thus, their judgment in performing official duties could not be impaired. It also did not appear that they would be in a position to make an official decision outside official channels because the selection of the contractor was not even made by their agency. It also did not appear that they would be in a position to give preferential treatment to the company because they could not control when the Division would need temporary help, so they could not "throw work" to the temporary agency. Also, the Division Director said that if the private enterprise was called and more than one person was available to work, if one of those persons was one of his State employees, he could select someone else. Thus, the agency would not act to insure that as a result of their State position its employees would get the temporary assignments. Under those facts, the Commission found no violation.

99-06 – Outside Employment—State Employee Serving as Local Elected Official: A State employee held an elected position with a municipality. He asked if there was a conflict of interest for him to participate in his State agency's decisions regarding certain property when he also may be participating in decisions about this same property in his other employment as an elected official of a municipality. He further indicated that it was possible that several other properties that his State office was involved with might have issues that could come before the municipality, and asked for guidance. Based on the information submitted a majority of the Commission members at the meeting concluded that at the time there was no conflict of interest.

(A) General Guidance

First, as a general matter of guidance, the Commission must base its opinions on a "particular fact situation" pursuant to 29 Del. C. § 5807(a). Thus, it addressed only the facts available relative to one property. The State employee was advised to use the decision on those facts as an aid in his future conduct, and as specific issues arose in his State capacity, he was advised to review the pertinent Code sections. The Commission also enclosed synopses of its opinions from previous years to use as a reference guide. In particular, it was suggested

that he may wish to review the Commission's prior decisions dealing with persons who sought elective office while employed by the State. *See*, *Commission Op. Nos. 92-02, 96-02, 96-22, 97-06*. If he encountered a particular issue which he could not resolve, he could return to the Commission for guidance based on the particular facts.

Second, in his elected position, he is subject to the City's Code of Conduct, which was approved by this Commission pursuant to 68 Del. Laws, c. 433 § 1. Thus, the Commission had no jurisdiction in that area. Accordingly, guidance of his conduct in his City position should be sought through the City's Ethics Commission and/or its attorney, as he had done in this instance.

(B) Applicable Law

State employees are restricted from having any interest which may be in substantial conflict with performing State duties and are restricted in their other employment if it may result in: (1) impaired independent 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). The Code, among other things, also prohibits State employees from:

(1) using public office to secure unwarranted privileges, private advancement or gain, 29 Del. C. § 5806(e);
(2) engaging 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);
(3) disclosing, beyond the scope of his public position, confidential information gained by reason of that public position or otherwise using such information for personal gain or benefit. 29 Del. C. § 5806 (g).

(C) Facts and Discussion

As it related to his elected position, the particular property was expected to be considered for re-zoning from commercial to residential by the municipality. The issues of re-zoning and subdivision of the property would go to the City's Planning and Zoning Board. It would make a recommendation to City Council. Thus, as a Council member, he might be involved in future debates and decision making concerning re-zoning/subdivision. According to the City Solicitor's letter, the outcome may be influenced by certain aspects of the property, and the State employee would have "special insight" into those particular aspects that "may not be a matter of public record," but "may be highly relevant in terms of the outcome of discussions." However, at the time, no particular issue was pending before the City. In his State job, his staff conducted studies of the property, but the studies were not related to re-zoning/subdivision. The study was conducted before he was elected to his municipal position. Thus, when the decision on the study was made, he did not hold the other employment so no facts indicated even a potential conflict at that time.

The property was being sold and the new owner would become responsible for regulatory requirements resulting from the State study. If the sale did not go through, the old owners would be responsible. In his State job, he would be involved in developing and approving a proposed plan regarding compliance with the State agency's requirements, which his office would issue to the public after its plan was prepared. He would have a significant role in developing/approving the plan. After that plan was issued, his State agency must accept

public comments and then issue a final plan. Again, he would have a significant role. He was not the final decision-maker. However, the Commission has held that the Code does not limit its parameters to only those who make final decisions. *Commission Op. Nos. 96-78 and 98-12*. For example, it restricts officials from reviewing or disposing of matters if there is an interest which tends to impair independent judgment. 29 Del. C. § 5805(a). This was pointed out as a matter of clarification to aid him in making any future decisions relative to any conflict. No facts indicated that any decisions made in his State capacity regarding the particular property were impaired by his other employment. His supervisor was monitoring the decisions on the property and other properties which may be subjected to review and/or action by him and his office, which may also arise before the City. The Commission said that while it cannot dictate personnel management procedures within his office, that may serve to reduce "any adverse effect on the public's confidence in the integrity of its government," under 29 Del. C. § 5806(b)(4).

The State employee indicated that the public would have 20 days to appeal the State agency's decision regarding the plan for the particular site. It was possible that he would testify before an appeals board. However, it was not probable because in the nine (9) years in his State job, he had never been called to testify. After the final plan, the property owner was to take action based on the plan and the State employee's technical staff would oversee compliance. No civil action or criminal action was pending regarding the problems with the property which were regulated by his agency. However, the law permits both possibilities. If either should occur, his office would be looked to as a source of information on the actions. While most of the activity would be a matter of public record, he said sometimes proceedings relative to the regulatory matters may not be matters of public record. Thus, in his State capacity, as indicated in a letter from the City's attorney, he might obtain information that was not a public record which may be relevant to his decisions as a Council member. However, from his statements at the Commission's meeting he was clearly aware of his obligation not to improperly disclose or use confidential information as provided by 29 Del. C. § 5806(e) and (f). Aside from that issue, the possibility of his testifying or being involved in his State capacity in a civil or criminal action related to the issues, was merely speculative. Thus, there were no "particular facts" on which to base a concrete decision as required. 29 Del. C. § 5807(a). Also, there were building and housing code violations being brought against the present owner, which would come before the City Council. He, as any other Council member, would receive status reports on the prosecution of the violations. However, such violations were entirely unrelated to the issues being handled by his State agency. His State office was not in any manner involved and did not even have authority over buildings. Thus, it did not appear that as to those matters he would be in a position in his State capacity to review or dispose of the issues; to obtain any confidential information, etc. Accordingly, no facts indicated a conflict relative to those matters.

