

# STATE PUBLIC INTEGRITY COMMISSION

## Synopses of 1998 Ethics Opinions

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## SYNOPSIS OF 1998 ETHICS OPINIONS

### JURISDICTION

#### ***Allegations of Violations of Constitution, Federal Laws, State Criminal Laws***

A complaint was filed against police officers and former police officers of a local government, current and former attorneys' and deputy attorneys' general, public defenders, and judges. The Commission held that it had no jurisdiction over: (1) certain persons named in the complaint; and (2) the subject matter of the complaint. As the Commission lacked jurisdiction, it dismissed the complaint pursuant to 29 *Del. C.* § 5809(3).

#### **I. FACTS**

The complaint arose from circumstances before, during, and after complainant's plea agreement to felony charges for which he had been incarcerated for more than 10 years. He had challenged those legal proceedings in the Delaware Superior and Supreme Courts, the United States District Court, Court of Appeals, and the United States Supreme Court. Those challenges alleged: insufficient evidence to convict; perjury; coerced confession; ineffective assistance of counsel for failing to file a motion, refusing to put DNA evidence into evidence, refusing to call certain witnesses; conspiracy by the Judge, defense attorney, prosecutor and an unnamed lab technician to manufacture evidence; and denial of the right to a speedy trial. In a separate proceeding, he alleged ineffective assistance of counsel for failing to present motions to suppress a confession and failing to present certain evidence.

In the complaint filed with this Commission, he alleged that: (1) all defendants violated his Constitutional rights under the 4th, 5th, 6th, and 14th amendments; (2) all defendants violated specific chapters of federal law; (3) all defendants violated specific State criminal laws; (4) all defendant attorneys violated certain identified rules of the Lawyers' Rules of Professional Conduct; and (5) all defendant judges violated specific canons of the Judges' Code of Conduct.

Essentially, he alleged: improper arrest; illegal search and seizure; perjury; ineffective assistance of counsel; coercion to enter plea agreement; tampering with and/or creating false evidence; racial profiling and discrimination; improper denial of motions; invasion of attorney-client relationship; violation of Criminal Court rules; prosecutorial misconduct; lack of probable cause; failure to hold evidentiary hearings; conspiracy, etc.

The complaint did not allege any violation of any State Code of Conduct provisions.

#### **II. LEGAL ISSUES**

Generally, administrative agencies have only such jurisdiction as is conferred by statute. *Commission Op. No. 95-20*. Thus, this Commission's jurisdiction is limited to administering and

implementing only the provisions of title 29, Chapter 58. *Id.*

**(a) Personal Jurisdiction**

Members of the judiciary are specifically exempted from the State Code of Conduct, as their conduct is governed by the Judicial Code of Conduct. *Commission Op. No. 96-38*. Thus, the Commission has no jurisdiction over such persons. *Id.* The State Code of Conduct also does not apply to local governments which adopt their own Code of Conduct. *68 Del. Laws c. 433 § 1*. As the local government which employed the police had adopted its own Code of Conduct, this Commission had no personal jurisdiction over its employees. *Commission Op. Nos. 96-11 & 96-45*.

**(b) Subject Matter Jurisdiction**

The complaint alleged violations of: (1) the Constitution; (2) federal laws; (3) title 11, Delaware Code; (4) the Lawyers' Rules of Professional Conduct; (5) the Judges' Code of Conduct; and (5) Criminal Rules of Procedure. The Commission has held that it lacks jurisdiction over the same types of subject matter alleged in this complaint. *Commission Op. No. 91-16*(no jurisdiction over alleged racial discrimination); *Commission Op. No. 94-01* (no jurisdiction where it was alleged that a State attorney had not pursued criminal case matters; had not zealously represented a defendant; and had violated many Delaware Lawyers' Rules of Professional Conduct); *Commission Op. No. 94-02*(no jurisdiction over State attorney who allegedly provided ineffective assistance of counsel by refusing to file a motion related to case); *Commission Op. No. 94-03*(no jurisdiction where it was alleged that State attorney violated numerous Rules of Professional Conduct; failed to check crucial facts of case; and failed to file a motion to dismiss); *Commission Op. No. 94-08*(no jurisdiction where it was alleged that State prosecutor solicited misleading statements from witness at trial and State defense attorney did not use the right strategy and tactics); *Commission Op. No. 95-20*(no jurisdiction to interpret Rules of Professional Conduct); *Commission Op. No. 95-5*(no jurisdiction where it was alleged that complainant was deprived of Constitutional rights of due process and equal treatment under the law); *Commission Op. No. 96-10*(no jurisdiction over title 11 criminal code provisions); *Commission Op. Nos. 96-09 & 97-06*(no jurisdiction over Federal laws); *Commission Op. No. 96-38*(no jurisdiction over judges, prosecutors and local government where it was alleged that: witnesses perjured themselves; prosecutors improperly filed a motion to exclude certain evidence and had other evidence admitted which was allegedly altered; illegal search; judge refused to hold suppression hearing; no jurisdiction over procedural and evidentiary matters in prosecution for murder).

**III. CONCLUSION**

Pursuant to its authority to dismiss for failing to state a claim, the Commission dismissed the claims against the local police and the judges for lack of personal jurisdiction; and dismissed all claims for lack of subject matter jurisdiction. ***(Commission Op. No. 98-25)***.

**DISCLOSURE OF DEALINGS WITH GOVERNMENT**

***Local Government Officials Contracting with Their Government***

A local government asked how often and with what detail its officials must submit financial disclosures to comply with the "full" disclosure requirement when officials do business with their

government entity. Based on the following, the Commission concluded that the disclosures by the four local officials whose circumstances are discussed below, should file annually, unless situations arise where the Code of Conduct cannot be followed. In that case, they should immediately notify the Commission so it can consider whether to grant a waiver. Also, their disclosures should not be prospective; should have more information; and should be personally completed and signed by the local officials, to comply with “full disclosure.”

## **I. Applicable Law**

As the local government had not adopted its own Code of Conduct, its employees and officials are subject to the State Code of Conduct. *68 Del. Laws. c. 433 § 1*. Thus, they must file “a written statement fully disclosing” financial interests in a private enterprise subject to the regulation of, or doing business with, the local government agencies. *29 Del. C. § 5806(d)*. The disclosure shall be confidential and shall not be released, except as necessary to enforce the Code. *Id.* The filing shall be a condition of commencing and continuing employment. *Id.*

## **II. Frequency of Disclosure and “Full Disclosure”**

The Code does not say how often disclosures must be filed, so the Commission must base its decision on a “particular fact situation.” *29 Del. C. § 5807(c)*. Thus, decisions on how often individuals must file must encompass the facts of that person’s business dealings with their government entity, which can only be known through disclosure.

As the statute does not define “full” disclosure, the plain and ordinary meaning is used, consistent with the manifest intent of the General Assembly. *1 Del. C. § 303, 301*. “Full” implies the inclusion of everything that is wanted or required. *Merriam Webster’s Collegiate Dictionary, p. 471 (10th ed. 1989)*. In the context of the General Assembly’s intent, “full” disclosure would include everything needed for the Commission to decide if the expressed intent of the General Assembly is achieved. That intent is for government employees/officers to “avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.” *29 Del. C. § 5802(1) and § 5806(a)*. Where government officials seek contracts with their governmental entity, the concern noted by Delaware Courts is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” *W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748, 752 (1971)*.

When the General Assembly enacted the Code of Conduct, it said that government employees and officials should not act in an official capacity on matters where the employee or official has a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independent judgment, and should avoid even the appearance of impropriety. *29 Del. C. § 5811(2); 29 Del. C. § 5805(a); 29 Del. C. § 5806(a)*. To implement that purpose, the General Assembly adopted specific restrictions on conduct when the individual has a financial interest. *See, e.g., 29 Del. C. § 5805(a)(cannot review or dispose of matters if there is a personal or private interest (including financial interests) which tends to impair independent judgment); 29 Del. C. § 5805(b)(cannot represent or assist private enterprise before agency associated with by employment or appointment); 29 Del. C. § 5805(c)(cannot bid on government contracts of more than \$2,000 without public notice and bidding); 29 Del. C. § 5806(b) (cannot have any interest*

*in a private enterprise in substantial conflict with the proper performance of duties in the public interest).*

While restricting official conduct where financial interests are involved, the General Assembly also said it is: “necessary and desirable that citizens be encouraged to assume public office and employment, and that therefore, the activities of officers and employees should not be unduly circumscribed.” 29 *Del. C. § 5802(3)*. Thus, to encourage citizens to assume public office, the General Assembly allows government officials to have business dealings with government agencies (assuming no conflict), but requires full disclosure of those dealings. That disclosure requirement should not be read as imposing a penalty on citizens who assume public office. Rather, it is a way to balance public concerns of alleged favoritism, undue influence, conflict and the like, without “unduly circumscribing” the activities of public officials.

Thus, “full disclosure” requires sufficient details for the Commission to decide if the official complied with the Code restrictions on official conduct where a financial interest is involved. Logically, common details are needed in all disclosures: (1) individual’s name and official capacity; (2) the financial interest (e.g., contract, grant-in-aid, etc.); (3) name of private enterprise; (4) contract amount and duration; (5) agency issuing the contract, etc. Most important are details which permit the Commission to decide if there is compliance with the Code. For example, if the contract was less than \$2,000 was there an arms’ length transaction? If more than \$2,000 was there public notice and bidding? Did the official avoid reviewing or disposing of matters where there was a financial interest? Did the official avoid representing or assisting the private enterprise before his own agency, etc?

### **III. Applying the Law to four Officials who contracted with their local government**

Regarding the contracts with these officials, the written disclosures did not appear to be “full disclosure” for a number of reasons: (1) no indication of the position these officials hold with their local government; (2) no indication of the amount of each contract; (3) no indication of the actual number of contracts to which the information refers; (4) no indication of the duration of each contract, etc. More importantly, there was no information to aid the Commission in deciding if these individuals complied with the Code. That is because the documents submitted were primarily **prospective**, reflecting no specific contract information; only what they expected would occur if a contract opportunity arose. Because “full disclosure” requires the information needed to decide if the individual has complied with the Code, “full disclosure” cannot occur when the information is merely speculative.

