

STATE PUBLIC INTEGRITY COMMISSION

Synopses of 1997 Opinions

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SYNOPSIS OF 1997 ETHICS OPINIONS

PERSONAL OR PRIVATE INTERESTS

Moving from the Private Sector to State Employment

An individual worked for a firm which contracted with the State. The firm, which she and another individual owned, previously bid on and was awarded a State contract. She subsequently sought a full-time position with the agency with which her firm had she had contracted. The agency asked if it would violate the Code of Conduct to hire her as a full-time State employee. If it hired her, the agency would exercise its right not to renew the contract.

State employees may not review or dispose of matters in which they have a personal or private interest which tends to impair independence of judgment. *29 Del. C. § 5805(a)*. As a State employee, she would not make decisions regarding any contracts which her former firm may have with the State in the future. Regarding the existing contract, it was for one year, subject to renewal and it would not be renewed, meaning that she would have no opportunity to make a decision on that contract.

As a State employee, she would not be involved in any decisions on whether the firm would receive future agency contracts. In fact, it was understood that her partner would not seek contracts with the agency. Therefore, she would have no occasion to review or dispose of such matters.

The Commission noted that it has no authority to decide the extent of the partnership arrangement; however, if her partner decided to seek a contract with the agency, it could come to the Commission for any guidance that may apply.

State employees, officers and honorary officials may not represent or assist a private enterprise on matters before the agency employs them. *29 Del. C. § 5805(b)*. She will not have any connection with the former firm except as a debtor. She will not perform any functions or have any authority to engage in or make decisions for the firm concerning the seeking of contracts with the State or participate in such things as voting on whether the company will pursue contracts with her agency and would not engage in such matters as helping the firm prepare responses to requests for proposals (RFPs) issued by the agency.

As she would not: (1) review or dispose of matters related to the firm; (2) have a relationship with the firm except as a debtor; and (3) would not represent or assist the firm on matters before the agency, the Commission found no conflict.

As she would be a new employee, the Commission cautioned her about Code prohibitions against improper disclosure or use of confidential information for personal gain or benefit. *29 Del. C. § 5806(f) and (g)*. If, for example, she had access to such information as competitor's bids on State contracts, to the extent

that information is protected, even if she is not the decision-maker on the contracts, she would be prohibited from improperly using or disclosing such information to her former firm. (*Commission Op. No. 97-21*).

Hiring an Agency Contractor for Personal Work

An elected State officer asked if it would violate the Code of Conduct to hire a firm which contracts with his State office to perform functions for a business in which he invested.

The Code prohibits State employees, officers, and honorary officials from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment. 29 *Del. C. § 5805(a)(1)*. It also prohibits them from engaging in conduct that would raise suspicion among the public that the individual is acting in violation of the public trust and which would not reflect favorably upon the integrity of the State government. 29 *Del. C. § 5806(a)*.

As head of the agency, he was required to review and decide which companies would contract to perform State work which was the same type of work he wanted the firm to do for his private business. Because of the nature of his State duties, realistically he could not accomplish a complete delegation of his duties because the staff would still come to him for final decisions, which is only appropriate because he, not his staff, was elected to make those decisions. Moreover, he clearly had a continuing oversight responsibility. Thus, delegating his responsibility would be merely form over substance.

Aside from the reality that he would be reviewing and disposing of the matters, even if he delegated the responsibility to a deputy, it might raise suspicion among the public that a deputy would still act at the official's direction. Thus, the public could suspect that the firm would receive preferential treatment when it seeks to renew its present contracts or seeks new contracts with the State office. This took on added significance because his employment of that firm would be an on-going, long-term arrangement, just as its dealings with the State will be on-going.

He could still hire firms for his personal needs which did not contract with the State, and the business was in another State so firms in that State could be considered by him. Thus, it did not appear that there was an undue hardship sufficient for the Commission to grant a waiver. (*Commission Op. No. 97-26*).

Close Relative Contracting with State Agency

A State officer asked the Commission if the Code of Conduct would be violated if his father were selected as a contractor by his agency.

The Code of Conduct prohibits State officers from reviewing or disposing of matters in which they have a personal or private interest which tends to impair their independence of judgment in performing duties

with respect to that matter. 29 Del. C. § 5805(a)(1). By operation of law, a person has an interest which tends to impair judgment with respect to any matter when: (a) any action or inaction on the matter would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or (b) the close relative has a financial interest in a private enterprise or interest which would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises. 29 Del. C. § 5805(a)(2)(a) and (b).

He did not review or dispose of the contract which was awarded to his father's firm, and normally did not review or dispose of such contracts. The contract was publicly noticed and bid, therefore, giving any class or group of persons the opportunity to bid. Further, all bidders which responded to the public notice were reviewed by a "short list" team. He did not select the team; did not review its decisions; or decide which firms were to be short listed. Once the bidders were short listed, another team was selected to decide the winning bidder. Just as with the short list team, he did not play any part in selecting the team, reviewing bids, or disposing of any decision regarding the final selection in terms of interviewing candidates engaged in contract negotiations, or make any decisions relating thereto. In short, he removed himself completely from the process. Additionally, both teams consisted of merit employees who were not supervised by him, nor were their performance evaluations signed by him. The final contract was signed by an individual who did report to him; however, that individual's signing of the final contract did not deviate from the selection team's recommendation.

When the contract was publicly noticed the advertisement said the contract was subject to renewal. If the contract is renewed, he will not participate in any aspect of the contract decision. (*Commission Op. No. 97-35*).

Promotion of Relative

An agency wanted to promote an individual but asked if the action complied with the Code of Conduct because the father of the individual being considered for promotion was in the same section and was a manager.

The Code of Conduct prohibits State employees from reviewing or disposing of matters if the individual has an interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1). As a matter of law, an individual has an interest that tends to impair independent judgment if action or inaction would result in a financial benefit or detriment to accrue to a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons. 29 Del. C. § 5805(a)(2)(a).

Here, the agency publicly announced the job; the father was not on the team which reviewed the applications from the ten candidates and recommended the son for promotion; team members were not persons whom the father supervises; and the team member who evaluated the specific technical skill required was a supervisor from a completely separate agency, who supervised persons with the technical skill. Thus, the father did not review or dispose of the promotion decision concerning his son.

Moreover, the father and son will work different shifts, and the son will report to an individual who does not report to the father, to insure that the father will not review or dispose of matters pertaining to supervising or evaluating his son.

Under these circumstances, the Commission found no violation of the prohibition against reviewing or disposing of matters where a close relative may benefit. Moreover, the Commission noted that the agency had worked to reduce any appearance of impropriety by publicly noticing the position; by having a representative from another agency evaluate the candidates' technical qualifications; and placing the two relatives on different shifts. (*Commission Op. No. 97-36*).

Contracting for Part-Time Job with Agency by Which Employed

A State employee asked if it would violate the Code if she privately contracted to provide administrative assistance to the section where she worked full-time as an administrative assistant.

State employees may not represent or assist a private enterprise on matters before the State agency which employs them. 29 *Del. C.* § 5805(b). The Commission has ruled that private contracts with the State constitute a "private enterprise." *Commission Op. No. 94-10 (See, 1991 - 1995 Synopses of Opinions, p. 25)*. Accordingly, it would not be appropriate for her to privately contract with the section which employed her. (*Commission Op. No. 97-19*).

Waiver Request to Contract with the Agency by Which Employed

A State employee asked if it violated the Code for him to privately contract with his agency to perform certain work. He said that if the Commission found a violation, he would like for a waiver to be granted.

A State employee may not represent or assist a private enterprise with respect to any matter before the State agency which employs him. 29 *Del. C.* § 5805(b). Because he was representing his own company as a private contractor on business transactions with the agency which employed him, such activity would violate the provision.

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

His primary contract work for the agency was not part of his official duties. While the work might not result in impaired judgment, preferential treatment, or government decisions outside official channels, the real concern was the adverse effect on the public's confidence in the integrity of the State government. Because

representing or assisting a private enterprise is specifically prohibited before the agency which employs the individual, it could appear that his company would receive preferential treatment if selected as the contractor.

Regarding the waiver request, waivers may be granted if the literal application of the statute does not serve the public purpose or there is an undue hardship on the employee or agency. 29 *Del. C.* § 5807(a). There was no indication of a specific hardship on the State employee. However, he said there were instances where other vendors would not set up a charge account with the State which prevented getting parts, and that getting other contractors was sometimes difficult because the jobs are too small. To the extent he was saying there was an undue hardship on the agency, the Commission believed it would be more appropriate for the agency to address the difficulties it may have in getting contractors. It suggested he might have his agency submit information relative to a hardship if he wanted the Commission to reconsider if it should grant a waiver. (*Commission Op. No. 97-13*).

Chair of State Commission Seeks Full-Time Position

An appointee to a State Commission intended to apply for a full-time position with a State agency. By law, the Commission, which he chaired, had to approve all personnel actions by the agency, including the hiring of full-time employees.

(a) The Chairman's Conflict

A conflict arises for the Chairman because as an Honorary State Official he may not review or dispose of matters in which he has a personal or private interest that tends to impair independent judgment in performing official duties. 29 *Del. C.* § 5805(a)(1). As a matter of law, an individual's judgment tends to be impaired if action or inaction would result in a financial benefit to that individual to a greater extent than it would to others who are members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a). Because the name of the recommended candidate must be submitted for approval to the Commission of which he is Chair, it appears clear that he should not participate in selecting the recommended candidate. While the Chair could recuse himself from participating, the Commission found that if he continued as Chair while also being considered for a full-time position, it still raised issues of appearances of impropriety that could not be overcome by mere recusal, for reasons addressed below.