As to the issues of re-zoning/subdivision, as noted, no particular facts were available on what the issues may be and we could not give any concrete guidance on speculative matters. He was again advised that as issues began to frame themselves he should be cognizant of his involvement on the State level with this property and of the Code provisions to aid him in deciding, for example, if he should recuse himself from participating as a result of the State Code restrictions.

98-43 – Outside Employment—Maintaining a Private Professional Practice: A State agency sought to hire an individual who also had a small private professional practice. The agency wanted him to maintain the professional practice because it believed that having an active member of the profession would be an asset to the agency.

The agency had discussed the outside employment with him and it was understood that his private practice work would be accomplished at hours other than those during which he was to be working for the State. This was consistent with the Commission's prior rulings that State employees must not have any interest in a private enterprise that is in substantial conflict with performing State duties, which is prohibited by 29 Del. C. § 5806(b).

Additionally, if a matter arose with the State agency regarding his private clients, he would not review or dispose of the matter, but would recuse himself, consistent with 29 Del. C. § 5805 (a), which restricts officials from reviewing or disposing of matters where they have a personal or private interest, including a financial interest, which may tend to impair independent judgment. The outside employment provision also restricts officials from outside employment which may result in impaired independent judgment. 29 Del. C. § 5806(b).

Also, he would not represent or assist his private enterprise on matters pending before his State agency, which is prohibited by 29 Del. C. § 5805(b). This provision is meant to insure that an official does not use any undue influence on his co-workers to obtain preferential treatment for the private enterprise. Similarly, the outside employment provision restricts officials from outside employment which may result in preferential treatment. 29 Del. C. § 5806(b). With those restrictions, the Commission found no violation, but advised the agency that if the individual was hired and additional situations arose, that the agency or the individual could return to the Commission for further guidance.

98-18 – Outside Employment—Workshops for Physically Impaired: The Commission concluded that a State employee may contract to give workshops for a private enterprise on its equipment, which was used by persons with a physical impairment, during her off duty hours.

The Code restricts outside employment if it may result in: (1) impaired independence of judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

In her State job, the employee provided information on technological devices to those with physical impairments through workshops, training, phone, mail, or fax, etc. As part of the activity, she included information on the system which would be taught in the workshops for the private enterprise. The company was the only one in Delaware to have that particular type of equipment. She also provided information on other devices, which the company and its competitors provided. Specifically, she provided listings to those with the physical impairment of all equipment providers.

The company wanted her to provide workshops on its behalf only on the equipment it had which was unique to that company in Delaware. The contract would be for six workshops over a six month period. She would conduct the workshops during off duty hours. The private enterprise did not charge persons who attended the workshop.

It was not expected that persons attending the workshops would be interested in other technological devices where the particular company had competitors. However, if inquiries were made about other technology at the workshop, the employee would provide a list of all providers to avoid even the appearance of any preferential treatment to the company sponsoring the workshops on its unique equipment.

Additionally, someone from the State agency, other than the employee, would notify persons on its client list of the workshops. However, that was not preferential treatment for the particular company because the agency provided the service to any service provider when they conducted similar activities. The action avoided having private providers obtain the agency's client list, while also insuring that clients were aware of technological aids and/or training on such devices. Under those particular facts, no violation of the restrictions on accepting outside employment was found.

98-14 – Outside Employment—Representing Private Client Against the State: After accepting full-time employment with the State, an attorney asked if he could continue as legal counsel for a private client in a lawsuit against a former employee of a State agency. The attorney had represented the State agency when he was a Deputy Attorney General. He had left the Attorney General's office; gone into private practice; and then returned to another State position. The Commission, based on the following facts and law, concluded that such concurrent employment would violate the Code of Conduct.

I. FACTS

While in private practice, the employee accepted a case representing a client who was suing a former State employee. It was alleged that while employed by State, the former State employee had violated the client's civil rights. The Attorney General's office was representing the former employee. If his client prevailed, the State might have to indemnify the former State employee. The current State employee had not been compensated by the private enterprise which asked him to take the case since late in 1997; was not currently being paid for work on the case; and had no compensation agreement for continued participation in the suit. If attorney's fees were awarded to the client, the private enterprise would be the recipient.

In his State duties, the current employee was a hearing officer for a State agency. He had the power to hear and determine cases; provide legal advice to and write opinions for the State agency; and he supervised other hearing officers. As a hearing officer, Deputy Attorneys General could appear before him representing State agencies, including the State agency he had previously represented and whose former employee was being sued.

The attorney discussed his representation of the private client with his agency, which concluded that his activities would not violate the agency's restrictions on concurrent employment as long as he did not use State property in connection with the case and received no State compensation while working on the case. He also obtained a decision from the Delaware State Bar Association that his activities would not violate the *Rules of Professional Responsibility*, specifically *Rules 1.7 and 1.11*, as long as he was not using confidential information gained while he served as a Deputy Attorney General to the agency where the former employee worked. Further, he advised his agency, his private client, the organization which hired him, and the Court of the possibility of a conflict.

II. APPLICABLE LAW

A. Jurisdiction

First, the Commission noted that it had no authority to interpret the employee's agency's restrictions on concurrent employment, including the practice of law. Nor did it have authority to interpret the *Delaware Rules of Professional Responsibility,* governing the acts of Delaware

lawyers. However, *Rule 1.11, "Successive Government and Private Employment,"* provides that a lawyer representing a government agency is subject not only to the Rules of Professional Responsibility, but also subject to statutes and government regulations regarding conflicts of interest. *See, Rule 1.11(d)(2) and "Comment" (*lawyers representing government agency are subject to the Rules of Professional Conduct and to statutes and government regulations regarding conflicts).