In later discussions with the local government’s representative, additional information was provided that was not in the written statements. That information is used to illustrate what to include in disclosures.

- !** **Arms’ Length Negotiations** -- Arms’ length transactions are those negotiated by unrelated parties, each acting in his or her own self-interest; which form the basis for a fair market value determination. *Commission Op. No. 97-17*. To test for “arms’ 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. *Id.* (citing 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 local government had instructed its agencies to obtain prices from several sources, other than the public official, for small purchases of \$200-\$300 or more. This aids in judging the fairness of the transaction, but price “is not the exclusive test by which a vendor is chosen.” Heller, 280 A.2d at 751 (upholding DNREC decision not to contract with appointee to its Fish and Wildlife Council to avoid allegations of favoritism and undue influence although he was lowest bidder). Thus, the disclosure should also include details on:*

- ! **Representing or Assisting a Private Enterprise before the agency by which employed** -- This restriction aids in insuring that officials do not use their influence within their own agency to affect the decisions of their colleagues or employees. It was clear that one local official did not provide services from his private enterprise to his own agency. The remaining officials had included only prospective, speculative information. Prospective, speculative disclosure statements do not (and could not) provide details on whether the officials who contracted with their local government had observed this restriction.
- ! **Reviewing or Disposing of Matters in Which there is a Personal or Private Interest** -- This restriction is to prevent “self-dealing.” Prospective, speculative disclosures do not (and could not) address this issue.
- ! **No contracts of \$2,000 or more unless there is Public Notice and Bidding** -- This openness in government contracts reduces suspicions of favoritism or undue influence. Prospective, speculative disclosures do not (and could not) indicate if contracts with these individuals were greater than \$2,000 and, if so, whether the public notice and bidding requirement was met.
- ! **Engaging in Conduct which will raise a suspicion among the public that the public interest is being violated** -- This is basically an appearance of impropriety test. Substantial information was provided at the Commission’s meeting that was not in the disclosure statements which aids in addressing this issue.

First, the total contracts/purchases from one official’s firm were: \$277 in 1996; \$709 in 1997; and \$64 in 1998. The totals reflect basically *de minimis* purchases. When government employees receive things of *de minimis* value, the likelihood of the perception that they are turning their public position into a private advantage is diminished. *Commission Op. No. 97-40*. Also, the local government did business with this company before the individual became a government official.

A second official, during that same time, received: \$694 (1996); \$6,000 (1997); and \$640 (1998). The 1997 jump over usually *de minimis* amounts was due to a special project. Also, during that time, the local government did business with other providers of the same type of services in the amounts of: \$29, 595 (1996); approximately \$25,000 (1997); and \$16,000 (1998). Thus, it did not appear that the government’s purchases of these services favored the official over competitors.

A third official, had few, if any, competitors for the type of services his firm provided. He received

\$6,346 (1996); \$31,000 (1997); and \$530 (1998). The government agency which used his services tried to use other companies but could not find another local company able to do this type of work. When it used an out of state firm a number of years ago, the local government had to pay an employee for a day to drive there and wait for the work to be done. Also, there was usually a wait to even get the work scheduled. Conversely, the government official recognized the local government's need to get its equipment operating as soon as possible and made the government's request a high priority. These facts showed a hardship in obtaining other contractors, and demonstrated that the contracts did not flow to him out of preferential treatment. The 1997 jump was because of a one time special project. This contract was entered before the individual became a government official, diminishing the possibility that it resulted because of his official position.

Regarding the fourth official, local government agencies made small purchases for different offices, with approximately 150 purchases each year. His firm received: \$18,000 (1996); \$22,000 (1997); and \$2,590 (1998). He had provided services to the local government for more than 20 years--long before he was elected. Again, this diminishes the possibility that he used his official position to obtain the contracts.

The local government had specific procedures for dealing with the companies owned by these officials to reduce any perception of preferential treatment. As previously noted, the agencies were to obtain prices from additional sources for purchases of \$200-\$300 when dealing with these companies. Where these companies are not involved, the agencies follow the local government's procurement law which requires prices from several sources if the purchase is for more than \$3,000. As noted, this aids in establishing arms' length negotiations and diminishes allegations of favoritism or undue influence. The dealings with these companies are reviewed not only by the agency's purchasing agent, but also the accounting department. The head of the government's finance section then reviews it before and provides a list to the local government's Council before payment. The information provided is public information. The review by a number of persons and the availability of the information to the public aids in eliminating suspicions that the officials are violating their public trust.<sup>1</sup>

#### **IV. Conclusion**

Based on all of these facts, the Commission concluded that these individuals should fully disclose their dealings with their local government annually if there is no substantive change in the procedures used to review the purchases and used to inform the public. However, if either the individual or the agency cannot comply with the Code, then the Commission must be notified immediately. For example, if an emergency arises leaving the agency without time to publicly notice and bid a contract of more than \$2,000 that is let to a public official, then it should be immediately disclosed so the Commission can decide if a waiver should be granted.

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<sup>1</sup>Each week the local government's administrator publicly reads an administrator's report at council meetings. The local government suggested that the amount purchased from these businesses could be included in that report. While we agree that this additional method sounds like a good, open way of doing things, we cannot micro-manage or dictate each procedure the local government wishes to implement.

As a final note, the Commission realized that the information regarding the local government's procedures and the background on the local government's dealings with these private enterprises is information which persons in accounting, finance or procurement may be more likely to have than the individual officers. While it was particularly helpful in addressing the appearance issues, we must emphasize that there is other information to be disclosed which is within the public officers' knowledge. Specifically, the critical issues of whether in their official capacity they reviewed or disposed of matters in which they have a financial interest or whether they represented or assisted their private enterprise before their own agency, are within their knowledge, as it is unlikely that the finance, accounting or procurement officials are present for every action they take. It is the individual's responsibility to comply with the Code and it is the individual's responsibility to file a full disclosure. Thus, the individual must insure that the disclosure includes enough information for the Commission to review those issues and the individual must personally sign the disclosure. **(Commission Op. No. 98-23).**

### ***State Employee Contracting with State Agency***

A State agency publicly noticed a bid request for a building for the State to lease. The lease would be for more than \$2,000. One responder to the competitive bidding process was a State employee. *See, 29 Del. C. § 5805(c) (where State employees or officers, or a private enterprise in which they have a financial interest, seek a State contract of more than \$2,000, there must be public notice and bidding).*

In the individual's official capacity, he did not review or dispose of this matter, nor did he represent or assist his private enterprise before the State agency by which he was employed. *See, 29 Del. C. § 5805(a) and § 5805(b)(1).*

The Commission found that his letter detailing these facts, and a copy of the leasing agreement in its entirety comported with the requirement for State employees to fully disclose any financial interest in a private enterprise which does business with the State, as required by *29 Del. C. § 5806(d).* **(Commission Op. No. 98-10).**

### ***Local Government Official Contracting with His Local Government***

A local government official who contracted with his local government asked: (1) if the information on his contracts constituted "full disclosure"; (2) how often he should file a "full disclosure"; and (3) if the Commission would grant waivers on two non-bid contracts which exceeded the \$2,000 threshold for public notice and bidding required when a government official contracts with their governmental entity.

A majority of the Commission, based on the following facts and law, concluded that: (1) the information provided constitutes full disclosure; (2) the official should file a "full disclosure" with the Commission once a year, unless the contracts would appear to violate the Code of Conduct, in which case an immediate disclosure must be filed; and (3) waivers are granted on the two contracts which exceeded the \$2,000 limit because of the identified emergencies.

At the Commission meeting, the Town Administrator and the official asked for guidance on how the

local government should proceed in the future in non-emergency and emergency situations. Thus, the Commission addressed these particular facts in detail to aid in providing guidance.

## **I. What Constitutes “Full Disclosure”**

The Commission addressed this issue at length in an opinion issued earlier this year. (*Commission Op. No. 98-23, supra at 7*). In that opinion, it noted that while all financial disclosure filings will have some common details, e.g., the official’s name, official capacity, contract amounts and duration, agency issuing the contract, etc., the most important details are those which permit the Commission to decide if there is compliance with the Code. Therefore, the Commission addressed the particular provisions of concern and its findings of fact as follows:

### **A. Restriction on Reviewing or Disposing of Matters Where there is a Personal or Private Interest that Tends to Impair Judgment--29 Del. C. § 5805(a)(2)(b).**

An official has an interest which tends to impair judgment if he participates in decisions where he has a financial interest in a private enterprise if the private enterprise would be affected to a lesser or greater extent than like enterprises. *29 Del. C. § 5805(a)(2)(b)*. From the correspondence and statements by the official, the local government’s attorney, and the local government’s administrator, the Commission understood that the official did not participate, in his government capacity, in decisions to contract with his firm. Also, he charged “at cost” prices. Thus, he did not review and dispose of the matter, and no facts indicate that his firm benefitted over like enterprises in these particular situations.

### **B. Restriction on Representing or Assisting a Private Enterprise - 29 Del. C. § 5805(b).**

Officials may not represent or assist a private enterprise before the agency by which they are associated by employment or appointment. When the local government’s backhoe broke, it was announced at a public meeting that another company estimated more than \$4,000 to fix it. The local official offered to send one of his company’s mechanics to look at the equipment. The Commission first noted that even when an official has a personal or private interest, the Code permits him to respond to questions on the pending matter. *29 Del. C. § 5805(a)(1)(a)*. However, if his action could be considered representing or assisting his firm before the Council, we grant a waiver based on an emergency, which we discuss below.