(b) The Commission Members' Conflict

State employees, officers and honorary officials must endeavor to pursue a course of conduct which will not raise suspicion among the public that they are engaging in acts in violation of their public trust, and which will reflect unfavorably upon the State and its government. 29 *Del. C.* § 5805(a). The other Commission members, like the Chair, are restricted from reviewing or disposing of matters in which they have a personal or private interest that tends to impair independence of judgment. 29 *Del. C.* § 5805(a). In essence, the public trust they are charged with when making any decision, including hiring decisions, is

that the decision be fairly reached. In the context of hiring, the decision must be based on merit. Because the Commission members must approve the candidate selected by the hiring official if that candidate is also the Chair, it could, at a minimum, raise suspicion among the public that the Commission members' approval was based on their relationship with or influence by the Chair.

(c) The Hiring Official's Conflict

By law, the Commission appoints the individual who makes the hiring decision. It sets his salary and approves his budget. Also, he must have its "consent and approval" when he hires employees. Thus, if the Chair retained his Commission position, it would mean that the hiring official must select a candidate from a list of candidates which included a person who has substantial authority over him. If he selected the Chair over other candidates, there may be a suspicion raised that his selection was based on something other than the merits. Thus, it raises the same ethical issues for him as it does for the Commission members. Consideration was given to bringing in panelists from outside the State to avoid the conflict. However, the statute required the hiring official to appoint all authorized personnel pursuant to the Merit System rules and regulations. Thus, he would still have to participate in the interviewing process.

(d) Waiver Considerations

A waiver may be granted if "the literal application of such prohibition in a particular case is not necessary to achieve the public purpose or would result in an undue hardship on any employee, officer, official or state agency." 29 *Del. C.* § 5807(a).

(1) Public Purpose

The purpose of the Code of Conduct is to insure that the conduct of government officers and employees holds the respect and confidence of the people. 29 *Del. C.* § 5802(1). Thus, such persons must "avoid conduct which violates their public trust or creates a justifiable impression among the public that such trust is being violated." *Id.* Among the public trust concerns expressed in the Code of Conduct are that government employees make decisions based on the merits, not on personal relationships and that public office not be used to secure unwarranted privileges, personal gain or benefit. *See, 29 Del. C.* § 5805(a) and 29 *Del. C.* § 5806 (e). Here, there could be a justifiable impression among the public that if the Chair continues to hold that position while being considered for full time employment that: (1) a decision to nominate him by the appointing official could be the result of the authority that the Chair exercises over him; (2) a decision by his fellow Commissioners to approve his selection could be the result of their collegial association; (3) he would receive preferential treatment over other candidates because of his relationship with both the appointing official and his fellow Commissioners; and (4) he used his appointed public office to secure a personal gain or benefit by parlaying the appointment to public office into a full-time position. Moreover, he would be doing so without risking loss of the appointed position. Thus, if he is not selected for the full-time position, he keeps the prestige and authority of the appointment, where he would still exercise authority over the appointing official's budget, hiring recommendations, etc. This places the appointing official and the Commission members on the horns of a dilemma because, regardless of how qualified the Chair is for the position, the public may well question whether the trust in

unbiased and unduly influenced decision making was violated. In these circumstances, the Commission concluded that the literal application of the prohibition was necessary to achieve the public purpose.

(2) *Undue Hardship*

In considering whether an undue hardship should be granted, the Commission examined the other purpose of the Code of Conduct which is “that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed.” 29 *Del. C.* § 5802(3). Here, the appointing official said that if a conflict existed because the Chair wanted to retain the appointed position, the agency would still have qualified candidates for the position. Thus, it does not appear that the agency would suffer an undue hardship by disqualifying the Chair for the position.

On the other hand, would such action result in a hardship on the Chair?

He did not wish to risk surrendering an appointment on a prestigious body, and then find that he was not selected for the full-time position. The Code of Conduct requires that the hardship be “undue,” which means “more than required” or is “excessive.” *See, Merriam Webster’s Collegiate Dictionary, p. 1290(10th ed. 1992); Black’s Law Dictionary, p. 1370 (5th ed. 1989).* That is not the case in these circumstances. Indeed, contemporaneous service on a State Commission should not be perceived as a requirement for applying for a salaried job with the State. To hold otherwise would give little credence to the provision which mandates that conduct should be avoided “which creates a justifiable impression among the public that such trust is being violated.” 29 *Del. C.* § 5802(1).

Here, the justifiable impression among the public would be that by retaining the appointment, the Chair used his appointed office to gain a personal benefit (a full-time position); he would receive preferential consideration from the appointing official who must have his budget, personnel decisions, etc., approved by the Chair; and he would receive preferential consideration from the Commission members who serve with him. Not only would it create a justifiable impression that he was violating the public trust, but it would force the Commission members and the hiring official into a position where their integrity could justifiably be called into question. Thus, in balancing between the need to avoid even the perception of impropriety against the need to attract qualified people to public employment, the balance must be weighed, under these facts, in favor of serving the public purpose of avoiding the appearance of impropriety, especially as there is evidence that the State would not lack qualified candidates.

If the Chair, who was not present at the hearing, or the agency believed there were factors this Commission did not consider which would support a waiver, a hearing to reconsider the matter could be requested. (*Commission Op. No. 97-34*).

ACCEPTING ANYTHING OF MONETARY VALUE

Concurrent Employment

Professional Services to Clients Regulated by the Employing Agency

A State employee had a professional degree and opened a consulting business as part of his outside activities. Primarily, his clients were from out of state, but three were Delaware clients.

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

Regarding his Delaware clients, these companies must comply with the laws which he enforced in his State position. In his State job, he had not investigated or taken any action against these companies. However, because these companies were subject to action by his Division, it was concluded there may be an adverse effect on the public's confidence in State government if he provided services to these Delaware clients. This is because if an employee from his office investigated these companies, they would review the documents he prepared in his consultant capacity. Although he prepared the documents based solely on what the company provided him, the State investigator from his Division could find a discrepancy between the information which the company provided to him for the reports he prepared and the actual records on which he based his reports. Accordingly, he could find himself in an adversarial position with his own Division. This Commission previously held that where a State employee wanted to engage in outside employment that could result in his private employment creating an adversarial position with his agency, it would reflect unfavorably on the employee's position of holding the public trust and, therefore, violate the Code. *Commission Op. No. 91-19*; *see also*, 29 *Del. C.* § 5805(b) (*State employees are restricted from representing or assisting any private enterprise with respect to matters before the State agency by which the employee is associated by employment.*) Accordingly, the Commission found it would be improper, under 29 *Del. C.* § 5805(b), for him to have Delaware clients who were subject to laws enforced by his Division. Additionally, such activity may result in an adverse effect on the public's confidence in State government in violation of 29 *Del. C.* § 5806(b).

Regarding clients from other states, as they were not subject to the Delaware laws enforced by him and his Division, and he was not performing work for them during official duty hours, the Commission found no conflict in having those outside clients. (*Commission Op. No. 97-15*).

Outside Employment with Company which Contracts with Agency

A State employee held a professional degree and used that education in both her State employment 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. (*Commission Op. No. 97-31*).

Running for Elective Office

A State agency asked if a Merit employee, in a federally funded position, may 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. 92-2, 96-02, and 96-22*. However, while running for elective office, individuals should be alert to 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 may apply, 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 has 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 is 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 applies to State employees who are paid by federal funds would not be a matter within this 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 applies 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. (*Commission Op. No. 97-06*).

State Employee's Private Company Seeks Contract with State Agency

A State agency and a State employee jointly requested an advisory opinion on whether the agency could contract with the State employee who worked for another State agency. Accordingly, the State employee was not representing or assisting his private enterprise before the agency that employs him, as such activity may be prohibited by *29 Del. C. § 5805(b)(1)*. Additionally, the State employee was not reviewing or disposing of the contract decision in which he has a personal interest, in his official capacity, which may be prohibited. *See, 29 Del. C. § 5805(a).*

The agency wanted to contract with the State employee's private business which provides certain services for the physically disabled. The agency said it expected to contract for less than \$2,000, but it was possible that a contract might be for more than \$2,000. It gave the Commission a breakdown of its past and anticipated contracts for these services. The list reflected the vendor selected; work site location; amount of each contract; whether each contract needed public notice and bidding; the Fiscal Year in which the work was completed or needed to be completed; and a brief description of the type of work.

When the State contracts with a State employee, the Code of Conduct requires "arm's length negotiations" for contracts of less than \$2,000. For contracts of more than \$2,000, the Code requires public notice and bidding. *29 Del. C. § 5805(c).*

Arm's length transactions are those negotiated by unrelated parties, each acting in his or her own self-

interest; the basis for a fair market value determination. *Black's Law Dictionary*, p. 100 (5th ed. 1979). To test if there is "arm's length" negotiation, it must be ascertained how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *See, e.g., Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991)*(in finding arms' length negotiations, court noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions"). Here, the agency followed the procurement law regarding obtaining bids for such small contracts. For example, in the past, it has contacted three providers for bids and sometimes the State employee is the only contractor who responds. The agency is working with a State Board and with a private Association of providers of such services to try to insure that contract opportunities are provided to competitors, and to try to find a larger pool of providers.

Under these circumstances, and if the non-bid contract reflects the going rate for these services, the requirements for arm's length negotiations have been met.

