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## ***Jurisdiction***

### ***Allegations of Improper Hiring Procedures, Sexism, Racism, etc.***

Complainant alleged that a State officer violated the Code of Conduct by: “creating” jobs; “doctoring resumes” of persons not qualified for jobs; violating Merit policies in interviewing and hiring; pre-selection of job applicants; having employees work out of their job classifications; racism, poor management; failing to accommodate sick or injured employees when medical documents were provided; carrying a handgun on the job; “leering” at female employees; making sexual comments; infatuation with a female employee allegedly resulting in favoritism; misuse of state vehicles; misrepresentation in accounting reports; prohibiting “Christmas” luncheons but instead having a “Holiday” party; computer misuse; and suborning perjury.

The Commission held that it had no jurisdiction over the allegations, and dismissed them pursuant to *29 Del. C. § 5809(3)* based on the following:

This Commission’s jurisdiction is limited to administering the laws in Title 29, Chapter 58. *Commission Op. No. 95-5*. It has no jurisdiction over personnel laws or regulations governing the hiring, management and compliance with Merit policies. *Commission Op. No. 97-28*. Title 29, Chapter 59 and other personnel laws govern those matters. Laws and regulations regarding allegations of sexual harassment such as “leering,” making sexual comments, etc., are governed by laws and regulations administered by such entities as the Equal Employment Opportunity/Affirmative Action (EEO/AA) section under State Personnel, or the Department of Labor, or certain federal offices. Similarly, allegations of racism are governed by laws and regulations administered by such entities. *Commission Op. No. 91-16*. Alleged misuse of government vehicles and penalties for misuse are governed by Title 29, Chapter 71. Thus, such allegations might more properly be within the jurisdiction of the Department of Administrative Services. Misrepresentation in accounting reports is not in this Commission’s jurisdiction. The authority to audit is given by statute to the State Auditor. *See, 29 Del. C. § 2906*.

The allegations of computer misuse were that programs were installed on the agency’s computer without authority to do so. This Commission has no authority to decide which computer programs are proper for an agency to install or whether the installation may violate any licensing agreement with the software vendor. Whether the allegations raise issues of any criminal laws, such as theft of services, would be a matter for the Attorney General. Whether the allegations raise issues under any licensing agreement with the software vendor would be a matter for the vendor to decide if it could pursue.

The allegation that the individual will not permit “Christmas” luncheons, but instead has a “Holiday” luncheon, is not within the Commission’s jurisdiction. To the extent that complainant is trying to allege some type of religious discrimination, such matters again might more properly be addressed to EEO/AA. Generally, laws against religious discrimination restrict showing a preference or bias for one religion over the other. However, it is unclear what the basis might be because “Christmas,” the term which the State officer will not use, is not observed by all religions.

It also was alleged that the individual carries a personal handgun on the job. The Commission has no authority to decide if any State employee or official may carry a handgun or under what circumstances such action would be permitted. To the extent the allegations raise issues of whether he has legal authority to carry a handgun, the Commission has no authority to: license or revoke the license of any person carrying a handgun; or decide if carrying the handgun raises an on-the-job safety issue.

Regarding the allegation of having State employees make false statements under oath, to the extent the allegation is that the individual is suborning perjury, this Commission has no authority to determine if perjury has occurred. The crimes related to perjury are in Title 11, Chapter 5. To the extent those laws are alleged to have been violated, the Commission has held that it lacks jurisdiction over Title 11, criminal code provisions. *See, Commission Op. No. 96-10. (Commission Op. No. 98-42).*

### ***Overcrowding and Lack of Medical Care in Correctional Facility***

A prisoner alleged that a State correctional facility was overcrowded; he had not received proper medical treatment; and the facility has not responded to his grievances. The Commission’s jurisdiction is limited to Title 29, Chapter 58: “It does not have the unrestricted, roving authority to review administrative actions where there is no alleged specific violation of the Code of Conduct.” *Commission Op. No. 93-17.* As the allegations did not constitute a violation of the Code of Conduct, the complaint was dismissed for failure to state a violation, pursuant to 29 *Del. C.* § 5809(3). (***Commission Op. No. 99-07.***)

### ***Exposure to Toxic Fumes***

A prisoner alleged that he was exposed to toxic fumes at a State correctional facility. He alleged that he experienced dizziness, headaches, memory loss, etc., due to the exposure. He said he was consulting with his attorney; was bringing an action against the State; and that an environmental specialist had documented this matter.