### **C. Arms’ Length Negotiations and Public Bidding Requirements--29 Del. C. § 5806(c).**

Although government officials may contract with their government, absent conflicts, the General Assembly provided that if: (1) the contract is less than \$2,000, it must reflect arms’ length negotiations; and (2) it is more than \$2,000, it must be publicly noticed and bid. *Id.*

#### **(1) The Contracts for less than \$2,000**

During an approximate three year period--May 26, 1995 to the present--the official had 10 contracts with the local government for less than \$2,000. In 1996, there were seven, primarily to repair water leaks; in 1997 there was one water leak repair; and in 1998 there were two--one for topsoil and one for a hydrant leak repair. The smallest amount was \$45; the highest amount was \$1,255. The total of contracts for less than \$2,000 was \$ 4,236.30.

As noted, a contract of less than \$2,000 must reflect arms' length negotiations. The Commission previously ruled that "arms' length negotiations" means that unrelated parties negotiate the contracts, each acting in his or her own self-interest, which forms the basis for a fair market value determination. *Commission Op. Nos. 98-23 & 97-17*. Delaware Courts, in ruling on arms' length negotiations, have noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id.* (citing *Oberly v. Kirby*, *Del. Super.*, 92 A.2d 445 (1991)). Here, the official charged only his firm's actual costs in fulfilling these contracts. No facts indicate that an alternative transaction would have resulted in an "at cost" price. Here, the former town administrator, now deceased, made the contract decisions. The Commission noted that the Council, on which the official serves, is responsible for hiring and firing the town administrator. However, the official who obtained the contracts was not solely responsible for the hiring decision. Moreover, these contracts were *de minimis* in value and were small in number. In interpreting the Code of Conduct, there is a legal presumption of honesty and integrity in public officials. *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, *Terry, J.* (June 30, 1995) *aff'd*, *Del. Supr.*, No. 304 (January 29, 1996). Nothing indicates that these small contracts were sufficient to cause the town administrator to use the official's firm to insure his own employment or that he selected the official's firm so it would experience a financial gain, especially as the work was performed at cost.

## **(2) Contracts of More than \$2,000**

In October 1995 and again in September 1997, the official's firm entered two contracts of more than \$2,000 with the local government. Specifically, on October 2, 1995, his firm repaired the local government's backhoe for \$2,426 and on September 23, 1997, he demolished a property for \$4,945.50. The two contracts were not publicly noticed and bid as required by the Code of Conduct. *See*, 29 *Del. C.* § 5805(c). The Town believed that the threshold was \$5,000 but now clearly understands that it is \$2,000. The Commission was asked to grant a waiver. Waivers may be granted if literal application of the provision is not necessary to serve the public purpose or there is an undue hardship on the government agency or the government official. 29 *Del. C.* § 5807(a).

### **(a) The Backhoe Contract**

The Town was in the middle of a job at the town dump when the backhoe broke. The Town Administrator publicly announced at a Town meeting that an estimate of \$4,000 had been given for the repair costs. The backhoe was bought in the 1960s for about \$6,000. The official said he would send his company's mechanic to look at the backhoe for an opinion on what was wrong. His firm repaired the backhoe for \$2,426 and the Town proceeded with the job the next day. Aside from substantial costs savings, the Town had only two Public Works employees. If a project is beyond them or their equipment, the Town must bring in outside help. The official's firm

is large, giving it more crews available to respond to emergency work; and is nearby, which provides a quick response time, as the nearest competitor with similar capacities is in Dover. Additionally, the backhoe is old; has some mechanical difficulties and problems; and according to the present town administrator, the Town usually has problems finding a mechanic. The official provided similar services to the Town for more than 15 years before he was elected to public office. He repaired the backhoe “at cost.”

Delaware Courts have said that the purpose of public bidding statutes is to open the procurement process to protect the public against the waste of government money, and to prevent such waste through favoritism, because the award of public works contracts has been suspect “because of alleged favoritism, undue influence, conflict and the like.” *W. Paynter Sharp & Son v. Heller*, Del. Ch. 280 A.2d 748, 752 (1071).

Here, nothing indicates the Town’s money was wasted as the use of the official’s firm resulted in substantial savings over the estimate given by another firm. However, Delaware Courts have noted that when a government official seeks a contract with his government, “price is not the exclusive test by which a vendor is selected.” *Commission Op. No. 98-23*(citing *Paynter, supra*). Here, the public’s interest in the award of contracts was addressed by the following: (1) although not publicly noticed and bid, the backhoe’s breakdown, the estimate by another firm, and the discussion to have the official’s mechanic look at the backhoe were openly discussed at a public meeting; (2) there was no indication of waste of government funds because his firm performed the work at a greatly reduced cost; (3) the possibility of alleged favoritism, undue influence, conflict and the like were diminished by: the open meeting discussion; the quote from another firm; the fact that the official did not vote on the matter; and his firm did not profit from the contract as the work was performed at cost. Thus, a waiver was granted. In doing so, the Commission noted that when a waiver is granted, the records are no longer confidential. *29 Del. C. § 5807(b)(4)*. This is additional insurance that the public has access to the details regarding the award of the contract, the reason for non-compliance with the public bidding provision, and the reason for the waiver.

#### **(b) The Demolition Contract**

The “Morgan Property” was dilapidated and abandoned for some time. The Town tried to get the property owner to demolish it, but he could not come up with the funds--an estimated \$25,000. After negotiations, the property was turned over to the Town so it could have the building demolished. When the paperwork was in progress, the adjacent property owner called to say the building was leaning into his adjacent building. Town employees went to shore up the building, but the Town was concerned about liability if the building fell into the adjoining business. It was decided to immediately demolish the building without obtaining bids. The official did not participate in the decision. As previously noted, the Town thought the public notice and bidding threshold was \$5,000. His firm demolished the house for \$4,945.50. Again, he charged the Town only the “at cost” price, and did not make any money from the Town. No facts indicate that the contract resulted from favoritism or undue influence or that the official used his public position to secure personal gain or unwarranted privileges. Thus, a waiver was granted.

#### **D. Restrictions on Conduct if it May Raise Public Suspicion that the**

## **Public Trust is Being Violated--29 Del. C. § 5806(a).**

Government officials covered by the Code of Conduct are to “endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government.” 29 Del. C. § 5806(a). This is basically an “appearance of impropriety” standard. First, the mere fact that a government official contracts with his government is not, in and of itself, sufficient to raise the appearance of impropriety because the General Assembly specifically provided that such officials may contract with their government, absent any conflict. Rather, it chose to restrict the official’s conduct to insure: (1) there is no self-dealing (e.g., restricted from reviewing and disposing of matters where there is a personal or private interest); (2) the official’s influence on his colleagues is avoided (e.g., restricted from representing or assisting the private enterprise before his own agency); (3) the public concerns regarding waste of government funds are protected (arms’ length negotiations and public notice and bidding); (4) officials do not secure contracts merely as a result of their public position (no self-dealing; no dealing with own agency; arms’ length negotiations and public notice and bidding; no use of public office for unwarranted privileges), etc. Thus, a decision on whether the conduct raises an appearance of impropriety, just like a decision on any other part of the Code, must be based on the particular facts. 29 Del. C. § 5807(c).

Here, the official is not prohibited by the statute from making a profit on contracts with the Town, absent any conflicts, but he chose not to profit by acting “at cost.” Additionally, most of the contracts were not for large amounts: \$45, \$85, \$120, \$130, \$269, \$316.80, \$719, \$1,092.50, \$1,255, \$2,426, and \$4,945.50. The number of contracts per year was also small: 1 in 1995; 7 in 1996; 2 in 1997 and 1 in 1998. Most of the contracts were related to water leaks, and the official’s firm was nearby, had sufficient crews to rapidly respond, and had expertise that the two Town employees lacked. On the larger contracts, which violated the notice and public bidding, the Town identified emergencies for using his firm and he performed both contracts “at cost.” His costs were less than other estimates. These two situations, where the Code was unintentionally violated, are now a matter of public record and a waiver is granted.

### **II. Frequency of Filing**

We have held that because the Code does not say how often disclosures of business dealings must be filed, we must base our decisions on a “particular fact situation.” *Commission Op. No. 98-23*. In that opinion, we looked to the number and amount of the contracts, the frequency of the contracts, and the circumstances surrounding the contracts and held that those officials should file on an annual basis. There might be other fact situations which would require a more frequent review in order to decide if the Code of Conduct is being followed.

Here, the official contracted with the Town once in 1995 and in 1998; twice in 1997; and seven times in 1996. Most of the contracts were *de minimis*. Based on those facts, the Commission concluded that a yearly filing was sufficient. It further noted that two of those contracts violated the \$2,000 bidding requirement, as the result of emergencies. It previously held that where an emergency precludes officials from complying with the Code, they must immediately notify the Commission of all facts and circumstances pertaining to that contract. *Commission Op. No. 98-23*. This ruling recognizes that the Commission usually only meets once a month and cannot be available

to rule immediately on every emergency. Accordingly, it again held that if an emergency arose and the contracting source is a government official and the Code cannot be complied with, a full disclosure must be immediately filed with the Commission.

### **III. Procedures in Non-Emergency and Emergency Situations**

During the Commission's meeting, it was asked for advice on how the Town should proceed if it contracts with a government official in a non-emergency or an emergency situation. The Commission has noted that regarding procurement procedures, "we cannot micro-manage or dictate each procedure that a local government wishes to implement." *Commission Op. No. 98-23*. However, this ruling on past transactions should aid the town in deciding how to handle similar issues in the future. The Commission also noted that it offers training on the Code, and the Commission's staff is available for questions. Also, the Commission has drafted a worksheet dealing with contracting with the government. (*See, Appendix A-1*).

### **IV. Conclusion**

For the foregoing reasons, a majority of the Commission concluded, based on the particular facts, that: (1) the information provided constituted "full disclosure;" (2) based on the particular facts, the official should file on an annual basis, unless his contract results from an emergency; and (3) waivers were granted for the two contracts where there was no public notice and bidding. (*Commission Op. No. 98-11*).