The agency said contracts of more than \$2,000 rarely occur and it could comply with the Code of Conduct public notice and bidding requirement if it decided to offer this particular State employee, or other State employees, an opportunity to bid on such contracts. Thus, the public notice and bidding requirement of 29 *Del. C.* § 5805(c) could be met.

The agency said that occasionally situations arise where the physically disabled may require a more immediate response to their needs. In such instances, there may not be enough time to wait for public notice and bidding. However, no specific facts were pending before the Commission regarding such situations, so the Commission did not rule on whether such situations were a basis for a waiver. If such a situation arose, the agency has the option under the procurement law of using any contractor, other than a State employee, to fulfill the obligation without notice and public bidding on such small contracts. Alternatively, if the agency experiences an undue hardship and needs this State employee to perform the work, the agency can seek a waiver from the Commission, to be considered on an expedited basis.

Beyond the contract requirements cited above, the Code of Conduct requires State employees with a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency to file with the Commission a written statement fully disclosing the same. *See, 29 Del. C.* § 5806(d). Such disclosure is confidential and is not released, except as may be necessary to enforce the Code of Conduct. *Id.* The filing of such disclosure statement is a condition of commencing and continuing employment or appointed status with the State. *Id.*

As this State employee has a financial interest in a private enterprise which is doing business with a State agency, the Commission accepted this request for an advisory opinion, which was co-signed by the State employee, as a disclosure of his financial interest. However, if there was additional information, such as contracts with other State agencies, the State employee should fully disclose that to the Commission. (*Commission Op. No. 97-17*).

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 this 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 this provision. (*Commission Op. No. 97-03*).

Installing Computer Software

A State employee installed an accounts payable/receivable computer software program for a friend's business. This 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). (*Commission Op. No. 97-03*).

See also, Commission Op. No. 97-19, supra, p. 4. "Contracting for Part-Time Job with Agency by Which Employed."

Payment of Expenses and Compensation

Compensation from an Outside Source During State Working Hours

State employees were completing surveys for vendors of certain products. The surveys provided marketing information for the vendors and were also marketing devices themselves. Vendors paid State employees amounts ranging from \$2 to \$50 to complete the survey. The agency stopped the activity and asked if accepting money for completing the surveys was permissible.

State employees who select products and services participate in the surveys, and may respond to the surveys during official duty hours. Money for surveys that come directly through the head of the section, has been used for a yearly celebration. Agency employees and the public are invited; the public becomes more familiar with the agency's work. However, the surveys can be sent to an employee and the agency head would not know if the individual kept the money. Further, when the agency hosts the celebration, it identifies the vendor who paid for the surveys on the flyer.

The Code restricts acceptance of any compensation, gift, or any other thing of monetary value under circumstances where such acceptance may result in: (1) impaired judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government of the State. 29 *Del. C.* § 5806(b).

The Commission previously ruled that "accept" includes constructive possession, which means the ability to exercise control over the payment. *Commission Ltr. Op. January 27, 1995*. Here, employees can control the payment because they may give it to the agency; however, they are not obligated to do so. Further, some payments could go directly to the employees without the agency having knowledge of the receipt.

The public's confidence in the integrity of the government could be adversely effected in that it may raise concerns that employees would, during official work hours, fill out surveys so they would receive payment from the vendor while also receiving their State pay. Further, other vendors and the public might see the recognition on the flyers of the vendors who pay for the survey as an indication that such vendors may be given preferential treatment over companies which do not pay employees for participating in a survey, especially as persons who select the products and services participate in the surveys. (*Commission Op. No. 97-16*).

Expenses Paid by Another State

A State officer was asked to come to another State to serve as a judge in a competition which it was hosting. The other State reimbursed her expenses.

The Code of Conduct restricts State officers from accepting a payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

Here, she had no decision making authority over either the State agency which reimbursed her, or over the competitors who were being judged. Also, neither the State agency, nor the competitors had any business dealings with her agency. Thus, it did not appear that she would be in a position to have her judgment impaired, nor to give either the agency or the competitors any preferential treatment. She was invited to evaluate the competition principally because of her official position and expertise in the subject area of the competition. In those circumstances, such action did not raise any appearance of impropriety. (*Commission Op. No. 97-43*).

Expenses Paid by Foreign Government

A State officer, and persons from other States in similar positions, traveled to a foreign country to participate in meetings to enhance understanding with the foreign government on cultural, economic and political affairs, with a specific emphasis on government issues handled by his agency and similar agencies in the other States. The foreign government paid the travel expenses.

The official spent approximately six days overseas, and while there, actively engaged in attending meetings with various officials of the foreign government. He was expected not only to attend the meetings, but required to give information and a presentation on the Delaware laws which his agency enforced, with particular focus on certain Delaware laws. The agenda and his statements at the Commission's meeting showed that he was actively engaged in performing government related duties during the visit.

The Code of Conduct restricts State employees and officers from accepting payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) an appearance of impropriety. 29 *Del. C.* § 5806(b).

As he had no decision making authority over the foreign government in his official capacity, his judgment in performing official duties would not be impaired nor would he be able to give that government, or any member thereof, any preferential treatment. Further, the purpose of the trip and his active participation in performing duties related to his official functions did not raise an appearance of impropriety. (*Commission Op. No. 97-42*).

Honoraria and Payment of Expenses

A State employee asked if accepting honoraria and/or payment of expenses would be appropriate if he: (1) made a presentation during off-duty hours to private enterprises regulated by his agency; (2) made a presentation to out-of-state organizations where it is possible that some persons in the audience could be subject to Delaware regulations he enforces; or (3) taught classes at the college level where students might subsequently decide to enter the health care field and, consequently, might become subject to the statutes which he enforces.

The Code of Conduct restricts State employees from accepting compensation, gifts, outside employment, payment of expenses, or any thing of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). Additionally, the Code prohibits using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).

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

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 3d 85, 94 (1995). If the private party has an interest in the official decisions of the employee, the appearance of impropriety may remain even if the government sanctions the payment by the private party. *Id.*
2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the specter that government employees are "selling" their labor twice--once to the government and once to the private party, thus creating at least an appearance that the employee is using public office for private gain. *Id.*

Thus, in applying Delaware law to a situation where private parties may offer to pay to have a State employee speak about his government duties, and considering the ethical issues such payments raise, the Commission finds as follows:

A. Organizations Regulated by His Agency

These organizations are subject to the licensing laws and/or may be investigated for certain alleged activities by his agency. Thus, he would be in a position to make official decisions regarding their licensing and/or whether they are complying with laws the agency enforces. It has been his policy to refuse any

compensation from such Delaware enterprises. However, one organization sent him a check despite the fact that he informed them that he did not wish to be paid for his presentation. There could, at a minimum, be an appearance of preferential treatment being afforded to organizations which are licensed and/or regulated by his agency and also pay him to make speeches to them. Also, it may appear that his judgment could be impaired as a result of accepting such payments and such appearance could cause an adverse effect on the public's confidence in its government. Therefore, it is best to avoid accepting payment for such speaking engagements.

B. Out-of-State National Groups

When asked to speak out-of-state by a national organization, he declined the opportunity because he had only recently assumed his State position. Therefore, he did not believe he had been in office long enough to be familiar with the laws and regulations to serve as a speaker. However, he anticipated that such offers could come again and he asked for guidance on responding to such opportunities. The statute requires that the Commission base its rulings on a "particular fact situation." 29 *Del. C.* § 5807(c). As no particular facts were before the Commission and no specific offer was pending, the Commission could not render a final decision on such activity. However, pursuant to its authority to provide guidance, 29 *Del. C.* § 5809(10), the Commission suggested the following as an aid in responding to such requests if they occur. First, the Commission noted that there was the possibility that an attendee at such sessions may be in the specific career field in Delaware and therefore may be subject to the laws he administered. However, if such individuals were not involved in selecting him as a speaker and paying for his expenses, then the concern that the payment is made to "curry favor" in making his decisions is somewhat remote. Also, the appearance that he may be using public office for private gain may be reduced if the payment of expenses is "reasonable." For example, if the private enterprise paid for four star accommodations, first class airfare, etc., the perception could be that he was turning his public position into one of social advantage or private "perks." *See, Sanjour at 95-96 (noting the difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area).*

C. Teaching at Various Colleges

A local college had offered him the opportunity to be on its faculty but because of his government commitments, he felt he would not have the time to teach evening classes. His concerns, however, were that if he accepted a teaching job there is a possibility that some students he taught could become employed in the specific career field which his agency regulates. Whether such a set of facts is likely to result, was too speculative for the Commission to offer any specific guidance. However, it suggested that general guidance is provided by the Code section restricting outside employment referred to above. Also, he could review the Commission's synopses of opinions for a better understanding of how that provision is interpreted. (*Commission Op. No. 97-40*).

Travel Paid by National Association

A State officer traveled overseas to participate in meetings focusing on national and international policies in his area of expertise. His 48-hour trip was paid for by a national association of which the State of Delaware is a dues-paying member. He had no decision making authority over the association.

The purpose of the trip was to share information on different approaches to issues in his field. The trip was held overseas because the issues are on-going and additional meetings were expected with some occurring overseas and some in the United States, to equalize the burden of costs and travel.

The individual was tasked with participating in discussion groups on the Executive Branch's roles in formulating and implementing policy in the area of concern. Additionally, he was asked to give the international group a detailed explanation of the federal/State relationship in the United States with respect to the matters, and subsequently participate in the preparation of a report on the proceedings.

The association which paid for his trip made direct payments to the vendors, e.g., hotels, air carriers, etc.