The Commission has no jurisdiction over alleged medical complaints that arise in a correctional facility. *Commission Op. No. 99-07*. As none of the allegations constituted a violation of the Code of Conduct, the complaint was dismissed for failure to state a violation, pursuant to *29 Del. C. § 5809(3)*. (***Commission Op. No. 99-19***).

*See, Commission Op. No. 99-35, "Personal or Private Interests of General Assembly Members," supra at pp. 20-21*, for jurisdictional issue on personal or private interests that may create a conflict for General Assembly members.

*See, Commission Op. No. 99-34, "Scope of the Code when Working for State Contractor," supra at pp. 9-15*, for jurisdiction issue on Merit Rules, salary issues, etc.

## ***Disclosure of Business Dealings With Government Entities***

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

The State Code of Conduct applies to local governments which do not adopt their own Code of Conduct. *68 Del. Laws, c. 433 § 1*. Thus, officials of such local governments must fully disclose business dealings with their government entity. *29 Del. C. § 5806(d)*. "Full disclosure" means providing sufficient details for the Commission to decide if the Code of Conduct was followed. *Commission Op. Nos. 98-11 & 98-23*.

Here, a town's representative and its official submitted a "Worksheet for Filing Disclosure of Financial Interests," and other information on three contracts which the official's company performed for the town: one for less than \$250; one for just over \$400; and one for just over \$325. Such contracts require "arms' length negotiations." *29 Del. C. § 5805(c)*. "Arms' length negotiations" means that "unrelated parties negotiated 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*. Also, Delaware courts, in ruling on arms' length negotiations, have said: "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id. (citing Oberly v. Kirby, Del. Super., 92 A.2d 445 (1991))*.

The official did not review or dispose of the matter in his official capacity and did not represent his private enterprise before his own agency; and filed a full disclosure as required by the Code. *See, 29 Del. C. § 5805(a), (b), (c), § 5806(d)*. Regarding an alternative transaction, the town's representative said that in these types of contracts, when other firms are brought in, they charge not only for the actual work, but for man-hours for traveling to and from the site, and while at the site. He charged only for

materials and labor at the sites. The town's representative said its employees did not have the expertise to perform the work and the nearest company he could have called would have been from Dover. As that firm would have charged man-hours for the travel time to and from and at the site, the official charged less than could have been obtained from an alternative transaction. These facts did not create the appearance that he used his public office for private gain as prohibited by *29 Del. C. § 5806(e)*. Based on those facts, the Commission found no violation. (**Commission Op. No. 99-01**).

### ***State Employee Contracting with Agency to Transport Clients***

A State employee wanted to contract with a State agency to provide transportation to its clients. For the following reasons, the Commission concluded that he could seek the contract with the agency without violating the Code of Conduct.

The Code permits State employees to contract with the government if:

(A) there is notice and public bidding if the contract is for more than \$2,000. *29 Del. C. § 5805(c)*;

(B) the State employee does not represent or assist a private company before their own agency. *29 Del. C. § 5805(b)*;

(C) the State employee does not review or dispose of the matter where they have a financial interest. *29 Del. C. § 5805(a)*;

(D) the State employee files a full disclosure with the Commission when they do business with the State. *29 Del. C. § 5806(a)*;

(E) the State employee does not use public office for private gain; *29 Del. C. § 5806(e)*;

(F) the State employee's other employment is not in substantial conflict with performing their State job and will not 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 contract was publicly noticed and bid. Also, it was not with his own agency, and he was not involved with the contracting agency in his State capacity. Thus, he did not represent his private company before his own agency and would not review or dispose of the contract decision on behalf of any agency. Based on those facts, it did not appear that his judgment in performing official duties would be impaired or that he was in a position to make official decisions outside official channels regarding the contract. The contract provided that the agency "intends to contract with any and all companies licensed in the State of Delaware willing to accept the terms and conditions set forth by the Division." Also, he said that the agency would give its clients a list of

all contractors so they could call any company they desired. Thus, it did not appear that his private company would receive any preferential treatment in the contract decision. Further, he would not work on the contract during hours when performing State duties. His drivers would provide the actual transportation, so he would not be called to provide transportation while on State time. (*Commission Op. No. 99-03A*).