### ***Business Interests Regulated by the Government***

The Commission was asked if licensed professionals who are appointed to the boards which regulate their profession or occupation (Title 23 or Title 24 Boards) are required to file a full disclosure with this Commission. The Commission concluded that assuming the language may require such persons to file, it would grant a partial waiver for the following reasons.

Under the Code of Conduct, any honorary State official who has a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, shall file with the Commission a written statement fully disclosing the same. *29 Del. C. § 5806(d)*. The disclosure is confidential and the Commission shall not release the information, except as may be necessary for enforcing the Code of Conduct. *Id.*

First, no Title 23 or 24 board appointees presently do business with the State agency on which they serve as an appointee. If they did, it would pose a different factual situation and may require a different result. Thus, no waiver was granted as to that portion of the statute. If such situation should arise, they could request an opinion based on the specific facts.

The remaining portion of the statute required appointees, who are regulated by the Board to which they are appointed, to file a full disclosure with the Commission if they have a financial interest in a private enterprise regulated by their Board. It was indicated that the licensing boards' jurisdiction was limited to its own licensees as individuals and did not extend to private enterprises in which licensees

may have a financial interest. While the Commission understood that to mean that the individual, not the business, is “subject to the regulatory jurisdiction” of the licensing boards, it noted that for some professional enterprises to operate, they must have a licensed professional. As a consequence, the operation of a business may depend on the licensee maintaining that license. For example, a barber who is regulated by a licensing board may have a financial interest in the barber shop where he or she is licensed to practice the profession, and without a licensed professional that shop may not be able to operate.

The Code defines “financial interest” as: (1) having a legal or equitable ownership interest in a private enterprise; (2) being compensated more than \$5,000 per year as an employee, officer, etc., of the private enterprise; or (3) having a creditor relationship with the private enterprise. *29 Del. C. § 5804(8)*. Thus, if the licensed professional is compensated at more than \$5,000 per year, or has the requisite ownership or creditor status, the license and the private enterprise are directly connected. The Commission did not review the particular status of all Title 23 & 24 appointees, which was estimated at more than 100. Rather, it assumed they may have a financial interest in a private enterprise.

With this assumption, the issue was whether they must file a full disclosure with the Commission. The Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the State official or agency. *29 Del. C. § 5807(a)*.

The public purpose of disclosing financial interests is to insure that government officials refrain from acting in their official capacity on matters where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independent judgment, and avoid the appearance of impropriety. *29 Del. C. § 5811(2)*. We understand that the following actions are taken to insure that such concerns are avoided:

- (1) Title 23 and Title 24 statutes require that a certain number of appointees be members of the profession or occupation which is being regulated, and the statute is a public record;
- (2) the identity of all licensed professionals is publicly available from the Division of Professional Regulation;
- (3) appointees recuse themselves from participating if there is a potential conflict of interest;
- (4) the recusal is recorded in minutes of the meetings;
- (5) questionable issues are referred to the deputy attorney general assigned as counsel to each board; and
- (6) the identity of board members as either public or professional members is recorded at each meeting.

Thus, the information that is critical to the public, the knowledge of the appointees’ direct or indirect financial interest, is a matter of public record.

Under the Code, even if the appointees filed a disclosure with this Commission of their financial interest in a private enterprise regulated by their Board, it would generally be confidential. *See, 29 Del.*

*C. § 5806(d)*. As presently handled, the information in which the public is interested is publicly available, and the professional or occupational interest is identified at each meeting. Accordingly, the purpose of the statute is served through the information which is publicly available. Therefore, a literal reading which would require confidential filings is not necessary to achieve that public purpose. **(Commission Op. No. 98-34)**.

### ***Negotiating with State Agency When Son has Contracted with the Agency***

The Commission concluded that it would not violate the Code of Conduct for a State employee to participate in lease negotiations regarding a State agency when his son had contracted to provide video conference capabilities and perform other general assignments for the agency. The Code prohibits State employees from reviewing and disposing of matters where a close relative will benefit to a greater extent than others of the same class or group. *29 Del. C. § 5805(a)(2)(a)*.

Here, the State employee did not review or dispose of the decision by the State agency to contract with his son. He did not work for the agency which needed the lease and which had contracted with his son. Further, the agency's contract with his son had nothing to do with the leasing negotiations. Thus, the lease negotiation activities did not violate the restriction on dealings with close relatives. **(Commission Op. No. 98-02)**.

## **ACCEPTING ANYTHING OF MONETARY VALUE**

### ***Payment from Private Source for Performing State Duties***

A State agency asked if its employees could be paid by a private enterprise for serving as mentors/preceptors to college students. The Commission concluded that accepting such payment would violate the Code of Conduct because it may result in the appearance that State employees are using public office for private gain. Moreover, the Attorney General's office has concluded that other laws may impact on accepting such payment, and the Commission has no authority to waive those provisions.

The Code restricts State employees from accepting compensation or anything of monetary value if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. In a prior opinion, we noted that accepting payment from private sources may raise at least two ethical concerns:

1. If the private party has an interest in the employee's decisions, it may appear that the employee is beholden to the private enterprise and prone to provide regulatory favors in return; and

2. Even if the private payor does not have an interest in the official decisions, the employee's acceptance of payment 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. This may create the appearance that the employee is using public office for private gain which is prohibited by the code. *Commission Op.*

*No. 97-10 (citing Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).*

Here, no facts indicate that the State employees would make regulatory decisions regarding the private enterprise. Thus, the Commission's chief concern was whether acceptance will have "any adverse effect on the public's confidence in the integrity of its government." This is, in essence, an "appearance of impropriety" test. To decide if an employee's conduct may result in an appearance of impropriety, the Commission considers the totality of the circumstances, based on the particular fact situation. *29 Del. C. § 5807(c); Commission Op. No. 96-78.*

Here, while receiving their State salary to perform State duties, they could earn an additional \$400-800 per year from the private enterprise for performing their State duties, e.g., inspecting facilities, etc. The college students which they would mentor would occupy them, observe their performance, learn how they do their work, and eventually assist them with their work. Based on those facts, the Commission concluded that private payment to the State employees for performing State duties may, at a minimum, raise the appearance that they were using public office for private gain, which is prohibited by *29 Del. C. § 5806(e)*.

Moreover, accepting payment from other sources while performing State duties may raise the appearance that the State employees are in contravention of other laws. Specifically, the Attorney General's office has concluded that State employees are restricted from having their State salary supplemented by other sources because an "employee's services during the hours of employment belong to the employer whether prescribed by statute or by the express or implied terms of an employment contract." *Att'y Gen. Op. No. 83-I031*. Subsequently, the Attorney General's office concluded that aside from raising appearance issues under the State Code of Conduct, acceptance may also raise issues under other laws. *Att'y Gen. Op. No. 87-I024*. It noted that the Merit Rules restrict Merit employees from accepting salary supplements from private sources while on State time. *See, Merit Rule 5.0500*. Here, the State employees were Merit employees. Thus, acceptance could result in the appearance that they are acting in contravention of the Merit Rules. Such conduct could clearly have an adverse effect on the public's confidence in its government.

Moreover, the AG's office noted that when a State employee accepts payment from private sources for performing State duties that, "criminal penalties may apply depending on the circumstances." *Att'y Gen. Op. No. 87-I024*. Specifically noted were the Bribery statute, the Official Misconduct statute, and the Receiving Unlawful Gratuities provision. The "Receiving Unlawful Gratuities" provision prohibits public servants from soliciting, accepting or agreeing to accept any personal benefit for engaging in official conduct which the public servant is required or authorized to perform, and for which the public servant is not entitled to any special or additional compensation. *11 Del. C. § 1206*. Here, the State employees were authorized by their agency to perform the duties as mentors, and no specific statute entitles them to any additional compensation. In fact, the Merit Rules appear to specifically prohibit any additional compensation. Thus, acceptance may result in the appearance that the employees are violating a criminal provision. Again, such conduct could clearly have an adverse effect on the public's confidence in its government.

This Commission's authority to grant waivers applies only to the State Code of Conduct. *29 Del. C.*

§ 5807(c). Thus, it has no authority to waive other laws, such as those referred to above, which impact on the appearance of impropriety. (**Commission Op. No. 98-31**).

### ***Appearing in an Advertisement***

A State officer asked if it would violate the Code of Conduct if he appeared in an advertisement for private company and accepted payment of his expenses to travel to and from the West Coast for a photo shoot for the ad.

Under the Code of Conduct, officials may not accept payment of expenses 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) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

First, the Commission noted that while the private enterprise offered to pay his expenses to the West Coast, the trip would be for less than 24 hours, with most of that time spent in flight. Thus, it did not appear that he would receive any substantial private benefit from the trip. However, the Commission must consider all the facts in the context of the criteria which limits acceptance of anything of monetary value under certain circumstances.

Regarding his official duties, he said that he was not involved in the daily tasks of managing contracts his agency entered. However, because of his high level position, he was responsible for final decisions pertaining to contracts. The private enterprise was performing subcontract work through the State's current vendor for particular materials and services. There was no direct contract with the private enterprise. However, future contracts through his agency would require services which this company could provide, and he would be endorsing those services in the ad. If a dispute arose over a contract, he said his role was "limited" to resolving disputes with unsuccessful vendors. While he considered his decision making authority over specific contracts "limited," the Commission believed it was significant.

Delaware Courts have noted that the purpose of State bidding laws is to "prevent waste through favoritism and yet permit proper supervision over the qualifications of bidders." W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748(1971). The State officer said that the State specifically prohibits using specifications that would limit vendors to one name brand product. This is consistent with avoiding the possibility of favoritism or preferential treatment of a specific company's product. Similarly, the Code of Conduct restricts accepting anything of monetary value under circumstances that may result in preferential treatment. Thus, even though he was not involved in the daily management of the agency contracts, as a high level official with significant decision making regarding contracts, his endorsement of a specific company's product could, at a minimum, appear to reflect favoritism or preferential treatment for that company.