Thus, while generally it is within the Delaware Supreme Court's exclusive power to supervise the conduct of attorneys, in this particular fact situation, the Commission's authority extended to interpreting the Code of Conduct as it applied to State employees who also were attorneys.

Courts have upheld the authority of State Ethics Commissions to impose standards of conduct, apart from the Rules of Professional Responsibility, on State employees who are attorneys. *See, Maunus v. State Ethics Commission,* Pa. Supr.,544 A.2d 1324, 1326 (1988) (Ethics Commission could apply State Ethics law to attorneys employed by the State without "running afoul" of Court's authority, because employers, including the State, may properly adopt professional and ethical standards for employees including attorneys); *Howard v. State Com'n on Ethics,* Fla. App., 421 So. 2d 37 (1982)(application of State Ethics law restricting concurrent employment by attorney did not interfere with Florida Supreme Court's authority to regulate the practice of law).

Having concluded that the Commission had jurisdiction over this particular fact situation, it looked to the Code of Conduct provisions relative to the substance of the issue proposed--that is, did the Code restrict him from engaging in the outside employment described above?

B. Code of Conduct

The Code of Conduct provides:

"No state employee, state officer or honorary state official shall have any interest in a 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 state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which acceptance may result in any of the following:

(1) impaired independence of judgment in the exercise of official duties;
(2) an undertaking to give preferential treatment to any persons;
(3) the making of a government decision outside official channels; or
(4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

The Code also admonishes 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).

III. APPLICATION OF LAW TO FACTS

As noted above, the employee's State duties included acting in a quasi-judicial capacity for the State, as he had authority to hear and make final decisions on certain agency cases. In other situations, he served as the agency's legal counsel. In cases where a State employee sought an agency decision, he had decision-making authority and legal counsel responsibility in matters involving the State in which the Attorney General's Office would represent the State. Moreover, he supervised the other hearing officers, who heard such matters.

Conversely, in his representation of the private client, he would go "head-to-head" against a fellow law officer of the State in a case against a former State employee who had worked for an agency which he previously represented for the State. He would be litigating against his full-time employer (the State) which may have to indemnify its former employee.

We have held that 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." *Commission Op. No. 92-11.* We said that provision did not require actual misconduct; only a showing that the conduct could "raise suspicion" that it reflected unfavorably upon the State and its government. *Id.* Similarly, Section 5806(b) does not require actual misconduct. It only requires conduct that "may result in" impaired judgment; preferential treatment; official decisions outside official channels; or any adverse effect on the public's confidence in its government. *See, 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 noted that the Standards of Conduct prohibited activities that may be considered impermissible because it <u>appears</u> to the public to be a violation) (emphasis added). Thus, the Commission considered the appearance created by his private employment.

In speaking with the Commission, he said that if he viewed this situation from the public's perspective he would find the representation of a private client under these circumstances "highly suspicious." We agree.

If he acted in his quasi-judicial capacity and decided cases where the State Attorney General's law officers appeared before him on behalf of the State and/or the Department he had previously represented, it may, as a minimum, appear to the public that his judgment would be impaired since in his private representation, he would be opposing the Attorney General's law officers and the Department's former employee. Even if he recused himself from the State activities, he would still be representing the private client in litigation against a fellow law officer of the State and would be opposing the position taken by his full-time employer, the State. If his private client did prevail, the public may suspect that he had gained unfair advantage as a result of his prior representation of the Department. If his private client did not prevail, the public may suspect that he had not properly performed his duties to his client because of his affiliation with the State. Thus, regardless of the trial's outcome, it may result in an adverse effect on the public's confidence in its government.

IV. CONSIDERATION OF WAIVER

The Commission may grant a waiver if: (1) the literal application of the statute is not necessary to achieve the public purpose; or (2) there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a). We discussed above the need to achieve the public purpose, therefore no waiver will be granted on that basis. Additionally, no facts were submitted which substantiated the need for a waiver based on a hardship to the State employee

or State agency.

V. CONCLUSION

For the foregoing reasons, the Commission concluded that the representation of a private client by a law officer of the State, in a suit against a former State employee represented by another law officer of the State, where the State may be required to indemnify the former employee, under these circumstances would violate the Code of Conduct.

98-03 – Outside Employment—Inspecting Federal Agencies: The Commission concluded that a State employee's outside employment, which consisted of inspecting certain equipment for federal agencies, outside the State of Delaware, did not violate the restrictions on holding outside employment.

Specifically, the Code restricts outside 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 its government. 29 Del. C. § 5806(b).

Here, the federal equipment was statutorily exempted from State inspections. Thus, in the employee's State capacity he had no decision making authority regarding the federal equipment. Further, his inspections of federal agencies could not result in any enforcement action by him, as the federal government may accept his inspections, but did not have to act on his recommendations. Also, the inspections would be performed outside the State of Delaware and completed during hours when he was not working for the State.

The agency had a conflicts of interest provision which applied specifically to his State agency. The Commission is limited to interpreting only Title 29, Chapter 58. *See, Commission Op. No. 98-25.* It therefore has no jurisdiction to interpret other conflicts of interest provisions.

97-31 – Outside Employment—Employment with Company Contracting with State: A State employee held a professional degree and used that education in both her State position and with a private enterprise. The private enterprise contracted with her State agency.

The Code of Conduct prohibits State employees from representing or assisting a private enterprise on matters pending before the agency which employs them. 29 Del. C. § 5805(b)(1). Here, the individual was not in any manner involved with the contracts which the private enterprise had with the State. Thus, she provided no input to the private enterprise, nor did she in any other manner represent or assist the private enterprise before her agency.

The Code also provides that outside employment may not result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b). Here, in performing her official duties, she did not decide if the agency would contract with the private entity, or if the existing contracts should be renewed. Moreover, in her State position, she did not engage in such matters as evaluating her own performance on behalf of the private employer. Additionally, if the private enterprise needed assistance from her State agency, it would pursue such assistance through

the proper channels, rather than having her make recommendations to the agency on its behalf as it may appear that it was receiving preferential treatment.