### ***State Employee Conducting State Training***

A State employee asked if he could train State employees on a subject which was part of his expertise in his other employment. In his State job he was a trainer, but not in the area of his other employment. His other employment required that he be licensed. Besides having private clients, he taught at a school, training students in this subject.

He wanted to give the training during State hours. It was expected that he would be paid his State salary while giving the training. He and his division director envisioned that the training sessions would be set-up through the State Personnel Training Unit and would be open to any State employee who desired to sign up.

The Code of Conduct restricts State employees from:

(A) reviewing or disposing of matters where they have a personal or private interest which tends to impair independent judgment. *29 Del. C. § 5805(a)*;

(B) representing or assisting a private enterprise on matters before the agency which employs the individual. *29 Del. C. § 5805(b)*;

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

(D) using public office to obtain a personal gain. *29 Del. C. § 5806(e)*.

Whether he could be paid his State salary to train on matters which were part of his other employment was not an issue within this Commission's jurisdiction, as State pay issues are governed by other statutes and regulations. Similarly, it could not decide which agency would be responsible for paying, if such payment were permitted. Thus, it addressed only those issues within the purview of the Code of Conduct.

The decision of whether the State Personnel Unit could use his expertise in its training program would be made by the State Personnel Office. Thus, he would not review or dispose of the matter in his official capacity, nor would he represent or assist his private enterprise before his own agency.

Here, he wanted to tell the State trainees that he was licensed, so they would know of his credentials. If he informed them that his outside business provided this service, it might create the perception that he was trying to create business for his private enterprise. Thus, it could appear that he was using public office to obtain a personal financial benefit. Such appearance could have an adverse effect on the public's confidence in the integrity of its government. Similarly, the same perception, that he was using public office to obtain a financial benefit for the school, could arise if he informed them that he provided training at the school.

Thus, the Commission held that he may say that he was licensed, but he may not take State attendees as his private clients. The Commission understood that this would be unlikely because he was not seeking new clients as his primary focus was to provide training at the school. Also, he could not refer to the school in his presentation to State employees. (*Commission Op. No. 99-02*).

### ***Contracting with State Agency - Waiver Granted***

The Commission may grant a waiver to Code prohibitions if the literal application of the law is not necessary to serve the public purpose or there is an undue hardship on a State employee, officer, honorary official, or a State agency. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings become a matter of public record. 29 Del. C. § 5807(b).

Laurence Raichle, an employee of the Division of Public Health, gave the Commission a letter showing that he had contracted with the Department of Health and Social Services (DHSS) to provide transportation for Medicaid patients who are not in State facilities. He did not have the full contract details and gave authority to the Commission's legal counsel to contact the agency for details. Based on information from: Philip P. Soulé, Sr., Division of Social Services (DSS), Medicaid Director; Kay Wasno, EDS Corporation, Provider Relations Manager; and Mr. Raichle, the Commission granted a waiver so he could fulfill the contract.

The Code permits State employees to contract with the government if:

- (A) there is public notice and bidding if the contract exceeds \$2,000. 29 Del. C. § 5805(c);
- (B) the State employee does not represent or assist a private company before their own agency. 29 Del. C. § 5805(b);
- (C) the State employee does not review or dispose of the matter. 29 Del. C. § 5805(a);
- (D) the State employee files a full disclosure with the Commission. 29 Del. C.