This concern was compounded by the fact that the ad language showed it was a promotional tool for the company to aid it in capturing large commercial contracts. The ad said that the company "offers the only nationwide program dedicated to [the particular service and] used commercially on any real significant scale." The language does not target the general public with something particularly

beneficial to all citizens. Moreover, the ad would appear in publications targeting commercial businesses. Additionally, the ad attributed to him the comment that: “You can bet [the particular type of service] will be a mandatory part of every bid package that comes in from now on.” He confirmed that future contracts would require this particular service. As the ad basically proclaimed this private enterprise was the only company that can handle large scale contracts of this nature, it could appear to competitors that if the service was mandatory for every bid, then the private enterprise might receive preferential treatment if it bid on or subcontracted for this particular type of State contract. Even if the company’s activities were limited to work that would only be a part of the contract, other bidders may view his endorsement as requiring them to use that company for that aspect of the contract if they wanted the State contract. Moreover, if bidders who did not use this company, were denied the contract, and wished to dispute the decision, he was the official responsible for resolving the dispute. Even if he recused himself, the fact that he was a top official endorsing a specific company’s product, could cause the appearance that the contract decision was based on favoritism, undue influence, conflict or the like. **(Commission Op. No. 98-30).**

## **Gifts**

### ***de minimis Gifts***

The Commission considered a request for an advisory opinion regarding whether State employees may accept *de minimis* gifts, such as key chains, Band-Aid boxes, plastic pens, etc., from vendors at a Health Fair. It concluded that State employees may accept these small items, based on the following law and facts.

State employees and officials are restricted from accepting gifts or anything 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 its government. 29 Del. C. § 5806(b).

The decision to grant contracts to vendors of health care services to State employees was made by a Committee. When the vendors were selected, the Committee members were not aware that the vendors intended to offer gifts at the Health Fair.

It was expected that the vendors would limit their activities to discussing their services, but not engage in sales pitches. However, subsequently the vendors asked if they could offer various free items to the State employees who attended the Health Fair. The offering of more expensive gifts was rejected by the Committee. However, having seen offerings of inexpensive items, such as key chains, etc., at Health Fairs for non-government personnel, it was asked if those items may be accepted by State employees.

The employees who will attend the Health Fair will be making a personal choice regarding the vendor they wish to use as their provider. Thus, that decision is not a decision on behalf of the State. However, some State employees do have responsibility for making decisions in their State jobs which may have some relevance to these providers. However, we do not believe gifts of such *de minimis* value as those suggested, key chains, etc., would have any material effect on their decision making. Therefore, acceptance of such items would not violate the Code. **(Commission Op. No. 98-07).**

## ***Tickets to Athletic Events***

A State employee accepted tickets to two major league athletic events from a company. The tickets were valued at \$410 for one event and \$368 for the other event. As the total value of the tickets to each event exceeded \$250, the source and value of the tickets was reported to the Commission pursuant to Executive Orders No. 5 & 19. The Executive Orders also require the Commission to decide if accepting a gift raises any ethical issues. To decide if any ethical issues are raised, the Commission applies the Code of Conduct provision which restricts State officials from accepting any gifts or anything of monetary value if acceptance 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)*.

His official duties required him to develop and execute strategies to protect existing Delaware jobs and recruit industry to the area for additional jobs. In essence, his official duties required him to "court" the industry to protect jobs and recruit jobs for the State. While this company, like other similar companies, would have an interest in the strategies he was required to develop and execute, he had not worked on any development project for this company within the last 12 months. Thus, it did not appear that the gifts would affect his judgment on any pending official decision or result in any type of preferential treatment for this company.

The Commission emphasized that his State position is unique from most State positions because of the need to "court" private enterprises. Thus, issues regarding appearances of impropriety when a State employee accepts gifts from private enterprises are different because of the unique operations of his agency. Accordingly, the Commission found no violation of the Code of Conduct. ***(Commission Op. No. 98-26)***.

## ***Tickets to A Concert***

A private company offered a Senior Executive Branch official two tickets to a concert. The company was subject to significant decision making authority by the official. The offer of tickets was made while a decision was pending which could affect the private enterprise. The official asked the company if he could have a third ticket.

The Code restricts acceptance of anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. It also prohibits officials from using public office for private gain or benefit. *29 Del. C. § 5806(e)*.

The Commission found that acceptance of the tickets could, as a minimum, cause an adverse effect on the public's confidence in the integrity of its government because it might appear to the public that: (1) the company was trying to curry favor with the official when a decision was pending; (2) his official judgment might be impaired; and (3) the official was using public office for private gain. ***(Commission Op. No. 98-35)***.

## ***Attending Athletic Events - What is “Value”?***

State officers notified the Commission that they had accepted an invitation to an athletic event from a private enterprise. They attached a per-person break down of the value of attending and participating in the event, and pointed out that they did not receive all items listed, such as breakfast and a plaque. In reporting the “value” of the gift, they believed the “value” was appropriately reduced by the amount of the items not received. The Commission has previously ruled that: “value” means “a fair return or equivalent in goods, services or money for something; marketable price; relative worth, utility or importance.” *Commission Op. No. 96-33*. In that opinion, the Commission held that the “value” received when participating in an athletic event is what one would have to pay or contribute to participate in the event. Thus, to the extent that the costs to participate covered the costs for such items as plaques, breakfasts, etc., it appears that the “value” would not be reduced just because the individual did not personally partake of those items. (***Commission Op. Nos. 97-38 and 97-39***).

## ***“Forbearance” as a “Gift”***

A State official asked the Commission if she needed to report the value of attending a seminar where a private company asked her to serve as a panelist at one session of the seminar. If she served as a panelist, she would not be required to pay the registration fee. The private company also paid the travel and accommodation expenses.

The Code of Conduct applies to “anything of monetary value.” *29 Del. C. § 5806(b)*. Here, the value of the registration was given in the form of “forbearance,” as the company refrained from enforcing payment of the registration fee. (***Commission Op. No. 98-13***).

## ***Corporate Aircraft Travel***

A State officer used a corporate aircraft to travel to a conference. The Commission held that it was a “gift,” as defined by the financial disclosure statute, as no facts indicated any consideration of equal or greater value. *See, 29 Del. C. § 5812(o)*. As the officer was a member of the Executive Branch, the Commission applied the Code of Conduct to decide if any ethical issues were raised by acceptance.

The Code of Conduct restricts State employees, officers or honorary State officials from accepting other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any persons; (3) the making of governmental decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the government of the state. *29 Del. C. § 5806(b)*.

This is the second of two opinions regarding State officials using transportation provided at no cost by private companies. *See, Commission Op. No. 96-26*. The Commission found that it was reasonable for the officer to rely on Opinion No. 96-26 in determining that use of the corporate jet would not

violate the Code of Conduct.

Both uses were similar in some respects--they were for public purposes which benefitted the State of Delaware; the use of the private jet satisfied a justifiable expedited transportation need; and the use of the corporate jet saved the State money.

However, the Commission cautioned that the trips differed. For example, each company had different relationships with the State; the trips were scheduled differently (in No. 96-26, the company was making the trip because one of its directors was participating in the conference); and the more recent flight was catered. The reason for pointing out the differences in the two cases was to emphasize that the Commission's conclusions must be based on the specific facts of each matter before the Commission.

It advised the officer not to construe the opinions as blanket approval for any other use of corporate aircraft. The fact that use of a private jet saves taxpayers money is but one factor considered. Any future use of corporate aircraft could, depending on the specific facts and the cumulative effect, result in a different conclusion by the Commission if the public perception could be that a government official may become beholden to the private interest supplying the jet or that a government official may be using public office for private gain, which is prohibited by *29 Del. C. § 5806(e)*. (**Commission Op. No. 98-29**).

### ***Award from Professional Association***

A State officer was nominated and selected for an award from a professional organization. The basis for selection was to recognize, among other things, his career dedication to public service. He received a statuette and a complimentary registration to attend the organization's meeting. As the statuette and registration were valued at more than \$250, they were to be reported as gifts under the financial disclosure statute, as no facts indicated that he had given the organization consideration of equal or greater value. The Commission also applied the Code of Conduct to decide if any ethical issue was raised.

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

The officer was a member of the association and was nominated for the award to recognize his career dedication to government service. The nomination was by another association member who also worked for a Delaware agency.

In his State position, the officer had no decision making authority over the association. Thus, it did not appear that his judgment would be impaired or that he was in a position to give the organization preferential treatment or make official decisions outside official channels which would benefit the organization.

There was an official relationship between the agency where the nominator worked and the State officer. The officer chaired a State committee which had awarded a contract to the nominator's agency. The contract was managed by the recipient's department. It was awarded before the officer was nominated for the award. The nominator was one of the principal persons responsible for the contract, and his contribution was part of the "in kind" resources in the contract. A student, whom he supervised, was paid out of the contract. None of these facts constituted a violation of 29 Del. C. § 5806(b). (**Commission Op. No. 98-27**).

### ***Concurrent Employment***

#### ***Workshops for Physically Impaired***

The Commission concluded that a State employee may contract to give workshops for a private enterprise on its equipment, which is used by persons with a physical impairment, during her off duty hours.

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

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

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

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

Additionally, someone from the State agency, other than this employee, would notify persons on its client list of the workshops. However, this is not preferential treatment for this particular company because the agency provides this service to any service provider when they conduct similar activities. This action avoids having private providers obtain the agency's client list, while also insuring that clients are aware of technological aids and/or training on such devices. Under these particular facts, no violation of the restrictions on accepting outside employment was found. (**Commission Op. No. 98-18**).