97-06 – Outside Employment—Merit Employee Running for Elected Office: A State agency asked if a Merit employee, in a federally funded position, could serve in an elected office without a conflict with the federal grant or any State law. The State employee was contemplating running for a local government position.

As noted in previous opinions, no specific provision in the Code of Conduct prohibits running for elective office. *See, Commission Op. Nos. 92-02, 96-02, and 96-22.* However, while running for elective office, individuals should be aware of the provisions which restrict State employees, officers and officials from engaging in conduct that would appear improper and from engaging in activities in substantial conflict with official duties. *Id.; See,* 29 Del. C. § 5806(a) and (b). The Commission has interpreted those provisions as precluding the individual from engaging in political activities or soliciting political contributions, assessments or subscriptions during State work hours or while engaged in State business. *See, Commission Op. Nos. 96-02 and 96-22.*

Regarding any other State statutes that applied, the Commission has no authority to interpret such provisions. However, the Commission referred the agency and the Merit employee to 29 Del. C. § 5954. *See also, Att'y Gen. Op. No. 78-016* (discussing application of Merit Rules if running for elected office*).* Also, the Delaware Code may have other provisions that may apply to the individual which the Commission had no jurisdiction to interpret. For example, in other cases the Commission referred individuals to the Police Officer's Bill of Rights, etc., and advised the individual to check the Delaware Code to see if other provisions may affect their decision to run for office. (Note: See, 29 Del. C. § 5822 (provides that those employed by the government and who also serve in an elected position shall have their pay reduced on a prorated basis for hours or days missed during the normal workday while serving in an elected position which requires the employee to miss time which is normally required of other employees in the same or similar positions).

Regarding the fact that the individual may move to a federally funded State position, the Commission was aware of a Federal provision referred to as "The Hatch Act," governing political activities for federal employees. *See*, *"Hatch Act," c. 410, 53 Stat. 1147* (1939) (codified in scattered sections of 5 and 18 U.S.C.). Whether that provision applied to State employees who were paid by federal funds would not be a matter within the Commission's jurisdiction. *See, Att'y Gen. Op. No. 78- 016* (discussing application of Hatch Act to certain State employees). Here, the agency had discussed the Federal statute with the Federal agency which would fund the position.

As noted in other Commission decisions, specific facts must be presented before the Commission can decide if holding elected office while a State employee creates a conflict. 29 Del. C. § 5807(c). Here, the individual had not yet been elected. As there were no specific facts on which to rule, the Commission advised the agency and the individual to be alert to the Code of Conduct provisions referred to above and to provisions restricting outside employment. *See,* 29 Del. C. § 5806(b).

As the individual was running for an elected office in a local government which had not adopted its own Code of Conduct, he also was alerted to the fact that the State Code of

Conduct applied to him not only in his State position, but also would apply to him if elected as a local government official. *See,* 68 Del. Laws c. 433 § 1 (State Code of Conduct applies to local government employees and officials unless it adopts a code at least as stringent as the State Code).

If he were not elected, he would have no further concerns about an actual conflict between the elected position and the State position.

97-03(a) – Outside Employment—Employment with Company Regulated by State Agency: A State employee held a part-time job with a private corporation which was subject to regulation by the State agency for which he worked. As a State employee, his duties entailed investigating whether private corporations were complying with the State regulations which his agency administered.

In his State position, he had never investigated the business, nor had he ever had occasion to make any official decision regarding the company. Thus, it did not appear that he had reviewed or disposed of matters pending before the State in which he had a personal or private interest. *See,* 29 Del. C. § 5805(a)(1).

The Code also prohibits State employees from representing or otherwise assisting private enterprises on matters pending before the State agency which employs them. 29 Del. C. § 5805(b)(1). While working for the private company, the State employee did not: (1) assist it in such matters as insuring that its records complied with the laws and regulations enforced by his agency; (2) interpret the laws and regulations in his non-State capacity; (3) work with the company on any matters regarding compliance with the State laws and regulations, etc. Thus, the Commission found no violation of that provision.

State employees also are restricted from accepting outside employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in State government. 29 Del. C. § 5806(b). As he did not have occasion to make decisions for the State regarding the company; did not decide if it was complying with applicable State laws or regulations; did not assist it in responding to matters pending before the State; did not work in the company's department which dealt with the records which his State agency would review, etc., the Commission found no violation of the Code.

97-03(b) – Outside Employment—Installing Computer Software: A State employee installed an accounts payable/receivable computer software program for a friend's business. It was a one-time job which took approximately three hours and he had no other occasion to be involved with the company's computer system. The friend's business was required by law to register with the State division where the employee worked. As a State employee, he had no decision making authority over the friend's company. Thus, he did not review and dispose of matters in which he may have had a personal or private interest which would have tended to impair his judgment. 29 Del. C. § 5805(a)(1). He also did not represent or assist the friend's private business on matters before his Division, which may be prohibited by the Code. *See,* 29 Del. C. § 5805(b)(1).

The computer software he installed was not in any way related to laws and regulations enforced by his agency. Rather, it was a commercially available product which functioned as a

bookkeeper. The program was not set up to track payments monitored by his agency.

Based on these facts, the Commission found no violation of the provision which restricts outside employment if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in State government. 29 Del. C. § 5806(b).

96-66 – Outside Employment—Consulting with Facility Regulated by Employee's Agency: A State employee who inspected private facilities for compliance with Federal and State regulations had duties which included going to the facilities, interviewing clients and residents, making observations, etc., and writing a report on whether the facility complied with regulations. When a facility had not complied with the regulations, it had to write a plan of correction, and submit the plan to his office for approval.