- § 5806(a);
- (E) the State employee does not use public office for private gain. 29 Del. C. § 5806(e);
  - (F) the State employee's other employment is not in substantial conflict with performing their State job and will not result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; and (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

Here, the State employee did not review or dispose of the contract decision. Thus, there was no violation of 29 Del. C. § 5805(a). Contract details were fully disclosed as required by 29 Del. C. § 5806(d). Mr. Raichle had no decision making authority in his position as a nurse at the Delaware Hospital for the Chronically Ill (DHCI), Division of Public Health, regarding transportation service for Medicaid patients and does not transport Medicaid clients who are in State facilities because the State transports them. Thus, it did not appear that his judgment in performing official duties would be impaired or that he could obtain preferential treatment for his company from the State; and no facts suggested that he would make official decisions outside official channels, as prohibited by 29 Del. C. § 5806(b). Additionally, before applying to be a Medicaid transportation provider, his company had privately contracted with private nursing homes to provide transportation for their cash clients. They suggested that as he was transporting their cash clients, if he could transport Medicaid clients at the same time from the private facilities it would be a better service contract. He also provides transportation for other activities, such as limousine service to airports, proms, etc., Thus, he did not create the business based on reliance on a State contract, which diminishes the possibility that he used public office for private gain under 29 Del. C. § 5806(e).

The restrictions which were not complied with were: (1) public notice and bidding; and (2) the requirement not to represent or assist a private enterprise before the agency which employs him.

Regarding the public notice and bidding requirement, the employee pointed out, and Mr. Soulé and Ms. Wasno confirmed, that any member of the public can seek to contract as a Medicaid transportation provider. According to the contract, the amount paid to providers is at the sole discretion of the Delaware Medical Assistance Program developed by a formula, based on the Federal Medical Assistance Program and/or Delaware Medical Assistance Program laws and regulations. (*Contract p. 2 of 7, ¶ 3*). The purpose of the public notice and bidding requirement is to insure that State employees do not obtain

an unfair advantage over other competitors for the same contracting opportunity. Since any member of the public may seek the contract and the amount paid is apparently not negotiable, it does not appear that he would be able to obtain an advantage over competitors. Accordingly, the Commission waived that provision for this contract because there was substantial compliance with the other code provisions and because the literal application of this specific provision, in this case, was not necessary to achieve the public purpose. *See, 29 Del. C. § 5807(a)*. However, for any future contracts, he was advised to stay alert to the public notice and bidding requirement when State employees seek State contracts of more than \$2,000.

Additionally, he contracted with DHSS, which is the Department that employs him. The restriction against representing or assisting a private enterprise before one's own agency is to insure that State employees do not obtain an unfair advantage as a result of receiving preferential treatment in decisions made by their colleagues. He said that he heard about the transportation contracts when he was in nursing school; not from the agency, and was not aware that the contract was with DHSS. The record reflects that the initial application was submitted and handled by EDS Corporation. According to Mr. Soulé and Ms. Wasno, EDS is a private company which contracts with the State to provide the service. EDS reviews the applications for compliance with the contracting standards and then sends its recommendation to the agency. The application does not require applicants to indicate if they are a State employee. No facts indicate that EDS was aware that he was a State employee and worked for the agency which issues the contract. Additionally, the contract is with the Division of Social Services; not with his own Division. Thus, his immediate colleagues were not involved in the decision. The correspondence indicating his selection as a provider came from EDS. There is nothing to indicate that his selection resulted from preferential treatment because, among other things, EDS was not aware that he was employed by DHSS; the selection was not made by his colleagues; and as noted, the amount paid is formula driven so he would not be able to negotiate a more favorable contract because of his State position.

The Commission noted that the EDS letter states that the contract is with DHSS and the actual contract clearly states that the contract is with DHSS. A more careful reading of these documents may have alerted him to the fact that the contract was with his own agency. However, he stated that he was not aware of the statutory restrictions. He said that when he mentioned his transportation business to a co-worker, the co-worker pointed out that he might want to come to this Commission to insure there was not a problem. While he had entered the contract, he had not provided any services, and immediately came to the Commission. Nothing indicated any intentional violation.

Based on these facts, while the letter of the law may have been violated, the spirit of the

law--to insure that State employees do not obtain an unfair advantage over competitors or through contracts as a result of their State employment--was not violated and the Commission, therefore, granted a waiver. (**Commission Op. No. 99-03B**).