He asked how the direct payments would be treated under the financial disclosure statute. The Commission's decision on how the matter was to be treated under the Financial Disclosure subchapter can be found in the Commission's synopses of its Financial Disclosure Opinions.

Additionally, Executive Orders 5 and 19, require the Commission to decide if accepting the payment of expenses raises any ethical issues for Senior Executive Branch officers. Whenever the value is more than \$250. *E. O. 5 and 19*. Under the Code of Conduct, restrictions are placed on the receipt of gifts, payment of expenses, etc., if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State government. *29 Del. C. § 5806(b)*.

As the individual had no decision making authority over the source of the payment, he would have no occasion to render any kind of judgment or make official decisions regarding the association. Thus, he would not be in a position to have his judgment impaired or give them preferential treatment. Also, most of his time was spent either in flight or in the meetings; and the meetings related to performing his State duties. Thus, the Commission found no ethical issues raised. (*Commission Op. No. 97-07.*)

Honorarium for Educational Consulting Work

A State officer was offered an honorarium from an institution of higher learning for serving as a consultant for one of its degree programs.

The Code restricts accepting outside employment or compensation if it may result in: (1) impaired independence of 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)*.

In his official capacity, he had no decision making authority over the institution. Although it might periodically seek State grants and may have dealings with another State agency, he was not involved in making decisions regarding such grants or in making decisions regarding dealings between the institution and the other agency. Further, he did not advocate on behalf of the institution for any grant or in any dealings it has with the State. In his official capacity, he headed an agency which provided certain support services to State agencies, including the agency which had dealings with the institution. However, those dealings had no impact on the institution. He also served on a State board which made some decisions regarding some educational institutions; however, if he found himself in a position where decisions had to be made about this particular institution, which was very unlikely, he would recuse himself. (*Commission Op. No. 97-44*).

Gifts

Invitation to Party by Organization Regulated by State Agency

Appointees to a State regulatory agency, and its Executive Director, were invited to an invitation-only dinner party given by a company which the agency regulated. The appointees to the agency, who made the regulatory decisions, served in a quasi-judicial capacity. The agency asked if it would be appropriate for them to attend the party which would consist of cocktails, dinner, speakers, etc., in a rather lavish setting. The estimated ticket cost to the company was at least \$65 per person or \$130 per couple.

The appointees were frequently asked to approve or reject, after hearings, a wide range of matters involving the company and its competitors. The company was involved in a highly-competitive industry and matters before the agency frequently gave rise to adversarial challenges from many competitors. Issues regarding the company were on the agency's agenda almost every time it held its bi-monthly meetings. In fact, issues were pending before the agency at the time the officials were to attend the party.

Two sections of the Code of Conduct were relevant: 29 *Del. C.* § 5806(a) and (b).

Section 5806(b) deals with accepting gifts, payment of expenses or any other thing of monetary value, and restricts acceptance if, among other things, it "may result in any adverse effect on the confidence of the public in the integrity of the government of the State." 29 *Del. C.* § 5806(b)(4).

Section 5806(a) admonishes State employees, officers and honorary officials "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.* § 5806(a).

In considering this section, the Commission, in another opinion wrote:

The significant import of Section 5806(a) is that employees are to pursue a course of

conduct which will not “raise suspicion” that their acts will “reflect unfavorably upon the State and its government.” Actual misconduct is not required; only a showing that a course of conduct could “raise suspicion” that the conduct reflects unfavorably. *Commission Op. No. 92-11*.

Thus, it examined the issue: would attending this dinner by the officials, whether they pay for the dinner or not, likely raise suspicions that reflect unfavorably upon the State and its government?

It was clear that the agency was charged with serious and important responsibilities. For example, the Delaware Supreme Court had recognized that in certain respects it performed legislative tasks. (citations omitted). It also had recognized that it had limited authority to review the agency’s performance of legislative tasks. It went on to observe that in performing other functions, the agency “acts as litigant, lawyer and judge in the initial determination of the matter before it.” (citation omitted). Moreover, the Court had noted that in performing its regulatory functions, the agency has a specific public function, which is to regulate with the authority to “compel those corporations to discharge their duties to the public and not to exact excessive charges.” Thus, the agency had a very specific “public trust” to fulfill in performing its regulatory functions.

Because the company was routinely and frequently seeking decisions from the agency which were often subject to adversarial challenges from competitors, and in some situations, even the Courts had limited authority over reviewing the decisions, it raised concerns with the Commission about how not only competitors, but also the broader public, might view attendance at this event. Competitors might see it as an opportunity for that company to have access to the decision makers at the dinner which they would not have, especially where the decisions could affect them often and substantially on adversarial issues. As for the public, it could view with suspicion the attendance at this invitation-only party in a rather lavish setting hosted by a company which now has several issues pending before the agency on which it will be making rulings in a few weeks, and will have other matters before the agency on a continuing basis.

The Commission believed the agency’s responsibilities and duties were of such importance to the public and to competitors, especially when it ruled routinely on issues affecting the company, that attending this dinner could raise suspicions which would reflect unfavorably upon the State and its government. (*Commission Op. No. 97-11*).

Lunches from Vendors

The State contracted with a vendor for certain services, including periodic training sessions for the agency’s trained professional staff. The contract required the training to be: (1) conducted by qualified instructors; and (2) approved for credit hours to fulfill the contract, the contractor either provides its own qualified trainers or selects qualified trainers from course catalogs. Trainers selected from course catalogs are usually sponsored by private companies which sell certain products which the agency’s professional staff may use in performing their State duties.

While the contract required the contractor to provide accredited training, there is no requirement for the agency's professional staff to attend. The contractor tries to encourage attendance by scheduling sessions on days that are normally reserved for training. The sessions usually are scheduled during the lunch hour and are held as teleconferences or in-class sessions. The contractor or the companies which sponsor instructors provide lunch to attendees. It consists of such items as sandwiches, Chinese fare, sodas and chips. There is no promotion or advertising of the sponsoring companies. The attendees have no decision making authority in selecting the State contractor. They also have no decision making authority in choosing courses, and therefore, no decision making authority over the companies which sponsor instructors.

The Code of Conduct restricts State employees, officers and honorary officials from accepting gifts, payment of expenses or any thing of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment of 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).

This question arose as the result of a prior Commission ruling dealing with lunches paid for by vendors who gave product demonstrations. *Commission Op. No. 96-78*. The Commission concluded, under those specific facts, that acceptance was not permitted. The Commission is to strive for consistency in its rulings. 29 *Del. C.* § 5809(5). While the facts in that case are to some degree similar, this Commission must base its rulings on a "particular fact situation." 29 *Del. C.* § 5807(c). For the reasons below, the Commission found that the particular facts of this case are distinguishable from No. 96-78.

Mainly, in No. 96-78 the programs were conducted by sales representatives of companies which sought to sell products, not qualified instructors. The Commission balances the public interest in preventing improper attempts to influence the decisions of public employees against whether acceptance creates a genuine risk of affecting the performance of the official duties of employees. When it balanced those interests in No. 96-78, it found that the balance was in favor of public concerns, but it noted even then that it was a close call. See, *Opinion Synopses -1996*, "Lunches from Vendors," *Commission Op. No. 96-78*, pp. 13-14.

Also in No. 96-78, State employees decided which vendors would make presentations; the decision was not based on such criteria as whether the course provided approved credits and, in fact, no credits were generally given. Moreover, the decision was not based on presenters being trained in the specific profession, but on how familiar a sales representative was with his company's product.

As sales representatives gave the training, it could raise the perception that, by the very nature of their job, they would use the sessions as an indirect avenue to a sale. Thus, this direct communication from the sales representative on his particular product might be seen as an opportunity to influence decision making.

Here, while the speakers might be sponsored by a private company, they are trained professionals, and the dictates of their profession are different from those of a sales representative. Additionally, the contractor said the presentations are unbiased and educational. This statement was supported by the fact that the presentations are made by trained professionals, and the presentations must be officially approved for educational credits. Further, the contractor said that the sponsoring companies do not make a direct

presentation of their products; the companies nor their products are advertised in the presentations; and promotional materials are not distributed.

Thus, the opportunity to influence selection of a particular company's product is more remote than in No. 96-78.

Finally, the State contract requires the contractor to offer the training, and to engage qualified instructors whose courses are approved for credit. Such contractual obligations provide additional support for the view that providing lunches in these circumstances is not likely to have any adverse effect on the public's confidence in the integrity of its government.

Thus, looking at the totality of the circumstances, including the nature of the programs presented, and weighing the public interest of preventing improper attempts, or a genuine risk, of influencing the decisions of public employees, the Commission concluded that the risks were too remote to find that accepting these lunches would violate the Code. (*Commission Op. No. 97-23*).

Barbeque from State Contractor

A State agency was housed in privately owned facilities which the State leased. The landlord leased other space in the building to non-State businesses. The agency asked if it would be appropriate for the State employees working at the building to accept an invitation from the private landlord to attend a barbeque luncheon.

The Code of Conduct prohibits accepting gifts or anything of monetary value if it may result in: (1) impaired judgment in official decisions; (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 State government. 29 *Del. C. § 5806(b)*.

The invitees to the barbeque were middle management and line staff personnel who, although tenants in the building, were not responsible for deciding to lease the offices in this privately owned building. A separate agency made that decision. However, if there were problems with the landlord, or if the landlord was not properly fulfilling the lease terms, the tenants may provide that information to the leasing agency. Because the tenants are there on a daily basis, they are more likely to note any deficiencies or exceptional services by the landlord. The weight of the information they would provide to the leasing agency could significantly effect whether the leasing agency decided to renew the lease or decided to take any action to enforce the landlord's lease obligations.