The employee was contemplating becoming a consultant during off duty hours and anticipated two consulting possibilities. First, he asked if he could be a consultant to the same type of facilities in another state. He wanted to provide quality assurance to improve facility compliance with the State and Federal regulations. He said the Delaware facility owners, which his office licensed and certified, might also own the same kind of facility in other states and that he would seek clients from those Delaware owners. Second, he asked if he could consult with the regulated facilities in Delaware if he transferred to another division in his own agency or to another State agency. He would call the Delaware providers to see if they wanted to hire him. For out-of-state clients, which Delaware providers did not own, he would go door-to-door. He intended to tell prospective clients that he regulated such facilities in Delaware.

The Code prohibits outside employment under circumstances where it may result in any of the following:

(1) impairment of independence of judgment in exercising official duties;
(2) undertaking to give 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).

State employees, officers and officials also must not engage in conduct that would raise suspicion among the public that they are violating the public trust and that would not reflect favorably upon the State. 29 Del. C. § 5806(a). State employees also may not use public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).

(A) Consulting Work Outside the State

The Commission concluded it might appear to the public that he would give preferential treatment to companies with facilities regulated in Delaware if he consulted for those same companies in other States. Thus, the public's confidence in the integrity of its government could be adversely affected, which would violate 29 Del. C. § 5806(b)(4). Additionally, there could be an appearance of impropriety, even if the Delaware companies he regulated did not own the out-of-state facilities. When the employee inspected for compliance with federal regulations, federal monitors followed-up on his inspections. If he advised an out-of-state client how to comply with the same federal regulations he enforced in Delaware, and the federal agency that monitored his Delaware work challenged his advice, he could find himself in an adversarial role

with the federal agency he must work with as part of his State position.

The Commission previously recognized that if an individual worked as a private consultant to companies outside of Delaware on the same matters his agency was responsible for in Delaware, his advice as a consultant could be later challenged, and his State position would certainly be brought out. *Commission Op. 91-19.* The Commission believed the adversarial position would reflect unfavorably on the employee's position of holding the public trust, and therefore would violate the Code. Similarly, if this employee advised clients outside of Delaware on federal regulations he enforced in Delaware, and had his advice challenged, his State position would certainly be brought out in an adversarial proceeding. The Commission must issue advisory opinions with a view toward consistency. 29 Del. C. § 5809(5). To insure consistency in its opinions, the Commission found that the activities he wished to engage in with out-of-state clients would violate 29 Del. C. §5806(a).

In soliciting out-of-state clients, he planned to inform prospective clients of his position as a specialist with Delaware and tell them he inspected the same type of facility in Delaware. Even if the out- of-state facilities were not owned or operated by a Delaware company regulated by his agency, he could persuade out-of-State clients to hire him because such facilities in all States have to comply with the federal regulations he enforced as part of his State job. Prospective clients would believe he had an inside track on applicable federal regulations. Also, if clients followed his advice, and later had a compliance problem, they might argue that because he inspected Delaware facilities for compliance with the same federal regulations, his advice carries an inspector's seal of approval.

The Code prohibits State employees from using public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5805(e). It also prohibits conduct that would raise suspicion among the public that an employee is engaging in acts violating the public trust. 29 Del. C. § 5806(a). At a minimum, because he would be soliciting clients and telling them of his State position, it might appear to the public that he was using his State position to secure private clients for his own financial gain.

(B) Consulting with Delaware facilities

(1) While working in another position in the same agency

The employee had applied for another position in the same division where he presently worked. That would mean that he would still be an inspector in the same field, but would be inspecting different facilities. Assuming he was selected for the position, the outside employment provision would still apply. *See*, 29 Del. C. § 5806(b)(4). If clients hired him to consult on issues regulated by his same division, it might appear that his clients would receive preferential treatment from the persons within that division.

The Commission previously ruled that accepting outside employment with businesses regulated by their agency would be improper for State employees. *Commission Op. No. 96-41* (where State employees enforced regulations against a specific industry, accepting outside employment with those same companies would be improper because, at a minimum, it could adversely affect the public's confidence in government because the public might assume that the employees would give preferential treatment to the outside employer when enforcing the regulations. Also, the public may believe that the employees' judgment would be impaired because of the conflict between performing duties for the outside employer and the need to enforce State laws against that same employer).

Beyond the outside employment restrictions, the Code prohibits State employees from representing or otherwise assisting private enterprises with respect to any matter before the State agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). Thus, if selected for the job, if he consulted with private facilities regulated by the same agency that employed him, he would be at least "assisting" them with respect to matters before his agency because he would be advising them on how to comply with the regulations enforced by his agency. Thus, the Commission concluded that serving as a consultant to a private enterprise regulated by his agency under such circumstances would violate 29 Del. C. § 5805(b)(1).

(2) If employee transferred to another agency

He also asked if he went to another State agency, whether consulting with the facilities in Delaware would be permissible. The Commission must issue advisory opinions based on "particular facts." 29 Del.C. § 5807(c). Without the particulars of what the job would entail, what regulatory authority would be exercised in the position, etc., the Commission did not have the particular facts to render a decision.

96-48 – Outside Employment—Contracting with a State Agency: A State employee started his own computer company as an outside business. He asked if he could bid on a State contract that was to be publicly noticed and bid. The contract was not with his own agency, nor did he have any dealings with the agency in his official capacity. He asked if his outside employment violated the Code of Conduct.

The Code prohibits State employees or any private enterprise in which they hold a legal or equitable ownership of more than 10% (more than 1% if the corporate stock is regularly traded on the securities market) from bidding on State contracts of more than $2,000 if there is no public notice and bidding. 29 Del. C. § 5805(c). As there was notice and public bidding for the contract, the amount of the contract and the amount of the ownership interests were immaterial, and as a State employee, he could bid on the contract.

The Code also prohibits State employees from representing private enterprises before the agency by which they are employed. 29 Del. C. § 5805(b)(1). As he would not be representing the private enterprise before his own agency, there was no violation of this section.