### ***Scope of the Code when Working for State Contractor***

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

#### **(A) Applicable Law**

Under the State Code of Conduct, State employees:

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

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

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

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

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

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

**(B) Application of Law to Facts**

**(1) Limits of Jurisdiction**

This Commission's jurisdiction is limited to interpreting the Code of Conduct. *Commission Op. No. 95-20*. Thus, as to some issues discussed at the Commission's meeting, to the extent they require interpreting other laws, we have no authority to rule on such matters. For example, the State employee discussed a grievance filed over an agency policy on other employment. He said the matter was "settled" by an agreement that resulted in a different policy. Under separate law, his Department could "develop and implement rules, regulations, standards and policies governing the internal operation and administration of the Department and provision of services." (*citation omitted*). Delaware Courts have upheld an agency's policy that was more stringent than a statute when the policy was justified because of the potential for favoritism, undue influence and conflicts of interest if a State official participated in a contract with his agency. *W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748, 752 (1971)*.

However, we have no authority to interpret either: (1) the scope of his Department's legal authority to issue policies; or (2) any agency policy that it may issue pursuant to such laws. Similarly, to the extent that other employment is governed by other rules, i.e., Merit Rule 18.0200, or any collective bargaining agreement, we have no authority to interpret the Merit Rules or contract terms. *Commission Op. Nos. 97-17; 95-5*. He also said other employees in his agency hold other employment with contractors. Our decisions must be based on "particular facts." 29 Del. C. § 5807(a). As he did not give any "particular facts" regarding their situations, this opinion interprets only the State Code of Conduct as it applies to his particular situation.

His particular situation was that the private enterprise contracts with his division. He did not participate in awarding the contract; did not administer the contract; and did not supervise the person who does administer it. However, his present position exposes him to what he referred to as "indirect" decision making on the company's contract obligations. We discuss those activities in more detail below.

He wanted to contract with the company to work on its contract requirements for a program in Florida. He gained his experience in the work the company wanted him to do, not in his present position, but in a position he held a dozen years ago. He would

perform the work during hours when he is not working for the State, e.g., annual leave.

First, as to the requirement for full disclosure when there is a financial interest in a private enterprise which does business with the State, we have held that “full disclosure” requires sufficient information for us to decide if the conduct complies with the Code. *Commission Op. No. 97-17*. We find that his written submission and statements at the Commission’s meeting, with the relevant information identified in this opinion, constitute the required disclosure.

Second, as to representing or assisting a private enterprise on matters before the agency which employs him, *29 Del. C. § 5805(b)(2)*, he will not represent or assist the company before his agency because he will not work with or for the company on any contract they have or may seek with his agency. Rather, he will represent and assist it on its Florida contract. Thus, we find no violation of that provision.

However, under two provisions, we find that to comply with the Code of Conduct, he should recuse himself from participating in matters regarding the company for the reasons stated below.

The first provision is the one prohibiting State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair independent judgment in performing State duties. *29 Del. C. § 5805(a)(1)*. Delaware Courts have held that this provision requires State officials to recuse themselves from participating in State decisions when they have the requisite personal or private interest. *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff’d*, *Del. Supr.*, No. 304, Veasey, C. J. (January 29, 1996); *Prison Health Services v. State*, *Del. Ch.*, C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). In *Beebe*, the Court held that while the State official did not vote on the decision and his only remarks were neutral, he should not have participated even to that extent because the private enterprise for which he worked had a business agreement with the company over which the State Board on which he served was making a decision. In *Prison Health*, the State official was not on the contract selection committee and did not vote on the contract. However, he went to a meeting and asked three questions when a Departmental employee made a recommendation to some committee members and the head of the Department. The Court said that his participation “was inappropriate and he should have abstained from even this limited role in the procurement process because his wife was an employee (albeit a fairly low-level employee) of one of the bidders.” *Id.* Here, the personal and private interest which he has in the company is more direct than in *Prison Health*. He privately contracted with the company. Further, he is involved in his agency’s committee which makes contract decisions. Although he has no vote, he said the committee may ask him

to give a “thumbs up” or “thumbs down” on a program. For that and other reasons discussed below, and based on the *Beebe* and *Prison Health* rulings, we find that he should not participate in matters regarding the company because of his private contract.