Whether or not the services provided by the landlord meet the lease terms had no bearing on the Commission's opinion in this case. Rather, it based its conclusion on the fact that the tenants do exercise judgment concerning the landlord's activities. Acceptance may adversely effect the public's confidence in the integrity of the government if State employees attend functions of a private landlord, such as a free barbeque, because of the significance of their judgment. The public may perceive that their judgments may

be impaired or that the landlord might receive preferential treatment.

This was a planned yearly event; took place only during the lunch hour; and the per person expenditure might not seem significant. However, the Commission must balance these facts against considerations of the effect on the public's confidence in the integrity of its government. *See, Commission Op. No. 96-78 (to decide if accepting a lunch from vendor may adversely effect the public's confidence, the Commission looks at the totality of the circumstances).*

The purpose of the statute is to insure that the public's confidence in its employees and officials is upheld. 29 *Del. C.* § 5802. Statutes enacted for a public purpose are broadly construed to achieve that public purpose. *See, generally, 3A Sands, Sutherland Stat. Constr. Chapt. 71 (5th ed. 1992).* Under the particular facts of this case, a majority of the Commission concluded that attending the landlord's barbeque could create a perception problem. The elements creating the perception problem are: (1) the indirect, but significant potential of influence on decisions; and (2) the contractor's obvious business interest. It is generally accepted that business people will entertain customers often in the hope of influencing the customer to buy. Such conduct may be appropriate in the world of business but not so where the recipient is a public employee.

The Commission further noted that under Delaware law, public employees who are tenants in State operated facilities are unlikely to be entitled to a meal from the State merely because of the landlord/tenant relationship. Under Delaware law, a full-time employee of the State whose salary is paid by the State, cannot receive any additional stipend for the purchase of food, be supplied with food, or be reimbursed for food that was consumed during normal working hours within the State, subject to certain discreet exceptions. *See, 29 Del. C. § 5112.* Thus, it follows even more strongly that an adverse perception could result if State tenants in a privately owned building accept meals from their commercial landlord.

Finally, the Commission is required to be consistent in its opinions. 29 *Del. C.* § 5809 (5). The Commission previously ruled that State employees were prohibited from accepting a barbeque outing from a business association whose members were licensed by that same State agency. *Commission Op No. 92-6.* Accordingly, the Commission concluded that it would not be proper for State employees to accept a barbeque luncheon under these circumstances. (*Commission Op. No. 97-22*).

Airline Tickets Won in Drawing

A State officer put her business card in a hat at a social function. When the drawing was held, her card was selected and she won two tickets from an airline company for a trip overseas. The financial disclosure statute requires certain State officials to report the source and value of any gift received which is worth more than \$250 on their annual financial disclosure report. *See, 29 Del. C. § 5813(a)(4)(e).* Also, under Executive Orders No. 5 & 19, certain Senior Executive Branch officials must file: (1) an addendum to the annual report reflecting any gift with an aggregate value in excess of \$100, and (2) notice

with this Commission within 30 days of receipt of any gift worth more than \$250, so the Commission can decide if acceptance raises any ethical issues. *E. O. No. 5 ¶¶ 1 & 2; E. O. No. 19, ¶ 5th “Whereas,” and ¶ 1.*

To decide if accepting a gift raises an ethical issue, the standard applied is whether 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 the government of the State. *29 Del. C. § 5806(b)*. Regarding the airline tickets, the State officer had no decision making authority, or in fact, any dealings with the airline in her official capacity. Moreover, her business card was selected at random from all business cards which were put in the hat. Accordingly, the Commission found no ethical issue raised by accepting the tickets. (*Commission Op. No. 97-33*).

Gift from a Foreign Government

A State officer reported to the Commission that she received some jewelry from delegates of a foreign government which she was host to in her official capacity. The foreign government delegates were part of an agency exchange program. The foreign visitors offered the items as a complimentary gesture, given in a public presentation, as an expression of appreciation to the State officer for hosting the visitors.

Performing that duty was not contingent on receiving a gift. Because her agency was involved in the exchange program with the foreign government, she may have had some decision making authority regarding the program and persons from the foreign government who participated. However, the value of the items was *de minimis*--estimated value of \$5 each for two items. The Commission also factored in the circumstances under which they were given. The Commission found that accepting the jewelry would not result in impaired judgment, preferential treatment, official decisions outside official channels or adversely effect the public’s confidence. *See, 29 Del. C. § 5806(b)*. Thus, no ethical issue was raised by accepting the gift. (*Commission Op. No. 97-33*)

Tickets to Events

A State agency was responsible for evaluating certain private enterprises. The evaluations affected whether the private enterprises would be entitled to certain State grants. The agency asked if it could put in its grant applications that the private enterprises were to provide two tickets or free admissions to events which the agency representatives would evaluate. Tickets also are obtained from organizations who have not received grants and therefore those tickets are not the result of contract requirements. In both situations, the primary purpose of obtaining the tickets is for qualified individuals, acting for the agency, to evaluate an organization to decide if it qualifies for a grant or is complying with grant requirements. However, sometimes, a person who is not there to evaluate, such as a spouse or a friend, uses the second ticket or admission, simply to accompany the qualified evaluator. Also, tickets are obtained to events where the primary function is more social in nature, rather than evaluative.

The agency believed that if the terms were placed in the grant applications that the tickets or admissions would not be considered “gifts.”

The Commission first noted that the law permitted reimbursement of expenses related to official duties to the officials who attended events for evaluation purposes. It said that if the State reimbursed the evaluators, then the issue would not be within the Commission’s jurisdiction as it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the “watchful eye” of the agency. *See, Synopses of Financial Disclosure Opinions, “Guidelines for Public Officers” (citing Sanjour v. Environmental Protection Agency, D.C. App. Ct., 984 F.2d 434, 455 (1993)(interpreting the federal ethics provision restricting payment of expenses when performing official duties)).* The Commission has previously ruled that it has no authority to review expenditures made by the State. *Id.*

However, if the agency, rather than having the State reimburse the individuals, sought to place the requirement for free admission or tickets in a State grant application, then the Commission has authority to decide if obtaining the items by contract raises issues under the Code of Conduct because contracts violating the Code of Conduct may be voidable. 29 *Del. C.* § 5805(g).

As the State agency had two options--reimbursement or grant language--the Commission addressed the issues raised if the agency decided to require applicants to provide free access to their events.

(1) The Policy Issue

In addressing whether a contract requirement for grant recipients to provide two tickets or free admission to any event upon request of the agency does not constitute a “gift,” the Commission first noted that the facts raise more than just the issue of whether the tickets or free admissions are “gifts.” As noted above, there is a policy issue of whether the agency should reimburse the officials or mandate free admissions through the grant. Other issues are identified and addressed below.

(2) Are tickets or admissions a “gift” under the Ethics Law?

As the Code of Conduct does not define “gift,” the plain and ordinary meaning is used. 1 *Del. C.* § 303. “Gift” means “something voluntary transferred by one person to another without compensation or consideration.” *Merriam Webster’s Collegiate Dictionary, p. 491 (10th ed. 1993); Black’s Law Dictionary, p. 619 (5th ed. 1989).* When tickets or admissions are transferred to a qualified individual who attends the event to make evaluations for State grant purposes, then the transfer is not truly voluntary and the evaluator is giving consideration in return. Thus, the official does not receive a “gift,” but receives “payment of expenses” by the private enterprise.

However, when tickets or admissions are given to persons who are not attending as qualified evaluators, there is no consideration, and the ticket or admission is a “gift.” Because that “gift” is provided to the qualified evaluator to use as he or she sees fit, then the evaluator has received the “gift.” *See, Commission Ltr. Op., January 27, 1995.*

Regardless of whether the tickets or admissions are “payment of expenses” or “gifts,” the Code of Conduct restricts acceptance of gifts, payment of expenses, compensation or anything of monetary value if acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment; (3) official decisions outside official channels; or (4) an appearance of impropriety. 29 Del. C. § 5806(b)(*emphasis added*). The Code also prohibits using public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e). It further prohibits employees, officers and honorary officials from engaging in conduct which may raise suspicion that an individual is engaging in acts violating the public trust. 29 Del. C. § 5806(a).

(3) Does acceptance of tickets or admissions violate the Code provisions?

When private sources confer benefits on public employees (admission to events) to perform agency related functions (program evaluation), it may raise, at least, an appearance of impropriety. Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d 85, 94 (1995)(*interpreting federal ethics restrictions on accepting payment from private sources for performing official duties*). Two ethical concerns noted in Sanjour were:

(a) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “favors” in return. *Id.* If the private party has an interest in the employee’s official decisions, the appearance of impropriety may remain even if the government officially sanctions the private party payment. *Id.*

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

The Delaware Code of Conduct addresses those ethical concerns by restricting acceptance of gifts, payment of expenses, or anything of monetary value; prohibiting use of public office for private gain; and prohibiting conduct that may raise suspicion that the individual is violating the public trust. *See*, 29 Del. C. § 5806(a), (b) and (e).

Applying those provisions to this situation, clearly the evaluators are decision makers who must exercise independent judgment in performing the official duty of making grant decisions. The ethical problem emerges when the evaluator gives tickets to non-evaluators, such as spouses or friends. Clearly, in those situations, it could appear that the organizations, by placing no limits on who may use the tickets, are trying to curry favor or receive preferential treatment, especially when it is clear that the evaluator is performing a government function and their “guest” is not, and therefore would not be entitled to receive reimbursement from the State if they paid for the ticket. Also, accepting tickets or admissions for a non-evaluator could raise public suspicion that the government official is using public office to obtain an unwarranted privilege-- that is a “private perk” in the form of free admission for the spouse or friend.