Regarding whether his outside employment created a conflict, the statute provides:

> No State employee 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 State employee shall accept other employment . . . under circumstances in which such acceptance may result in any of the following:
>
> (1) impairment of judgment in exercising official duties;
> (2) an undertaking to give preferential treatment to any person;
> (3) the making of a government decision outside official channels; or
> (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The Commission had previously held that to insure there was no substantial conflict with performing official duties, the individual should not perform any functions related to the outside

employment during the hours when the individual is supposed to be performing State duties. *See, e.g., Commission Op. Nos. 95- 13, 95-30, 95-39.* Here, the State employee would perform the contract obligations in the evenings and on weekends, when he was not working.

The facts did not appear to create a situation which would tend to impair judgment, or result in preferential treatment or decisions outside official channels because the agency with which the employee sought to contract was not the same agency where he was employed, and the official decisions made for the agency where he worked did not impact on the contracting agency or vice versa. The law permits State employees to contract with State agencies if there is notice and public bidding, and he was not representing the private enterprise before the agency which employed him. Therefore, it did not appear that such actions would have any adverse effect on the public's confidence in its government.

However, the Commission based its opinion on a particular fact situation. 29 Del. C. § 5807(c). If he was selected as the contractor and learned additional facts which raised issues under the above provisions, or any other Code of Conduct provision, he was to re-evaluate his situation and return to the Commission for additional advice if necessary.

96-41 – Outside Employment—Companies Regulated by Employee's Agency: Employees of a State agency were offered temporary jobs by a company regulated by their agency. Their State position required them to enforce regulations against the company, when necessary. While performing the temporary job, they could observe whether the company was violating the regulations.

The Code prohibits outside employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment of any person; (3) official decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government of the State. 29 Del. C. § 5806(b).

Because they would be paid by a company for which they enforced State regulations and their off-duty work for the company could result in observations that State regulations were being violated, the Commission concluded that accepting the outside employment could adversely affect the public's confidence in the integrity of government because the public might assume the employees would give preferential treatment to the outside employer or assume that the employees' judgment could be impaired because of the conflict between performing duties for an employer against whom they must enforce State regulations.

96-22 – Outside Employment—Appointee to State Board Running for Elected Office: An individual who was an appointee to a State Board wanted to run for either a city or county elected position. He had not decided which one.

The Commission referred the individual to its earlier rulings which held the Code of Conduct does not specifically prohibit running for elective office. *(Commission Op. Nos. 92-02 and 96-02).* However, in those opinions, the Commission noted that the Code of Conduct does preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties. 29 Del. C. § 5806(a) and (b). Viewing those provisions in the context of running for elective office, the Commission held that individuals seeking political office should not engage in political activities or solicit any political contribution, assessment or subscriptions during hours of State employment or while engaged in State business. *See, Commission Op.*

No. 96-02. The Commission noted that apart from the Code of Conduct, other statutes prohibit certain persons from being a candidate or holding elective office. For example, Public Integrity Commission members cannot be elected or appointed to U.S. or State office or be a candidate for those offices, 29 Del. C. § 5808(b); the State Election Commissioner may not hold or be a candidate for office, 15 Del. C. § 301, etc. The Commission pointed to those provisions to alert the individual to check beyond the Code of Conduct for other statutes that might affect his decision to run for office.

The Commission held that it could not rule on whether any conflict would be raised if the individual were actually elected because it can render decisions based only on particular facts. 29 Del. C. § 5807(c). Here, the individual had not even decided which elected office he intended to seek. Assuming he was elected, it would still need a particular fact situation to decide if the concurrent employment would violate the prohibition against holding other employment where it may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making a governmental decision 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). Without specific facts, the Commission would not speculate on whether holding the concurrent positions would violate the Code.

If the individual was elected, as an elected official he would be subject to the State Code of Conduct, unless the particular local government had adopted its own code of Conduct. *See,* 68 Del. Laws, c. 433 § 1. Only four local governments had adopted their own codes of conduct--Lewes, Newark, Wilmington and New Castle County. Also, as a State official, he would remain subject to the State Code of Conduct as a result of that position.

The Commission advised the individual that if elected and a specific situation arose, he should feel free to seek a decision from the Commission based on that specific situation. (Merit Employees, *See,* 29 Del. C. § 5954 & *AG Op. No. 78-016).*

96-20 – Outside Employment—Second Job for Public School Teacher: A State employee asked if it was a conflict of interest for him to hold outside employment teaching a private course similar to a course he taught in the public schools for students. He and his spouse owned a company that offered the course.

The Code of Conduct prohibits State employees from having any interest in a private enterprise or incurring any obligation of any nature in substantial conflict with the proper performance of official duties. It also prohibits outside employment if it may result in: (1) impaired independence of judgment in exercising official duties; (2) an undertaking to give preferential treatment to any person; (3) a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The employee did not conduct business related to his private enterprise during hours when he was working for the State. He also did not use supplies, vehicles, books, etc., from his State employment to teach the outside course. If he used State facilities to teach the course, his private enterprise would pay a rental fee set by the State. The course was advertised by either notice in newspapers or to insurance companies to their clients, and did not specifically target students at the school where he taught. Students or their parents from the public school might respond to the ads, but not many had done so. When teaching the outside course, he did

not mention the specific school where he taught, but did say he was teaching a similar subject in public schools. Under those facts, the Commission found no violation of the outside employment provision.

96-17 – Outside Employment—Employment with Agency Contractor: A company which contracted with a State agency was unable to fulfill the contract in three areas because it did not have the necessary expertise. The agency asked another agency if the contractor could hire some of its employees to provide the expertise. They would provide the services to the contractor during their off-duty hours. I f the contractor could not hire the State employees, the contract restrictions would result in a funding reversion if the deadline was not met. The State employees who would fulfill the contract were well qualified to provide the services and would perform the functions during non-regular business hours so that it would not interfere with their full-time employment. One was a Merit employee and the other was a non-Merit employee. The agency asked if the contractor could hire the employees, and if so, whether they should be paid or receive compensatory time.