The other provision, 29 *Del. C.* § 5806(b), restricts other employment if it may result in:

(A) **Impaired independence of judgment in performing official duties--** This incorporates the same concerns raised under 29 *Del. C.* § 5805(a), but sets it explicitly in the context of having other employment. Thus, we discuss his past and present dealings with the company under this provision. As contract administrator, a number of years ago, he participated in awarding the company a contract. After three years, he transferred the oversight responsibility to a State employee in another county, whom he does not supervise. Subsequently, the contract was not renewed. Thus, as to official duties regarding that contract, he had not made any decisions for a number of years. We have held that the passage of time can be given “some weight” in deciding if an activity violates the Code. *Commission Op. No. 99-16* (citing *CACI, Inc.-Federal v. United States, Fed. Cir., F.2d 1567 (1983)*). Here, a number of years passed between his dealings with the company on its Delaware contract and the company’s subsequent offer to contract with him on its Florida program. This passage of time aids in reducing the appearance that his personal interest affected his State decisions regarding that contract, as nothing indicates that he anticipated privately contracting with the company at the time of his contract decisions. As the contract was not renewed that also serves to diminish the appearance that he may have used public office for private gain or undue influence. The non-renewal also means that in performing official duties for his division no more decisions will be made on that matter.

The company’s present contract with his division is not the type of work the company wants him to perform under the Florida contract. He has no direct involvement with the existing contract, which is managed by a State employee in another county, whom he does not supervise.

However, he said he has some indirect involvement on that matter. In his official capacity, he gives his opinion on which program is best suited for certain clients, and one company to which he could refer a client would be the company he is contracting with. That could only occur about once in every 40 situations. He said that he constantly reviews case files and “makes a lot of decisions” and can “redirect them” [other State employees] if their plan is “out of whack.” He also said these employees are “constantly giving feed back to their regional director, supervisors, and contract administrators” on the contracts. However, his immediate supervisors have approved the forwarding of questions on the company’s program to the administrator who presently handles the

company's Delaware contract. That would remove him from any indirect involvement with the contract in that respect.

He also said he is a consultant to the committee which authorizes all contracted spending. He is not a voting member. He said he would not participate in any decision regarding spending State funds on the company. However, he said as a consultant to the committee, "they might look at me for thumbs up or thumbs down," or might ask him to comment on a case. Thus, he has significant indirect decision making authority as a consultant to the committee.

The statute does not limit its application to direct and final decision making. *Beebe; Prison Health; and Commission Op. Nos. 98-12 and 96-78*. Rather, if a State employee has significant indirect decision making authority where they have a personal or private interest which tends to impair judgment, there may be a conflict. Here, he expressed his personal and financial interest in the company by saying that the compensation from it is "very lucrative" and that "just to go down there for 2 or 3 days of training, which is all they're asking for this time, I can make a payment, a monthly payment to [referring to college tuition for his child]. That's really what this is about." While we may sympathize with his situation, the purpose of not participating in matters where there is a personal or private interest, is to insure that "the line between public duty and private interest [is not] blurred." *In re Ridgely, Del. Supr., 106 A.2d 527 (1954) (holding that State employee's private interest in other employment must yield to his public duties)*. Accordingly, we hold that also under this provision, it is improper for him to consult with the committee or his agency on matters related to the company.

(B) **Preferential Treatment to Any Person**--The passage of time since his involvement with the company's contract with his division, and the fact that it was not renewed aids in diminishing the possibility that he gave preferential treatment to PSI regarding that contract.

Regarding the existing contract, he said that because it is a cost reimbursable contract, rather than a per diem contract, that it "is not as easy to influence." He said that is because a cost reimbursable contract is "a fully funded contract where negotiations take place at the award of the initial contract and then yearly thereafter for the budget they will have for that year." While it may not be as easy to influence, decisions still must be made regarding the initial award, contract renewals, new contracts, contract compliance, etc. As noted above, the State employees referred to above work hand in hand with contract administrators, such as him. Further, the committee could look to him for a "thumbs up" or "thumbs down" on a program. Thus, if he consulted with the State employees, the committee members, etc., on matters regarding the company, it not

only could place him in a situation where his decision making ability might be questioned, but also could raise the specter that because of his personal, financial interest in the company, he would be in a position to show preferential treatment to it in giving a “thumbs up” to its program. However, as the calls regarding the existing contract will be delegated to another individual who works in a different county and is not supervised by him, and if he does not consult with the contract committee members or his agency on company issues, those restrictions would serve to diminish the possibility that he could give the company preferential treatment.