(4) Tickets to Cocktail Parties, Receptions, Dinners, Etc.

Where these officials accept tickets to events where there is no evaluative function, or where in addition to a performance evaluation the ticket includes admission to cocktail parties, receptions, dinners, etc., there may also be an appearance of impropriety. The public may suspect that the officials are using their public position for social advantage or private gain. *See, Sanjour at 95-96(noting the difference in appearances of impropriety between accepting a bus ride to a nearby city with a box lunch en route, as compared to a Lear jet to a far-off resort area with a lobster dinner).* Added to this suspicion of private perks, maybe the suspicion that invitations to such events are a means of currying favor and influencing judgment when the invited official makes grant decisions.

The agency posited that organizations like to see these officials at these events. However, it may appear to the public that the main reason for inviting these officials is for the opportunity to “have the ear” of persons who evaluate their grant applications. Thus, great caution should be exercised in accepting such invitations, especially if the organization has a grant pending. *See, Commission Op. No. 97-11 (concluding that Commission members of a State agency which routinely made decisions regarding private companies should not attend an extravagant “gala” when the sponsor had matters pending before the Commission).* The appearance of impropriety can vary depending on such matters as whether the evening’s event consists of a reception of juice and cookies as compared to cocktails, dinner, etc.; whether the sponsor has an evaluation pending; etc. These observations were offered as guidance pursuant to 29 *Del. C. § 5809(10)*, and the Commission made no specific ruling because there were no “particular facts” on which to base an opinion, as required by 29 *Del. C. § 5807(c)*.

Conclusion

Whether the agency should have the costs of tickets/admissions paid by State reimbursement or have private enterprises, who receive grants from the agency, provide tickets/admissions at no cost to the State is a policy decision for the agency. If it elects the latter option, the acceptance of tickets/admission for non-evaluators raises, as a minimum, an appearance of impropriety. Moreover, acceptance of tickets/admission to events, such as cocktail parties, dinners, etc., may raise an appearance of impropriety depending on the factual circumstances. (*Commission Op. No. 97-33*).

Does a One-time Donation of Greeting Cards Violate the Gift Provision?

A private enterprise offered to give greeting cards to a State agency to include in a package the agency gives to anyone in Delaware who has a baby. The card would congratulate them on the event and include a reminder to inoculate their child. The company had given these cards to at least 26 states which included them in new-born packages. The private enterprise had no dealings with any State agency, other than this one-time offer.

The Code restricts the acceptance of gifts or anything of monetary value if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside of official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C. § 5806(b)*.

The Commission found that no State official or employee would receive any benefit from the decision, except to the extent that such official or employee, like any member of the public, might receive the card if they are the parent of a newborn. The Commission did note that the company would receive some advertising benefit because its logo appeared on the back of the card and on a growth chart included with the card. However, it found that under these particular facts, such potential advertising benefit to the company paled in comparison to the benefit to the State and its citizens by adding strength to the State's immunization program. Moreover, the company had no other dealings with the State so there was no potential for preferential treatment in other decisions. Also, no other companies had elected to participate in the program. Under the particular facts, the Commission found no violation of the gift restrictions. (*Commission Op. No. 97-29*).

JURISDICTION

Review of Local Government Financial Disclosure Ordinances

When a local government adopts a Code of Conduct, the Commission must review the local government's code to decide if it is at least as stringent as the State Code. *68 Del. Laws, c. 433 § 1*. The Commission was asked if it also must review local ordinances similar to the Financial Disclosure subchapter.

The Commission held that, "the Act requiring that local governments have their codes reviewed by this Commission clearly and specifically refers only to Code of Conduct legislation, which is Subchapter I of Chapter 58, Title 29. *See, 68 Del. Laws c. 433 § 1*. There is no reference to the subchapter on financial disclosure. Thus, any review by this Commission of local government codes would be limited to that government's code of conduct provisions. While local government codes of conduct would include provisions relating to financial disclosure similar to those in the State Code of Conduct, e.g., *29 Del. C. § 5806(d)*, in order to be as stringent as the State Code, it would be those provisions--not the annual reporting provisions--which this Commission would review and approve." (*Commission Op. No. 97-24*).

Review of Amendment to Local Government Code of Conduct

A local government sought to amend the Code of Conduct which it adopted in 1991. The Commission must review amendments to local government codes of conduct to insure they are at least as stringent as the State Code of Conduct. *68 Del. Laws, c. 433 § 1*. On reviewing the amendment, the Commission found it was not as stringent as the State Code because it did not apply to all employees, only to persons with duties that involved the exercise of discretion, while the State Code applies to all State employees.

Because local government codes need not be word-for-word the same as the State Code in order to be as stringent, the Commission then considered if the scope of the persons to whom the local government's code applied had such legal significance that the absence of including all employees would make the local

code less stringent than the State Code. While most State Code provisions factor in the decision making capability of the individual, there also are provisions that restrict certain conduct, regardless of whether the individual is acting in a ministerial or non-ministerial capacity. For example, the State Code restricts the disclosure and/or use of confidential information for personal gain or benefit. *See, 29 Del. C. § 5806(f) and (g)*. Even non-decision makers have access to confidential information, such as a clerk typist who types the information. Therefore, the Commission found that the scope of the persons to whom the Code applies has legal significance and, thus, concluded that the local code, by limiting its applicability to only those in non-ministerial positions, was not as stringent as the State Code.

It also noted that the local code lacked a post-employment provision and a restriction on improperly disclosing confidential information. The Commission noted that the local code should be amended to include such provisions. (*Commission Op. No. 97-24*).

Review of Local Government Code of Conduct

A City government submitted a Code of Conduct for its employees and officials for the Commission to review and determine if the local code was as stringent as the State Code. *See, 68 Del. Laws, c. 433 § 1*. The Commission approved the City's Code, except for three minor areas, which were more procedural than substantive, which needed to be more stringent. For example, the City needed to provide a time frame in which appeals could be filed. (*Commission Op. No. 97-37*).

Members of the General Assembly

A complaint was filed alleging that a General Assembly member had acted on matters where there was a conflict of interest. The Commission has no jurisdiction over General Assembly members as they are specifically excluded from the definitions of "State employee" and "State officer." *See, 29 Del. C. § 5804(11)(b) and (12)*. They also do not fall within the definition of "Honorary State Officials," who are appointed and who receive less than \$5,000 per year in compensation. *See, 29 Del. C. § 5804(13)*. Thus, they do not fall within the definitions of those persons to whom the Code of Conduct applies. Rather, such officials are subject to the Legislative Conflicts of Interest statute. *See, 29 Del. C. § 1001 et. seq.* Under that statute, the General Assembly has its own House and Senate Ethics Committees to deal with alleged ethical violations. (*Commission Op. No. 97-14*).

Activities Not Within the Scope of the Statute

A complaint was filed alleging that several State employees improperly engaged in activities during State work hours for which they should not have received State pay. It was further alleged that these individuals should not have worn a State uniform during the activities. The Commission held that it did not have jurisdiction to decide pay issues or uniform issues, as these issues were essentially personnel matters

because personnel laws and rules establish the circumstances under which uniforms may be worn and under which State employees are paid. It was suggested that the complainant may wish to pursue this matter with the agency's personnel section or with the State Personnel Office. (*Commission Op. No. 97-28*).

Scope of the Code of Conduct

The Commission was asked if the Code of Conduct was limited to only pecuniary or financial interests. Holding that the Code of Conduct was not limited to only financial interests, the Commission first noted specific examples of Code provisions that did not, by their language, apply only to financial interests. For example, the State Code restrictions on confidential information not only prohibit the use of such information for financial gain, but any personal gain or benefit and they also prohibit improper disclosure. *See, 29 Del. C. § 5806(f) and (g); See, also, 29 Del. C. § 5806(e) (prohibiting the use of public office to secure unwarranted privileges, private advancement or gain)*. Thus, the plain language of those statutory provisions demonstrate that the restrictions are broader than pecuniary interests.

Further, where the General Assembly intended for the prohibition to refer only to financial interest, it specifically used that term, which has a very precise statutory definition. *See, e.g., 29 Del. C. § 5806(c) (no State employee, officer or honorary official shall acquire a "financial interest...")*; *See, 29 Del. C. § 5804(5) (definition of "financial interest")*. In other instances it makes no reference to financial interests. *See, e.g., 29 Del. C. § 5806(b) (no State employee, officer or honorary official shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest) (emphasis added)*. If the General Assembly had meant for all of the restrictions to be limited to financial interests, it clearly could have done so. Moreover, to read the Code as limited to pecuniary or financial interests would ignore the broader statutory language, making broader terms such as "any interest" have no meaning. The rules of statutory construction require that all words and phrases be given meaning. *Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)*.

Also, it is clear under the Delaware common law that conflicts of interests for public officials may arise as a result of more than just pecuniary interests. *See, e.g., Shellburne, Inc. v. Roberts, Del. Super., 238 A.2d 331 (1967) (complaint alleged "personal interest," "conflict of interest," and "use of public office in the furtherance of such personal interest or conflict of interest," because public official allegedly based his decision on other than the merits because he was motivated by: (1) his desire to assist his coreligionists; (2) the close attorney-client and business relationship between the official and the attorney for the civic association which wanted rezoning; and (3) his colleague whose wife was a member of the Church)*. The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." *See, 29 Del. C. § 5805(a)(1)*. The Courts' concern is that decisions be based on a "fair and unadulterated examination of the merits" and that "any conduct giving the appearance that impropriety is involved therein

should be studiously avoided.” *See, Kulesza v. Star Services Inc., Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993)*(expressing the court’s concern for any deviation from the administrative process as provided by law or participation in *ex parte* communications between one party and those charged with reviewing the merits for the State agency). Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253 (1997)*. Thus, the State Code is basically a codification of the common law restrictions which Delaware Courts have recognized as encompassing more than pecuniary interests. (*Commission Op. Nos. 97-24 and 97-30*).