The Code restricts employees from accepting other employment if it would result in: (1) impaired judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) appear improper. 29 Del. C. § 5806(b).

The Commission found no violation of the Code under those facts. Even assuming a violation, the Commission may grant waivers if there was an undue hardship for the State agency. 29 Del. C. § 5807(a). Here, the need of the agency to fulfill the contract obligation, with consideration of both the expertise required for the program and the need to meet the contract deadline, would constitute a hardship for the agency. Regarding whether the employees should be paid or receive compensatory time, the Commission did not find that decision to be within its jurisdiction. Rather, the agencies should determine how compensation would be made based on the contract provisions and any other relevant law or rule. For example, as to the Merit employee, the agency could review such things as the *Merit Rules* regarding dual employment with another State agency *(Rule 5.0500)* and the *Merit Rule* on partial compensation received from another agency *(Rule 5.0500). See, Merit Rules* (Revised August 12, 1994).

96-09 – Outside Employment—Security Concerns: An agency asked if it would violate the Code of Conduct for one of its employees to accept part-time employment which would result in the employee having access to the agency's offices after duty hours. The agency was concerned that a security problem could occur, although no such incident had occurred. Further, the agency said its concern was not specifically about this individual. Rather, it resulted from a risk analysis determination that there could be a problem in granting agency employees access to areas where confidential information was retained as it could set precedent and create a problem.

The Code prohibits concurrent employment if it would result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (3) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The Commission issues advisory opinions on a particular fact situation. 29 Del. C. § 5807(c). As the agency concerns were not related to this individual and no security incident had

occurred, the Commission held that the matter was not ripe for decision. Further, the agency was charged by the federal government with risk analysis for security problems based on federal statutes and/or regulations. The Commission's jurisdiction is limited to implementing and administering the Code of Conduct. *See*, 29 Del. C. § 5808(a). Thus, it had no jurisdiction over federal provisions relating to security matters.

96-02 – Outside Employment—Local Government Employee Running for Elected Office: An individual who worked for a city government was subject to the State Code of Conduct because the Code of Conduct applies to local governments that have not adopted their own Code. 68 Del. Laws, c. 433 §1. Besides holding his government position, he wished to run for office in a different city. The Commission referred the individual to its prior holding that no specific Code of Conduct provision prohibits running for elective office while employed by the government. *Commission Op. No. 92-02.*

This individual was a law enforcement officer, so he also was referred to the Police Officers' Bill of Rights regarding participating in political activities. *See*, 11 Del. C. § 9200(a). The restriction against police officers engaging in political activity while on duty or when acting in an official capacity or while in uniform was similar to the statute governing political activities by State Merit employees, which prevents them from engaging in political activity or soliciting political contributions, assessments or subscriptions during hours of employment or while engaged in State business. *See,* 29 Del. C. § 5954. Although the Commission has no jurisdiction over those laws, it noted that those restrictions were consistent with the Commission's interpretation of Code of Conduct provisions which preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties under the concurrent employment provision. *See,* 29 Del. C. § 5806(a) and (b).

As the individual had not been elected to office, the Commission found that the issue of whether being an elected official would create an actual conflict with his government employment was not ripe for decision. The Commission advised the individual that if elected, he should be aware of the restrictions on holding concurrent employment. *See,* 29 Del. C. § 5806(b). He was advised that if elected, he would be subject to the State Code of Conduct not only in his employed position, but also in his elected position. It said if a particular fact situation arose after being elected, he could return to the Commission for an opinion on a particular fact situation. (Merit Employees, *See*, 29 Del. C. § 5954 & *AG Op. No. 78-016*).

NOTE: The Delaware Supreme Court, in a 1998 advisory opinion interpreting the State Constitution, held that a State trooper must resign as a State trooper if elected to the General Assembly as he would be exercising both legislative powers (enacting State laws) and executive powers (enforcing State laws) and the combination would be "antithetical to Separation of powers between the three branches of government." *In Re: Request of the Governor for an Advisory Opinion,* Del. Supr., 722 A.2d 307 (1998).

95-39 – Outside Employment—Writing a Book: A State employee sought a decision on whether entering into a textbook contract, as one of several authors, violated the Code of Conduct. Compensation was not based on the number of books sold; rather, the individual would be compensated at a flat rate for the section of the book which the individual would author. The Code prohibits acceptance of other employment or any compensation or payment of expenses where such acceptance may result in: (1) impairment of independence of judgment

in official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 Del. C. § 5806(b).

The individual was selected by the publisher as one of the authors because of professional training received prior to State employment. A self-imposed restriction was that the employee would not conduct marketing activities for the publisher in Delaware. The Commission found that receipt of compensation would not impair the individual's judgment in official decisions or result in preferential treatment or decisions outside official channels because: the publisher had no contracts with the State; if the publisher contracted with the State for sale of the book, the individual would not be involved in the selection; the employee would not make presentations to any Delaware State agency regarding the textbook; and would not participate in developing guidelines for selecting textbooks. Participation also did not substantially conflict with the individual's official duties because the employee worked on the book on the employee's own time. The Commission found no violation under those facts and directed the individual to observe the self-imposed limitation of not marketing in Delaware.

95-30 – Outside Employment—Real Estate: A State employee worked for an agency that engaged in real estate transactions and was concurrently employed by a real estate firm. The employee's official duties required him to review loan applications from developers and determine if the developer's numbers supported the particular development under review for a loan. The employee did not approve the loans. The loans were for development purposes, not acquisition. The employee had no way of knowing in advance the properties a developer would select, as the developer selected a site, then submitted loan applications, which identified the site, to the agency. Any real estate company used by the developer in acquiring the property was selected by the developer before applying to the agency. The real estate firm where the employee worked had no dealings with the agency or any developer with whom the agency was working. The employee's only real estate transactions were listing residential properties at the request of personal friends. The employee had not solicited sales or sold any properties. Also, the employee did not conduct real estate business during State duty hours. The Commission found no violation under these specific facts, but directed the employee to be alert to changes in either the State duties or the real estate transactions and re-evaluate the situation and return to the Commission if a further opinion was needed.