## ***Representing Private Clients Against the State***

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

### **I. FACTS**

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

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

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

### **II. APPLICABLE LAW**

#### **(A) Jurisdiction**

First, the Commission noted that it had no authority to interpret his agency's restrictions on concurrent employment, including the practice of law. Nor did it have authority to interpret the *Delaware Rules of Professional Responsibility*, governing the acts of Delaware lawyers. However, *Rule 1.11, "Successive Government and Private Employment,"* provides that a lawyer representing a government agency is subject not only to the Rules of Professional Responsibility, but also subject

to statutes and government regulations regarding conflicts of interest. *See, Rule 1.11(d)(2) and “Comment” (lawyers representing government agency are subject to the Rules of Professional Conduct and to statutes and government regulations regarding conflicts).*

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

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

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

## **(B) Code of Conduct**

The Code of Conduct provides:

“No state employee, state officer or honorary state official shall have any interest in a private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which acceptance may result in any of the following:

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

The Code also admonishes that:

“Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government.” *29 Del. C. § 5805(a).*

### III. APPLICATION OF LAW TO FACTS

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

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

We have held that the significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." *Commission Op. No. 92-11*. We said that provision does not require actual misconduct; only a showing that the conduct could "raise suspicion" that it reflects unfavorably upon the State and its government. *Id.* Similarly, Section 5806(b) does not require actual misconduct. It only requires conduct that "may result in" impaired judgment; preferential treatment; official decisions outside official channels; or any adverse effect on the public's confidence in its government. *See, Refine Construction Company, Inc. v. United States, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987)* (interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government," Court noted that the Standards of Conduct prohibited activities that may be considered impermissible because it appears to the public to be a violation) (emphasis added). Thus, the Commission considered the appearance created by his private employment.

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

If he acted in his quasi-judicial capacity and decided cases where the State Attorney General's law officers appeared before him on behalf of the State and/or the Department he had previously represented, it may, as a minimum, appear to the public that his judgment would be impaired since in his private representation, he would be opposing the Attorney General's law officers and the Department's former employee.

Even if he recused himself from the State activities, he would still be representing the private client in litigation against a fellow law officer of the State and would be opposing the position taken by his full-time employer, the State. If his private client did prevail, the public may suspect that he had gained unfair advantage as a result of his prior representation of the Department. If his private client did not prevail, the public may suspect that he had not properly performed his duties to his client because of his affiliation with the State. Thus, regardless of the trial's outcome, it may result in an adverse effect on the public's confidence in its government.

#### IV. CONSIDERATION OF WAIVER

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

#### V. CONCLUSION

For the foregoing reasons, the Commission concluded that the representation of a private client by a law officer of the State, in a suit against a former State employee represented by another law officer of the State, where the State may be required to indemnify the former employee, under these circumstances would violate the Code of Conduct. (***Commission Op. No. 98-14***).

#### ***Inspecting Federal Agencies***

The Commission concluded that a State employee's outside employment, which consisted of inspecting certain equipment for federal agencies, outside the State of Delaware, did not violate the restrictions on holding outside employment.

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

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

The agency had a conflicts of interest provision which applied specifically to his State agency. The Commission is limited to interpreting only Title 29, Chapter 58. *See, Commission Op. No. 98-25*. It therefore has no jurisdiction to interpret other conflicts of interest provisions. (***Commission Op. No. 98-03***).

#### ***Contracting to Provide Services to Own Agency's Clients***

The Commission concluded that it would violate the Code of Conduct for an agency's employees to contract, in their private capacity, with their own agency to provide certain services, during their off duty hours, to persons who were their State clients. It also concluded that, in the situations given, the facts did not warrant a waiver.

The agency asked for guidance, not just for three employees who were seeking to be service care providers, but also for such events in the future. Thus, the Commission addressed at length the various ethical issues raised by such private contracts.

Under the State Code of Conduct, State employees may not:

- (a) **Review or dispose of matters in which they have a personal or private interest which tends to impair independence of judgment in performing official duties.** 29 *Del. C. § 5805(a)(1)*. See also, *In re Ridgley*, Del. Supr., 106 A.2d 527 (1954)(where State employee held outside employment and had a personal interest, Court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “the public duty commands precedence.” See also, Merit Rule 18.0220 (Merit employees are precluded from having a personal interest in any business transaction within their area of influence in State government).

The particular services which these employees wanted to provide was part of a package available for the agency’s clients. One employee who wanted to contract with her agency to provide the service was, in her State job, responsible for arranging this particular service for the agency’s clients. Also, the agency was in the process of reorganizing its work force and expected to incorporate the responsibility for arranging for this particular service for its clients into the duties of other workers. One of those workers also wanted to contract with the agency to provide the service to the State clients. Thus, two of the State employees, in their State job would arrange for State clients to obtain the same service which they would offer in their private capacity. The third employee monitored contractors who provided this service to the agency’s clients. She also investigated complaints from the clients about the contractors. One of her relatives planned to operate a facility, and she proposed to be a private consultant to his facility. If her relative became a contractor, she could end up investigating his company, for which she also would be a private consultant.

Even if the agency could avoid having its employees who contract to provide the services in their private capacity from making referrals, investigating complaints, etc., so they would not review or dispose of such matters, this restriction is only one of many which the proposed activity appeared to violate.

- (b) **Represent or assist a private enterprise before the agency which employs them.** 29 *Del. C. § 5805(c)*. “Private enterprise” means “any activity conducted by any person, whether for profit or not for profit.” 29 *Del. C. § 5804(8)*. See also, *In re Ridgley*, Del. Supr., 106 A.2d 527 (1954)(representation of private client before a State Board which the State employee also represented created “an unseemly appearance”).

This Commission has held that private contracts with the State to provide services constitutes a “private enterprise.” *Commission Op. No. 94-11*. In two of these instances, the employees planned to directly contract, in their private capacity, with their own agency. Therefore, they would be representing a private enterprise before the agency which employs them, which is prohibited. In the other instance, the employee’s relative would own the business and she would be his consultant. As a consultant, she would be prohibited from representing or assisting his firm before her agency.

- (c) **Contract with the State for contracts of more than \$2,000 unless there is public notice and bidding.** 29 Del. C. § 5805(c). None of the contracts would be publicly noticed and bid because the price paid to contractors was established by formula. Thus, under this Code provision, the employees would clearly be prohibited from seeking the private contracts, absent a waiver.
- (d) **Accept outside employment or compensation if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government.** 29 Del. C. § 5806(b).

First, as a minimum, it could appear that their judgment would be impaired because they must make official decisions regarding the same subject matter for which they wished to privately contract. The Commission previously ruled that where State employees wanted to represent and assist private enterprises in areas where they are officially responsible, that such conduct would violate the Code. *See, e.g., Commission Op. Nos. 94-13 and 96-66.*

Second, the clients may assume: (1) the State employee's private services are better than the same services offered by other providers; (2) the agency more carefully scrutinizes them; or (3) the agency endorses the employees' private services. Thus, clients may feel pressured to select the State employee's private services; may think they will obtain preferential treatment if they enter a private contract with an agency employee; or may think they should contract with the agency's employee's private services if they want approval for other State services from the same agency.

Third, it may appear to the public that the employees: (1) are using their public office to secure unwarranted privileges, private advancement or gain because, among other things, the private contracts would not be subject to public scrutiny as the contracts are not publicly noticed and bid; (2) using public office and/or using confidential information for private gain because they have access to the clients and information on the clients that may benefit their private enterprise; (3) will receive preferential treatment when selected for the private contracts; or (4) will receive preferential treatment when the same agency which employs them inspects them. *See, 29 Del. C. § 5806(e), (f) and (g).*

Fourth, the employees could find themselves in an adversarial relationship with their own agency if their private services do not meet State standards, or if a client filed a complaint. They also could find themselves in an adversarial relationship with the agency's clients if those clients become unhappy with the private services. This Commission has held that where outside employment could result in an adversarial relationship between State employees and their agency, the outside employment would be improper because, as a minimum, it could adversely effect the public's confidence in its government because the public could assume the employee might receive preferential treatment from colleagues who inspect or regulate the private enterprise. *See, e.g., Commission Op. No. 96-41; Commission Op. No. 96-66; See also, In re Ridgley, Del. Supr., 106 A.2d 527 (1954)(Court found that State employee's outside employment placed him in an adversarial role which resulted in "the unseemly appearance" of one State employee trying to uphold the State's position, while another State employee was opposing it in his private capacity).*

For all the reasons above, the Commission concluded that the employees should not privately contract with their own agency, unless there was a basis for a waiver. The Commission may grant waivers “if the literal application of the provision is not necessary to achieve the public purpose” or would result in “an undue hardship” for the employee or the agency. 29 Del. C. § 5807(a).

The statute’s purpose is to instill public respect and confidence in its government through employee conduct which does not violate the public trust or create among the public a justifiable impression that the public trust is being violated. 29 Del. C. § 5802. The Commission addressed the issues which could leave the public with a justifiable impression that its trust is being violated--e.g., preferential treatment, using public office for private gain, etc. To grant a waiver on the basis that the literal application would not serve the public purpose would be contrary to the facts and law.

Regarding any “undue hardship,” we previously ruled that “undue” means “more than required” or is “excessive.” *See, e.g., Commission Op. No. 97-18.* The agency said that if its employees could not provide the private services, the clients would still have access to the same services through other approved providers. As to the employees, no facts were presented to indicate that they would suffer any hardship if they could not enter private contracts with their own agency.

Accordingly, the Commission found the proposed activity would violate the Code and that the facts did not warrant a waiver. (**Commission Op. No. 98-05**).

### ***Maintaining a Private Professional Practice***

A State agency sought to hire an individual who also had a small private professional practice. The agency wanted him to maintain the professional practice because it believed that having an active member of the profession would be an asset to the agency.

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

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

Also, he would not represent or assist his private enterprise on matters pending before his State agency, which is prohibited by 29 Del. C. § 5805(b). This provision is meant to insure that an official does not use any undue influence on his co-workers to obtain preferential treatment for the private enterprise. Similarly, the outside employment provision restricts officials from outside employment which may result in preferential treatment. 29 Del. C. § 5806(b).

With these restrictions, the Commission found no violation, but advised the agency that if the individual were hired and additional situations arose, that the agency or the individual could return to the Commission for further guidance. (**Commission Op. No. 98-43**).

## **POST-EMPLOYMENT**

### ***Training Contract with Former Agency***

The Commission concluded that it would violate the post employment provision if a State employee were selected and accepted a contract to develop a training program for a State council after she left State employment.