Post-Employment Restrictions in State Contracts

A State agency was contemplating putting a provision in its contracts concerning post-employment to alert contractors to the application of this provision to former State employees. The Commission advised the agency it had no authority to advise it on general contract issues. (*Commission Op. No. 97-08*).

Running for Elective Office

See also, Commission Op. No. 97-09, supra, p. 9, “Running for Elective Office.” Holding that Commission has no authority to interpret State Merit Rules or federal “Hatch Act” restrictions.

Expenditure of State Funds

See also, Commission Op. No. 97-33, supra, p. 23, “Ticket to Events.” Commission held that it has no authority to review expenditures of State funds.

POST-EMPLOYMENT

Private Contract with Former Division

A few months after a State employee retired, the agency asked if it could privately contract with him to work on certain projects. The projects in the contract were projects from the Division from which he retired. The agency said if the employment would violate the post-employment provision that it wished to have a waiver granted.

Former State employees may not, for two years after terminating employment, represent or assist a private enterprise on matters involving the State where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible. *29 Del. C. § 5805(d)*. Although the individual did not work specifically on the projects in the contract while assigned to the Division, for the reasons given below, the Commission concluded that in reviewing his responsibilities in the Division and comparing that with the post

employment contract responsibilities proposed for the same Division, the contract would be on matters for which he was directly and materially responsible while employed by the State.

In his most recent State position, he had oversight responsibility for the Division's projects. He was responsible for overseeing basically the last step before a project was advertised. That authority required him to review each project using the principles and practices of his profession to decide not only alternate ways to insure cost efficiency, but also to question, because of his past experience as a designer of similar projects in the same Division, the technical aspects of the project. He was also responsible for oversight of the Division employee who actually worked with the consultant to review the types of products used in design of the project.

Additionally, he was responsible for the "stewardship arrangement" on federally funded projects of the same nature. This entailed insuring that other sections involved in putting the total project together coordinated on the various project elements. He also oversaw the function where the technical project elements came together from the various sections with the financial arrangement. Thus, he administered the project contracts, supervising administrative, professional, technical, and support staff through his oversight responsibilities. As indicated in his job description, that position has "full technical responsibility for interpreting, organizing, executing, and coordinating assignments, and for planning and developing . . . projects. A significant aspect of this work involves coordination of the administrative and technical factors related to multiple programs."

His responsibilities, if awarded the proposed contract, would require him to coordinate with other Department sections in putting together the various elements of the contracts such as administering and drafting the contracts for final advertising and award. Such work is essentially the same as the responsibilities he performed for the Division while employed by the State.

The agency said it was interested in contracting with the former employee because he is "very familiar with the process..." and "he knows how to take a project from the start and come up with a completed ... design." Regarding his responsibilities for the Division, it was stated that "what he did was make sure all these things come together." Thus, it was his ability to manage a project that made him an attractive candidate.

The Commission recognized that while employed by the Division he had less "hands on" input but more oversight in the process because he possessed the requisite design skills. The fact that he would be expected to do more "hands on" input under the proposed contract was of little significance because his duties would still involve matters over which he was directly and materially responsible while employed by the State.

Accordingly, the Commission found a post employment contract with the former employee to perform duties for which he was directly and materially responsible only about several months previously would violate the post employment provision.

Regarding the agency's request for a waiver, waivers may be granted if the literal application of the statute

is not necessary to achieve the public purpose of the statute or would result in an undue hardship to the employee or agency. 29 Del. C. § 5807(a).

The post employment restriction is designed to prevent former employees from getting a “leg up” on other private enterprises that deal with the State. *Commission Op. No. 95-11*. In discussing the federal post employment provision similar to Delaware’s, Congress noted: like other conflict of interest statutes, post employment provisions are an attempt to insure public confidence in the integrity of the government. “*Ethics in Government Act*,” *Senate Report No. 95-170*, p. 32. It noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id.* The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post employment laws set a “cooling off period” in areas where the ex-employee dealt with the agency on certain matters. *Id.*

Similarly, the Delaware Legislature sought to insure public confidence in the integrity of government. 29 Del. C. § 5802. It then set a two-year “cooling off period” in areas where the former employee was “directly and materially responsible.” 29 Del. C. § 5805(d). This limits the actual or perceived unfair advantage in subsequent dealings with a department or agency.

While the agency admitted that there were other consultants who could perform the work, it wanted a waiver because it could hire him for less than other outside consultants because the agency would have to pay others a price which would include charges for overhead and profit. The agency said that while it could negotiate with other consultants on the amount charged for profit, it could not do so as to overhead. A contract with the former employee would not contain a charge for overhead because the agency intended to make its staff available to him. Thus, the State would pay those employees’ wages and benefits to work on the contract with the former employee.

Additionally, the agency said he was familiar with the process and, therefore, it would take less time for him to put together a project.

As noted by a Commissioner at the hearing, nothing in the Code creates a waiver only on the basis that it would be cheaper to hire a former employee. While the Commission finds the agency’s concern over the cost to be commendable, it notes that every former employee can bring continuity and familiarity to performing a contract on the same duties which were performed as a State employee. This would arguably always create a cost savings to the State. If a waiver were granted only on that basis, the former employee would always have the advantage against competitors.

Further, “undue” hardship means “more than required” or is “excessive.” *See, Merriam Webster’s Collegiate Dictionary*, p. 1290(10th ed. 1992); *Black’s Law Dictionary*, p. 1370 (5th ed. 1989). The very hardship imposed by the statute is that any cost savings created by the former employee’s familiarity with the work is lost. Logically, the “cost savings” argument could be used any time a former employee is hired to perform the same function for which such employee was directly and materially responsible. If

such a hardship were considered “undue,” there would never be a “cooling off” period.

Thus, to effect the public purpose of precluding an actual or perceived unfair advantage and to give meaning to “undue hardship,” the Commission would not grant a waiver merely on the basis that there would arguably be a cost savings if the former employee were the contractor. As noted before, the statutory purpose is to preclude former employees from capitalizing on their past employment. Here, the agency seeks to contract with a former employee who left employment with the same Division only a few months ago, on a contract which would run for more than a year. At a minimum, it could appear to the public that he had an advantage over other contractors based on his prior responsibilities with the agency, and could be capitalizing on his past relationship with the agency. (*Commission Op. No. 97-18*).

Application to Persons Who Do Not Hold a “Permanent” Position

A State agency was considering hiring an individual to fill a position that was not funded as a permanent position. It asked about the applicability of the post employment restrictions to the individual should she be hired. It said she would not be “the typical employee” because she is leaving private employment and may be asked to leave State employment through no fault of her own. It indicated that it believed the limit that may be imposed on others may not be fairly applied to her situation. The Commission noted the concern about these matters; however, the statute mandates that the Commission base its decisions on a particular fact situation. *See, 29 Del. C. § 5807(c)*. As she had not even begun work for the State, there were no facts to apply at this juncture.

The Commission said that the individual was obviously aware of the post-employment restriction and the Commission assumed she would factor that into her decision to accept State employment.

The Commission may provide assistance to an agency in understanding the Code. *See, 29 Del. C. § 5809(10)*. It pointed out the following: No specific exemption or distinction appears in the post employment restriction based on whether the employee is temporary, does not hold a permanent position, etc. Realistically, a number of people work for the State who have no permanent position: casual, seasonal employees who are hired for limited periods of time; non-Merit employees, who can be dismissed at any time with no “cause” required for termination; and Merit position employees who have a probationary period and can be terminated during that period under the applicable Merit Rules. Although a two-year restriction applies to post-employment activities, the Commission has previously noted that the General Assembly limited the restriction to “discrete and isolated transactions” that trigger the provision so people may move from private employment to public employment and back again. *Commission Op. 96-75*.

The first consideration is whether the former employee would represent or assist a private enterprise on matters involving the State. Further, even if she accepted employment with a private enterprise where her duties call for her to represent or assist in matters involving the State, the post employment restriction is limited to situations where the individual: (1) gave an opinion; (2) conducted an investigation; or (3) was directly and materially responsible for the matter while employed by the State. *29 Del. C. § 5805(d)*.

Thus, the effect of the post employment provision depends on what activities she engages in while employed by the State, and whether upon exiting State employment she would be assisting any private enterprise on matters involving the State in the three areas listed above. (*Commission Op. No. 97-21*).

Computer Services

A former State employee asked if it would violate the post-employment restrictions if he entered a short-term contract to provide computer services to input data provided by an agency for its fiscal year budget. He also asked if in the future he may work for a firm which might bid on other State contracts.

The post-employment law places a two year restriction on representing or assisting a private enterprise before the State on matters in which a former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible while employed by the State. It also precludes the disclosure or use for personal gain of confidential information gained while employed by the State. 29 *Del. C.* § 5805(d).

Here, the former employee was never employed by the agency with which he sought to contract to provide computer services. While employed by the State, he worked with computers and provided information to his agency regarding its computer needs. Some of the agency's needs were provided by the agency with which he seeks to contract. However, he was not involved in any manner in providing information for his former agency's budget that would be part of the information he would input under the contract. He also was in no manner responsible for the contract which he now seeks. In performing the contract obligations, he would not have any decision making authority over what numbers are input, rather he would perform merely the technical function of inputting data. He would not input any data regarding his former agency.