(C) **Official Decisions Outside Official Channels**--With the above restrictions in place, no facts indicate that he would be in a position to make official decisions outside official channels regarding the company.

(D) **Any adverse effect on the public’s confidence in the integrity of the government.** --We emphasize that *29 Del. C. § 5806(a) and § 5806(b)* do not require an actual violation, only that the conduct “may result in” or “raise suspicion” that a State employee is violating the Code. Actual misconduct is not required; only a showing that a course of conduct “may result in” or could “raise suspicion” that the conduct violates Code provisions. *Commission Op. No. 92-11*. Similarly, this provision does not require actual misconduct; only an “adverse effect” on the public’s confidence in its government.

At the Commission’s meeting, in discussing how the public might perceive his employment with the company which contracts with his agency, he first noted that there are “a lot of people who work for both the department and the contractors that we have.” As previously noted, we do not have the “particular facts” required to rule on those situations. *29 Del. C. § 5807(a)*.

He also said that if he made a competitive salary with his peers in other States, he would not have to do this. We have no authority to engage in State salary matters. However, we do note that the General Assembly, perhaps in recognition that State employees may want or need to supplement their State salary, has not placed a complete ban on other employment with private enterprises which contract with the State as some government entities have done. *See, e.g., Refine Construction Company, Inc. v. United States, U.S. Claims Ct., 12 Cl. Ct. 56 (1987) (federal agency issued order prohibiting its employees from performing service for a contractor or other person who contracted or did business with the agency)*. In Delaware, the General Assembly directed that “citizens be encouraged to assume public office and employment, and therefore, the activities of officers and employees of the State should not be unduly circumscribed.” *29 Del. C. § 5802(3)*. That concern is to be balanced against the General Assembly’s directive that State officers and employees are to “avoid conduct which is in violation of their public trust or which creates a justifiable

impression **among the public** that such trust is being violated.” 29 *Del. C.* § 5802(a); 29 *Del. C.* § 5806(a) (*emphasis added*).

We emphasize that language because he said that in his agency “nobody questioned anything that I would do with these people that would be out of line--that would violate any integrity.” Courts have held that even where an agency acquiesces in the other employment, an employee’s superior may not appreciate the nature of the conflict, and employees cannot claim an exemption from a conflict of interest simply because his superiors did not discern the conflict. *Refine* at 63. In *Refine*, the Court discussed the provision which prohibited any activity “affecting adversely the confidence of the public in the integrity of the Government,” which is like Delaware’s. *Id.* at 61. It said that “even perceived transgressions...can and do have an effect on the trust that the American people put into their government.” *Id.* Thus, to ascertain if conduct would have an “adverse effect” we look at the totality of the circumstances from the point of view of the public.

If he participated in decisions regarding the company when he has a personal and “lucrative” financial interest, the public’s confidence in its government could be adversely affected because the “perceived transgression” could be that: his judgment could be impaired; he could provide preferential treatment to the company; or he was using public office for private gain, which is prohibited by 29 *Del. C.* § 5806(e). Accordingly, to interpret the provision without “unduly circumscribing” his activities and at the same time insure that the public trust is not perceived as being violated, he must recuse himself from decisions pertaining to the company.

### **(C) Conclusion**

Based on the above law and facts, we conclude that his employment with the company which contracts with his division will not violate the Code of Conduct as long as he recuses himself from participating in matters before his agency involving the company. (***Commission Op. No. 99-34***).

### ***Having an Occupation Regulated by the State***

While attending an ethics class, a State employee became aware that the Code of Conduct requires State employees who have a financial interest in a private enterprise which is regulated by any State agency to file a full disclosure with the Commission. 29 *Del. C.* § 5806(d). “Full disclosure” requires sufficient information for the Commission to decide if a conflict of interest exists. *Commission Op. No. 98-23*. As she had a private business which was regulated by the State, she submitted a disclosure to the Commission.

Based on the following law and facts, her submission constituted full disclosure and there was no conflict of interest.