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

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

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

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

The council received responses to the RFP from a number of other persons for this contract. As nothing indicated that these applicants were not qualified to fulfill the contract, nothing indicated an undue hardship for the agency. Accordingly, we cannot grant a waiver under these circumstances. (**Commission Op. No. 98-19**).

## ***Computer Services for the State***

The Commission determined that proposed post-employment activities by a computer specialist would not violate the post-employment provision.

State employees may not represent or assist private enterprises on matters involving the State for 2-years after leaving State employment on matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C. § 5805(d)*. They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

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

As a computer support specialist, he worked with the agencies to assist them with identifying and developing their specific computer needs. The contract he sought would also require him to identify and develop specific computer needs for a different agency. However, he was in no manner involved with the agency decision regarding the issuance of the contract. Also, the new agency he would work for had its own specific needs and systems which did not overlap with those on which he previously worked. He had no dealings with anyone in that agency while employed by the State. As he was in no manner involved with the systems needs of the agency which needed the computer specialist, the Commission found no violation of the post-employment provision. (***Commission Op. No. 98-20***).

## ***Working with Agency Clients***

A State employee asked if it would violate the post-employment provision if she accepted a position with a private enterprise which contracts with her agency.

State employees may not represent or assist private enterprises on matters involving the State for 2-years after leaving State employment on matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C. § 5805(d)*. They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

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

In her State job, she worked with clients but did not refer any clients to this private enterprise. Rather, the clients she worked with were referred to another State agency for the particular services. If after a given period of time, the clients still needed the services, the other agency could refer them

to a contractor such as this private enterprise. If employed by the private enterprise, she would work with its clients and would have some dealings with her former agency. Specifically, if the client does not comply with the requirements needed to obtain the services, she could recommend to her former division that a sanction be imposed. Her former division would decide what, if any, sanction were appropriate. She was not previously involved in recommending sanctions against clients assigned to this private enterprise. The Commission found no violation. **(Commission Op. No. 98-21).**

### ***Developing Computer Systems***

A State employee asked if she could work for a company which contracted with her former agency. State employees may not represent or assist a private enterprise on matters involving the State for 2-years after leaving State employment on matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C. § 5805(d)*. They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

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

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

At present, the company wanted her to work with State agencies other than her former agency. However, the company said it was possible that she might be asked to work on the contract with her former agency. If the company decided it needed her to work on matters for her former agency, she was advised that she may not represent or assist the company on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible. As the Commission must base its decisions on particular facts, 29 *Del. C. § 5807(c)*, it could not render a decision on speculation that she might possibly work for the private company on matters involving her former agency which would violate the Code. Accordingly, she was advised that if the company sought to have her work on matters involving her former agency, she should review the post-employment provision and cases interpreting that provision, and could return to the Commission for further guidance based on the particular facts. **(Commission Op. No. 98-22).**

### ***Waiver Granted for Agency to Hire Former Employee***

The Commission may grant a waiver to the Code provisions if the literal application of the provision is not necessary to serve the public purpose or there is an undue hardship on the agency or employee. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings are no longer confidential but are a matter of public record. 29 Del. C. § 5807(b)(4).

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

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

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

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

The agency announced, at the beginning of the year, that there was an opening for Ms. Abrams' former position. DEDO concluded that the applicants were not qualified and re-announced the job. DEDO also was trying to fill an unexpected vacancy in the same unit. Further, an employee in the unit was trying to care for an ill spouse and for aging parents out of State and had required emergency leave. Thus, DEDO was short-handed in the six-person unit which Ms. Abrams directed. Mr. Lisa said that even if DEDO filled Ms. Abrams' position the new person would have difficulty completing a project that had been underway for almost nine (9) months. The correspondence indicated that bringing in a new person midstream would cause DEDO to lose "significant momentum." Also, DEDO had a June 1998 deadline for the project to be presented at a national conference.

The agency expected to pay Ms. Abrams at her current hourly State salary rate, plus Other Employment Costs (OECs) and expenses. OECs are more than 30% of an employee's State salary. OECs are the costs the State pays for its full-time employees to cover: health insurance, workers' compensation; pension, Medicare, FICA, and unemployment insurance. The State does not pay these costs for part-time employees. Generally, an advantage of using a private contractor for State work is so the State does not incur such costs. One concern of the post-employment law is to insure former employees do not get a "leg-up" on others who might compete for such contracts. Thus, the Commission asked Mr. Lisa whether the agency normally considers paying such costs for a private

contractor. Ms. Abrams responded that the contract would be 25% below the market rate. Mr. Lisa said the agency was suggesting an hourly rate; it would be putting a cap on the contract; and the contract would expire at the end of June 1998. He said he did not believe there were competitors who could do the job.

Under these particular facts, the Commission granted a waiver for the limited purpose of completing the "Incumbent Worker Project" which should be completed by the end of June 1998. (**Commission Op. No. 98-15**).

### ***Returning to Work with Former Private Employer***

A State employee had worked for his agency for a few months then decided to return to the private corporation where he worked before accepting State employment. He asked if returning to his previous employer would violate the post-employment provision.

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

State employees may not represent or assist private enterprises on matters involving the State for 2-years after leaving State employment on matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C. § 5805(d)*. They also may not improperly disclose State confidential information or otherwise use such information for personal gain or benefit. *Id.*

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

The job with the private enterprise would not result in dealings with his former division. Rather, he would train the private enterprise's employees. He might also conduct in-house investigations of its employees, if a client filed a complaint. The clients were not the same clients he dealt with while employed by the State. The private enterprise had State clients referred by an agency other than his, and he was not involved in any of that agency's decisions and did not work with its clients. The private enterprise did not operate the same type of facility, or have the same clients, as the ones he was responsible for while employed by the State. Any contact he might have with the State would be with Divisions other than the one where he was employed. Although the private enterprise did not anticipate any attempt to contract with his former agency, he said at the Commission's meeting that he would not have any dealings with his former division during the 2-year period. Thus, his employment with the private enterprise would not violate the post-employment provision. (**Commission Op. No. 98-17**).

### ***Employment by Firm Regulated by Former Agency***

A State employee planned to leave State employment and asked if he might accept a job with a company regulated by his former Division. The Commission concluded he could do so with the restrictions identified below.

First, in several situations he had dealings with the company in his official capacity, but said he was not the final decision maker. However, the post employment provision is not limited to situations where the former State employee is the final decision maker. Rather, it looks to the employee's responsibility and involvement in matters involving the State.

Specifically, the Code of Conduct restricts former State employees and officers from representing or assisting a private enterprise on any matter involving the State for 2 years if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for such matter while employed by the State. 29 Del. C. § 5805(d).

The matters involving the State on which the former employee will represent or assist the private enterprise must be placed in the context of the three triggering provisions, and the interpretation should serve the purposes for having a post-employment restriction. *Commission Op. No. 96-75*. The restriction recognizes, on the one hand, that moving between the government and private employment may create conflicts of interest or appearances of impropriety. The concern is that: (1) government employees who hope to move to the private sector will favor firms they think may offer rewards later; and (2) after they switch to the private side they may be able to exercise undue influence on those with government employees with whom they previously worked. *Id.* (citing United States v. Medico, 7th Cir., 784 F.2d 840, 843 (1986)). On the other hand, the chance to move from private to public employment and back again may allow the government to secure skilled people who might not otherwise make public service a career at current pay rates. *Medico* at 843. Thus, "matter" must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Id.*

Having laid the framework for interpreting "matter," we now address the particular situation using the examples of the former employee's dealings with the company in his official capacity.

In the first situation, he said controversies had arisen over certificates issued by his Division. His role was "to advise Division staff members . . . and the ...Secretary on these matters as they have arisen over the years." He said that "ultimately, in none of these matters was I the final decision maker." Clearly, if he advised such persons as his staff members and his Cabinet Secretary on these controversies, he "gave an opinion" and was "directly and materially responsible." The mere fact that he was not the final decision maker, does not mean he was not "directly and materially responsible." As noted above, the statute is not limited to final decisions. Rather, it looks to the employee's responsibilities. When the staff makes decisions, as the Division Director, he is ultimately responsible. Similarly, when he "advises" the Cabinet Secretary, who may later decide an issue, his advice is based on his training and experience as a Division Director. Thus, as to "matters" dealing with permits and certificates, he was directly and materially responsible.

In the second situation regarding a certificate, he said he had no direct decision making authority regarding the company because the certificate was a long-standing one and the choice of the company used was not discretionary. However, he said there was much controversy involving many parties and

he “had a direct policy role in a case which resulted in this company serving the community,” and he was “the Administration point person on most matters dealing with this case.” He said the project was “on-going” and might be so for several more months. He believed the prospective job might have him involved with customers or government representatives as the project proceeded. Again, the fact that he was not the final decision maker does not mean he was not directly and materially responsible. His statements that he had a “direct policy role” and was the “point person” supports the conclusion that he was directly and materially responsible. As he expected to be involved with customers or government representatives on this matter, he would be representing or assisting the private enterprise. However, to the extent he would be involved with the company’s customers, he would not be representing or assisting the company before the State. Similarly, if his representation or assistance to “government representatives” is not before the State, e.g., local government, then he could represent or assist the private enterprise in those activities under those conditions.

Third, he gave an example of “an investigation” in which the Division was involved and was “on-going” concerning a complaint about the company. However, he indicated that he was not involved in conducting the investigation as those matters were in the jurisdiction of two other agencies. As to matters within the purview of other agencies, he would be permitted to represent or assist the company before those agencies on matters in which his agency did not participate. He said it was possible that the company might become involved in another area which his agency handled. As this matter was not one of certainty, the Commission concluded that a ruling would be premature because it must base its rulings on “a particular fact situation.” 29 *Del. C. § 5807(c)*. However, this opinion could guide him, and, of course, he could come back for a specific opinion. (**Commission Op. No. 98-12**).