Regarding the possibility that he may, in the future, wish to work with a firm which may bid on other State contracts, any decision on that matter would be premature as apparently the State contract in which such firm may be interested has not yet been published for bid. (*Commission Op. No. 97-27*).

Contracting with Former Agency - Waiver Granted

NOTE: When a waiver is granted, the proceedings before the Commission are no longer treated as confidential matters. 29 Del. C. § 5807(a).

Lois Studte, asked if accepting a post-employment contract with her former State employer, Delaware Technical & Community College (Del. Tech.), would violate the post-employment provision, and if so whether a waiver would be granted.

The Code of Conduct prohibits State employees from representing or assisting a private enterprise on matters involving the State for two years after leaving State employment if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. Former employees also are prohibited from disclosing or otherwise using confidential information gained by reason of their public position for personal gain or benefit. 29 Del. C. § 5805(d).

In Ms. Studte's case, her former agency wished to retain her immediately after retirement to develop an associate degree program for paramedics. While employed by Del. Tech, she was an advisor to the paramedic program at the Owens Campus and also represented Del. Tech in discussions regarding developing the associate degree program. Also, she worked with accreditation standards and will be involved with accreditation standards for the paramedics degree program. Her employment at Del. Tech. involved more than these duties, as she indicated that the paramedic program was only a "sliver" of her responsibilities. However, it is clear from these duties that, as the Del. Tech. representative at the discussions concerning the paramedic associate degree program, she gave an opinion on the very program on which she would now be working. Moreover, she was directly and materially responsible for the existing paramedic program at the Owens Campus since she served as an advisor to that program. The Commission concluded that the proposed contract would violate the post employment provision.

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

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

The public purpose of the Code of Conduct is to insure public confidence in the integrity of its government and that public employees avoid conduct in violation of the public trust or conduct which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1).

In the context of post employment, it has been noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. "*Ethics in Government Act,*" *United States Senate Report No. 95-170, p. 32.* The main reason for public concern is that former employees may use information, influence and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id. at 33.* Reflecting that concern, post employment laws set a "cooling off period" in areas where the ex-employee dealt with the agency on certain matters. *Id.* In Delaware, that "cooling off period" is two years in the three areas described above. Here, while employed by Del Tech, she was specifically involved in putting together the very program for which she wishes to contract. The public could suspect that she used her public position involving access to information on the program, and access to colleagues, etc., to create a future employment opportunity for herself, giving her an unfair advantage over other possible competitors. In fact, there were discussions between her, the Cabinet

Secretary of Health and Social Services and the President of Del Tech beginning more than a year ago in which her willingness to contract with Del. Tech. upon retirement was sought. This is not to say that she, in fact, used her public position to capitalize, but the public purpose is to “avoid any justifiable impression” that the public trust was violated. Thus, the literal application of the statute is necessary to achieve the public purpose, and therefore would not be a basis for a waiver.

(2) *Undue Hardship*

As noted above, however, a waiver may be granted if there is an undue hardship for the agency. “Undue hardship,” means “more than required” or is “excessive.” *Commission Op. No. 97-18 (citing Merriam Webster’s Collegiate Dictionary, p. 1290 (10th ed. 1992))*. Part of the basis for the request was: her 26 years of experience at the college; she knows the policies, procedures and guidelines of the College; she has extensive experience with health accreditation; and she is very knowledgeable about the Delaware health care system. As to the paramedic program, she indicated that she was “uniquely qualified” because she worked with all of the critical organizations involved with this program during the past year and can coordinate between Public Health and Del Tech.

Basically, she was saying that she knew the players and knew the system. The Commission has previously noted that what any former employee brings to the table in a post employment situation is that they have an understanding of the policies, procedures, etc., and can arguably do the work faster and cheaper as a result of their prior work in the same area. *Commission Op. No. 97-18*. However, the very hardship imposed by the statute is that any costs savings created by the former employee’s familiarity with the work is lost. Logically, that argument could be used any time a former employee is hired to perform the same function for which such employee was directly and materially responsible. *Id.* If those facts alone constituted “an undue hardship,” and thus a basis for a waiver, there would never be a “cooling off period.” *Id.*

The other “hardship” basis was that the agency said there were significant time constraints in developing the program and that “finding another individual or firm with the requisite history and qualifications to develop and implement this program would present an undue hardship and could significantly delay the implementation of the educational paramedic program.” To get the paramedic association program implemented and running by August 1999, the program development had to begin immediately. The agency has looked internally for someone to perform the tasks, but the two employees who have an allied health background are not as familiar with the paramedic needs or some of the other related issues and the Dean of Academic Affairs thinks if one of those two individuals were used it could delay program implementation anywhere from six months to as much as a year. The agency has not attempted to advertise the position to persons outside the agency. According to Mark Brainard, Del. Tech’s Assistant Vice President, Personnel and Legal Affairs, the agency just does not know if persons outside the agency would have the experience she has in matters such as curriculum development, course development, admissions standards, accreditation issues which are necessary for a paramedic program and who have familiarity with the educational side. Even so, training or finding such an individual externally or internally would cause a serious delay in meeting the deadline for starting the program.

Because “time is of the essence” in getting this new degree program underway, it would be an undue

hardship on the agency not to grant a waiver in these circumstances. However, such waiver is conditioned upon: (1) work limited to that “sliver” of responsibilities related to developing the particular program; (2) the contract is for one year; and (3) as stated at the Commission meeting, Ms. Studte will take a 30% reduction in pay and will take no pay for the meetings in the spring.

While granting a waiver, we strongly encourage the agency to be cognizant of the post-employment provision, and where it has advance knowledge that an individual is planning to leave State employment, begin looking in a timely manner for a replacement. (*Commission Op. No. 97-41*).

Facilitating a Retreat - Waiver Granted

A State agency asked if hiring a former employee, Albert Edwards, III, to serve as a facilitator at a two-day retreat on Team Building, in July, would violate the post-employment provision. While employed by the State, he performed the same duties. He left State employment in January 1997.

The Code prohibits former employees from representing or assisting a private enterprise on matters before the State where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible for a 2-year period. 29 *Del. C.* § 5805(d). The Commission has held that private contracts with the State constitute a “private enterprise.” *Commission Op. No. 94-10*. While employed by the State, he facilitated this same type of training. Thus, he would be performing the same duties for which he was “directly and materially responsible.” As the two-year period has not expired, such activity would violate the post-employment provision.

The agency asked for a waiver if the activity would violate the Code. Waivers may be granted if the literal application of the statute is not necessary to achieve the public purpose of the statute or would result in an undue hardship to the employee or agency. 29 *Del. C.* § 5807(a).

The post employment provision is designed to prevent former employees from getting a “leg up” on other private enterprises that deal with the State. *Commission Op. No. 95-11*. In discussing the federal post-employment provision similar to Delaware’s, Congress noted: Like other conflict of interest statutes, post-employment provisions are an attempt to insure public confidence in the integrity of government. “*Ethics in Government Act*,” *Senate Report No. 95-170*, p. 32. It noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. *Id.* The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post-employment laws set a “cooling off period” in areas where the ex-employee dealt with the agency on certain matters. *Id.*

Similarly, the Delaware legislature sought to insure public confidence in the integrity of government. 29 *Del. C.* § 5802. It then set a 2-year “cooling off period” in areas where the former employee was “directly and materially responsible.” 29 *Del. C.* § 5805(d). This limits the actual or perceived unfair advantage in

subsequent dealings with a department or agency, while minimizing the burden on individuals who undertake government service.

Here, the written request asked for a waiver on the basis that: “While other individuals could be hired to provide this service, Mr. Edwards’ familiarity with the group and the program would reduce the advance planning time required of the facilitator. This, coupled with his residing close to the retreat site, should result in cost-savings for the state.”

Every former employee can presumably bring continuity and familiarity to performing the same job, which arguably would always effect a cost savings. If a waiver were granted only on that basis, the

former employee would always have the advantage against competitors.

Further, “undue” hardship means “more than required” or is “excessive.” *See, Merriam Webster’s Collegiate Dictionary, p. 1290 (10th ed. 1993); Black’s Law Dictionary, p. 1370 (5th ed. 1989).* The very hardship imposed by the statute is that any cost savings created by the former employee’s familiarity with the work, which also results in continuity, is lost. Logically, the “cost-savings” argument could be used anytime a former employee is hired to perform the same function for which such employee was directly and materially responsible. If such a hardship were considered “undue,” there would never be a “cooling off” period.

Thus, to effect the public purpose of precluding an actual or perceived unfair advantage and to give meaning to “undue hardship,” the Commission has examined other factors brought to its attention at the hearing by Ms. Nancy Pearsall, Staff Development/Project Management. She agreed that there were others available who would like to perform this work. However, she stated that: (1) there are no internal resources or outside resources which could adequately provide the services that Mr. Edwards can provide in the time frame given; (2) it would take her a lot of time to bring someone else up to his level; and (3) his vacant position has been announced but not filled and it would require a lot of time to prepare that individual even when hired.

Because of the difficulties in finding an adequately trained facilitator and the difficulty in training someone to his level in time for this one retreat, combined with other facts such as the limited employment period, the Commission grants a waiver for the agency to contract with him for the two-day retreat. This waiver is limited to that two-day period and does not include any follow-up work. (*Commission Op. No. 97-09*).