95-28 – Outside Employment—Realtor: A State employee held outside employment as a realtor. The employee's agency had occasion to deal in real estate transactions. Correspondence and testimony revealed that the employee's official duties as a secretary were primarily typing documents dealing with federal grants and did not include any duties, even typing, related to real estate development. The section to which the employee was assigned did not make any realty decisions for the agency, and any dealings by the section dealt with broader trends in developments that were not immediately translatable to realtors. Also, the employee was not exposed to information considered confidential by the agency in any of its real estate transactions.

Concerning outside employment, the individual dealt in limited residential real estate transactions, not commercial transactions. The realty company had no dealings with the State agency. Also, the employee did not conduct real estate business during agency duty hours. The Commission found no conflict, but directed the individual to be aware of changes to the outside employment and/or agency duties. If the duties began to overlap, the employee was to

re-evaluate the situation and return to the Commission if a further opinion was needed.

95-13 – Outside Employment—Employee's Own Business: A State employee asked if forming a consulting firm with a non-State professional associate to supplement his income and prepare for retirement would violate the Code of Conduct, which prohibits accepting outside employment if it would result in: (1) impairment of independence of judgment; (2) preferential treatment; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 Del. C. § 5806(b). The firm would not pursue the Delaware market while the individual was a State employee; the individual would devote weekends and nights to this outside employment so that it did not interfere with State employment; and the employee's primary responsibilities with the consulting firm would be in the marketing area, not in the technical and professional area the employee held with the State agency.

To ensure the outside employment did not conflict with the employee's State duties, the Commission approved the employment with the above noted restrictions and with the additional restrictions that the employee adhere to the Code provisions, including any compliance required by the post-employment restrictions after leaving State employment; adhere to the Code of Ethics for the professional association to which he belonged as a result of his professional training; did not work as a private consultant for the agency or perform work with the consulting firm that would be approved by the agency while still employed; did not solicit firms employed by the agency to form partnerships or other work relations on agency contracts while employed by the agency. The employee in his outside employment, and/or the consulting firm, was precluded from working directly or indirectly with any firms dealing with the State or Delaware local governments, or with any firms dealing with the State of Delaware, while employed by the State.

93-01 – Outside Employment – Elected Official: An individual was elected to public office. He also held a part-time job as an auctioneer. He was hired as an auctioneer by the sheriff of the county where the sales occurred. He requested a decision on whether his concurrent employment violated the State Code of Conduct. The Commission was advised that the sales as an auctioneer were "completely divorced" from his public office. The Commission held that such outside employment did not create a conflict of interest.

92-11 – Outside Employment: An employee's State position was as a Senior Counselor. He wanted to take a part-time job with a company owned and operated by his brother to eliminate some of the inconvenient and late hours for his brother. The part-time position would place the employee in the position of giving counseling services as a State employee to some of the persons he would have as clients in his brother's business. Also, as a counselor, he would learn confidential information about the State client that could be useful to his brother's business if the confidential information were disclosed. He also would be in the position of identifying for the State client the companies that offered the type of services provided by his brother's firm.

The Commission found that the significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." 29 Del. C. § 5806(a). Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably.

While the Commission had no doubt that the employee was honorable and wished to accept part-time employment to help his brother, it concluded that the employee's daily responsibilities would likely be perceived as pursing a course of conduct subject to suspicion by the public and that his brother's competitors, whether justified or not, would perceive the employee as being in a favored position by virtue of his State employment to steer business to his brother. It also concluded that although a mechanism was in place to provide an alternate counselor, it could be perceived by the public that the employee might be influencing the disposition of the matter through his status as Senior Counselor. The Commission noted that the employee's attorney acknowledged that: "It is difficult to argue down the perception." Finally, the Commission concluded that no waiver could be granted as there was no evidence to show that, "the literal application of such prohibition . . . is not necessary to achieve the public purposes" of [the Act] or "would result in an undue hardship on any employee, officer, official or State agency." 29 Del. C. § 5807(a). If any hardship existed, it fell on the employee's brother, who was not a State employee, officer or official.

92-07 – Outside Employment: A State employee wished to engage in part-time employment as a consultant with a firm and anticipated it would have clients from Delaware, New Jersey, Maryland and Pennsylvania. The firm would offer services similar to services performed by the employee in his State position. The employee stated that he realized a potential conflict of interest would arise with Delaware clients. He stated that his activities would be restricted to clients from the other States. The Commission found that, even if the employee were not a party to the actual work, the concurrent employment with a firm that did business in Delaware, would give rise to a perception of a conflict of interest under 29 Del. C. § 5806(a), which prohibits conduct that would raise suspicion that the public trust was being violated. It also would violate 29 Del. C. § 5806(b)(4), which prohibits accepting other employment under circumstances in which such acceptance may result in any adverse effect on the confidence of the public in the integrity of the government.

92-03 – Outside Employment: A State employee asked whether his part-time business conflicted with his State duties. The emphasis of his part-time business was to provide certain testing, counseling, consultation and analyses to clients. The clients were not clients of his State agency; they were not State employees; and they were not pursuing litigation against the State in matters on which he tested, counseled, consulted or analyzed. His State duties did not include any involvement with the private sector in similar matters.

The Code prohibits employees from accepting employment where it might result in: (1) impairment of judgment in official duties; (2) preferential treatment to any persons; (3) decisions outside official channels; and (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

Based on the employee's representation, testimony from a representative from his agency, and his agreement not to perform his part-time job during regular State working hours, and with the condition that if a conflict arose in the future he would come back to the Commission, no violation was found.