### ***Employment by Firm Which Contracts with Former Agency***

A former State employee went to work for a private enterprise which had a contract with his former agency. He was not in any manner involved in the contract decision. Additionally, while working for the State, he did not work for the same section with which the private enterprise contracted. Moreover, the subject matter of the contract was not within his area of responsibility. His work with the private enterprise was not likely to result in contact with the section which operates the programs he worked on for the State. Further, he would not disclose or improperly use any confidential information he may have gained through his public position. Accordingly, under those facts, the Commission found no violation of the post-employment provision. (**Commission Op. 98-04**).

### ***Working for a Firm Which Designs for State Agency***

A State employee was his agency’s liaison with certain companies which could be affected by his agency’s design projects. Once a design was submitted to the agency by a contractor, a review process began. The employee’s sole job in the process was to send proposed designs to certain designated companies so they could decide if the design would impact on their property. If the impact required changes, the changes were made by persons who were not State employees. He played no part in any changes. Once the initial review was completed, he continued to act solely as the liaison between his agency and the companies for any subsequent changes. He had no authority

to select designers; nor did he design any project.

He left the State to work for a private enterprise. He was not involved in any of its projects while employed by State, except for one project, where he was the agency's liaison. The company he went to work for had already submitted the designs, when he accepted employment. Thus, it had essentially completed its contract with the State agency. If design questions arose during construction, they would be answered by the company's designer. The former State employee would not work on that project. Therefore, to the extent he might be considered to have given an opinion or been directly and materially responsible for the project because he acted as a liaison, he would not be representing or assisting the company on that matter.

Under those facts, the Commission found that he did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for any matter involving the company, except for his limited involvement in acting as a liaison on one matter. As to that "matter," he would not be representing or assisting the private enterprise as the final plans were submitted to the agency before he was hired, and should a question arise regarding the plans, he would not handle the matter.

He was directly and materially responsible for liaison work between the State and private enterprises while employed by the State, but would not work as a liaison for the private enterprise. Rather, he would be responsible for design, engineering, and planning, which were not his State responsibilities. **(Commission Op. No. 98-01).**

### ***Working for Company with Agency Contracts***

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

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

His new employer sought to have the former State employee work on four projects it had been awarded by his agency. While working for the State, he was not involved in any manner with these projects.

Accordingly, the Commission found that the projects on which the company sought to use him were not matters on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible, and there would be no violation of the post-employment provisions. **(Commission Op. No. 98-36).**

## ***Insufficient Facts to Render A Decision***

A State employee planned to retire. She thought it was possible that she might seek contracts with the State. However, no contracts were pending which she might be interested in seeking. The Commission must base its decisions on a particular fact situation. *29 Del. C. § 5807(c)*. As there were no particular facts, the Commission advised her that it had insufficient information to issue an opinion. It said that if she obtained more specific facts, such as an announcement of a contract for the type of services she thought she would provide, then she could return to the Commission for an opinion. (***Commission Op. No. 98-37***).

## ***Subcontracting on State Contract***

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

The post employment provision restricts former employees from representing or assisting a private enterprise on matters involving the State for 2 years after leaving State employment if the former employees: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. *29 Del. C. § 5805(d)*. It also prohibits former employees from improperly using or disclosing confidential information gained while employed by the State. *Id.*

While employed by the State, he was not involved in any decisions on this particular contract. Thus, he did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for the contract while employed by the State.

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

Although the Commission could not address the particular projects, it considered the particular type of work he wished to do regardless of the projects. Specifically, he wanted to subcontract to perform work which he said he had not done for the State in 15 years. However, more recently, from 1992 until his retirement, he was responsible for similar work. He said that in that job he considered the

work different because he had a broader scope of responsibility--more of a coordinator and facilitator than "hands-on" work which he would do if selected as a subcontractor. The Commission found no violation. (**Commission Op. No. 98-38**).

### ***Contracting to Provide Training to Former Agency***

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

The Code restricts former employees from representing or assisting a private enterprise on matters involving the State for 2 years after leaving State employment if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. *29 Del. C. § 5805(d)*. They also are prohibited from improperly using or disclosing confidential information gained while employed by the State. *Id.*

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

Her State job was as head of an agency which performed oversight functions of a regulated industry, such as initial licensing, license renewals, monitoring and supervision, complaint investigation, enforcement, development of regulations and policies, technical assistance to the facilities, interpretation and technical assistance to the community.

As the head of the agency, she was responsible for insuring those functions were performed. As part of her duties, she also approved contracts, including a contract for this private enterprise to provide training to her staff more than six years ago. The agency now sought to contract with the company again to provide training on such topics as complaints, rules, legal and constitutional issues, enforcement and ethics. It was expected that the former employee would provide training on regulatory investigations. She had made such presentations at national conferences and was considered an expert in the field. The reason the agency wanted to contract with this private enterprise for training was because it had an influx of staff who needed training. Although the private enterprise provides annual seminars, the agency could not afford to send all of the staff to the seminar and wished to bring the company in to perform the training.

Here, the contract had not yet been entered and no facts indicated that the former employee was in any manner responsible for the contract. On a broader level, her responsibilities as head of the agency were not as a trainer to the agency, which she now seeks to do. While she made presentations on regulatory investigations at national conferences while employed by the State, and it was expected

that she would train her former agency's employees on investigations as part of the private company's team, the Commission did not find that training the staff on regulatory investigations was the same matter for which she was directly and materially responsible while employed by the State. Her State work focused on the licensing, investigation, etc., in the particular industry, while staff training was provided by outside agencies such as this private enterprise. **(Commission Op. No. 98-39).**

### ***Work on Contract Issued by State Agency***

A private enterprise was awarded a contract in 1991 which remained inactive until recently when the General Assembly approved going forward on the project. The agency turned to the private enterprise to begin the contract performance. Because it had hired a former employee from the agency, a decision was sought on whether it would violate the post-employment provision if he worked on the project.

The post employment provision restricts former employees from representing or assisting a private enterprise on matters involving the State for two years after leaving State employment if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C. § 5805(d)*. It also prohibits former employees from improperly using or disclosing confidential information gained while employed by the State. *Id.*

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

The facts clearly demonstrated he could not have given an opinion; conducted an investigation; or have been in any manner directly and materially responsible for any part of the contract when it was awarded more than 7 years ago, as he was not employed by the State. As to the cost estimates provided by him some time ago, it was the Commission's understanding that such estimates were not material to the re-activation of the project because: (1) the scope of the project had changed; (2) the alignment was moved; (3) the updated estimate was a rough estimate for construction, not design, and the former State employee's duties with the private enterprise would be design; and (4) new cost estimates must be prepared as a result of the changes in the project and the elapsed time. As the project was not the same as when he gave a cost estimate; as new estimates were necessary for the project as now envisioned; and because he would be working on the design aspect, not construction for which he gave an updated estimate, the Commission found that his proposed activity would not violate the post-employment provision. **(Commission Op. No. 98-41).**

## WORKSHEET FOR FILING DISCLOSURE OF FINANCIAL INTEREST

**Notice: The State Code of Conduct Requires Full Disclosure of Financial Interests in Any Private Enterprise Which Is Subject to the Regulatory Jurisdiction of, or Does Business With, the Governmental Entity. *See, 29 Del. C. § 5806(d)*. This Worksheet is Only an Aid in Completing Disclosure. Completing the Worksheet Does Not Guarantee that No Conflicts of Interest Exist. Persons Subject to the Code Should Review the Code and Can Seek an Advisory Opinion from the Public Integrity Commission for a Ruling on Any Conflict.**

Check Blocks Which Apply and Add Information Where Indicated. If any block is not checked, please indicate on a separate page why the block is not checked.

“Private enterprise” means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. *See, 29 Del. C. § 5804(8)(emphasis added)*. “Person” means an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities. *See, 29 Del. C. § 5804(7)*.

I have a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with the governmental entity by which I am employed, elected or appointed. The name of the private enterprise is \_\_\_\_\_ . The governmental entity is \_\_\_\_\_ . *See, 29 Del. C. § 5806(d)*.

In my official capacity with the government entity, I did not review or dispose of the decision which resulted in the private enterprise’s dealings with the governmental entity. *See, 29 Del. C. § 5805(a)*.

I have no reason to believe that the private enterprise may be directly involved in decisions to be made by me in my official capacity. *See, 29 Del. C. § 5806(c)*.

I did not represent or assist the private enterprise before the governmental entity with which I am associated by employment, elective office, or appointment. *See, 29 Del. C. § 5805(b)*.

The contract the private enterprise has with the government was for more than \$2,000 and was publicly noticed and bid. *See, 29 Del. C. § 5805(c)*. Amount of each contract: \_\_\_\_\_ .

*or*

The contract the private enterprise has with the government was for less than \$2,000 and there was arms’ length negotiations. *See, 29 Del. C. § 5805(c)*. Amount of each contract: \_\_\_\_\_ .

I did not use my public office to secure any business dealings for the private enterprise.

I did not disclose any confidential information gained by reason of my public position in these business dealings, nor otherwise use such information for personal gain or benefit. *See, 29 Del. C. § 5806(f) and*

(g).

\_\_\_ The substance of the business dealing is: (attach documents such as a written contract or describe the business dealing, i.e., is it a contract, lease, etc., what specific agency is it with, what is the duration?).

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If any items on this worksheet cannot be complied with because of an “undue hardship,” the individual subject to the Code of Conduct or the agency with which they seek to do business may request a waiver. *See, 29 Del. C. § 5807(a)*. For example, if a contract is for more than \$2,000 but cannot be publicly noticed and bid because of an emergency, e.g., a water line breaks and needs to be fixed immediately on a weekend, such information should be provided.

NAME: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

RETURN THIS FORM AND ANY ADDITIONAL INFORMATION TO:

State Public Integrity Commission  
150 William Penn St., Suite 4  
Tatnall Building, Ground Floor  
Dover, DE 19901

IF YOU HAVE QUESTIONS, YOU MAY CONTACT THE COMMISSION AT (302) 739-2399.