**(A) Applicable Law**

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

**(B) Application of Facts to Law**

In addition to her State employment, she had a private business that was regulated by the Department of Administrative Services, Division of Professional Regulations. *See, Title 24, Delaware Code for various businesses and occupations regulated by the State.* Her private business was in no manner similar to her State position, and her private business was not regulated by her own agency, nor did her private business contract with any State agency. She performed the regulated occupation on her own time; not State time.

Her disclosure worksheet indicated that she: does not review or dispose of matters regarding her private business; has no reason to believe her private enterprise would be involved in decisions she makes in her official capacity; has not represented or assisted the private enterprise before her own agency; has no contracts with the State; and uses no confidential information obtained as a result of her State position to benefit her private business.

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

Based on the above, her submission constituted “full disclosure” and there was no conflict of interest. (*Commission Op. No. 99-37*).

### ***Disclosure of Contracts of Local Officials***

Correspondence and the financial disclosure worksheets were filed by certain local government officials who had contracts with their local government. The submissions must constitute “full disclosure.” “Full disclosure” requires sufficient information for the Commission to decide if a conflict of interest exists. *Commission Op. No. 98-23*. Having reviewed the submissions, based on the following law and facts, we find that the filings constitute “full disclosure” and no conflicts of interest are present.

#### **(A) Applicable Law**

Under the Code of Conduct, these officials may not: (1) review or dispose of matters if they have a personal or private interest which would tend to impair judgment. *29 Del. C. § 5805(a)*; (2) represent or assist a private enterprise before their own agency. *29 Del. C. § 5805(b)*; (3) contract with their government unless public notice and bidding requirements or arms’ length negotiations requirements are met. *29 Del. C. § 5805(c)*; (4) use public office to secure business for their private enterprise. *29 Del. C. § 5806(f)*; (5) improperly use or disclose confidential information; *29 Del. C. § 5806(f) and (g)*; or (6) hold other employment if it may result in impaired judgment in performing official duties; preferential treatment to any person; official decisions outside official channels; or any adverse effect on the public’s confidence in its government. *29 Del. C. § 5806(b)*.

#### **(B) Application of Facts to Law**

None of the contracts were for more than \$2,000. Thus, public notice and bidding were not required. However, arms’ length negotiations are required. *29 Del. C. § 5806(c)*. Arms’ length negotiations means “transactions 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. Nos. 97-17;98-23*. Delaware Courts have held that in judging arms’ length negotiations, “the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions.” *Commission Op. No. 98-23 (citing Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991))*. The local government obtained prices from several sources, other than from the public officials, for small purchases. Additionally, the purchase decisions were reviewed not only by the agency head, but also by the local government’s employees who deal with financing. The information was also submitted at open meetings of the local

government's council.

Delaware Courts have held that in judging the fairness of a government contract when a government official seeks the contract, that the price "is not the exclusive test by which a vendor is chosen" because when government officials seek contracts with their governmental entity, the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *Commission Op. No. 98-23* (citing *W. Paynter Sharp & Son v. Heller*, Del. Ch. 280 A.2d 748, 752 (1971)). Thus, aside from the procedural precautions, the officials have verified that they: (1) did not review or dispose of the matters; (2) did not represent or assist their private enterprise before their own agency; (3) did not use their public office to secure any business dealings for their private enterprise; and (4) did not improperly use or disclose confidential information for private gain, etc.

Delaware Courts have also held that in interpreting the Code of Conduct, there is a presumption of honesty by government 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, Veasey, J. (January 29, 1996). Also, the individual contracts were for *de minimis* amounts, which reduces the possibility of the appearance that they are using public office for private gain. *Commission Op. No. 98-23*. Additionally, in the case of the contracts with one official, the availability of another reliable contractor that could meet the local government's needs did not exist locally from any other source.

Based on the above law and facts, the submissions constitute full disclosure and no conflicts of interest are present. (***Commission Op. No. 99-36***).

### ***Part-time Contract with Another State Agency***

A State employee wanted to privately contract with a State agency, other than her own. The Code of Conduct requires that a State employee who has a financial interest in a "private enterprise" which does business with any State agency must file a "full disclosure" with this Commission. 29 *Del. C.* § 5806(d). "Private enterprise" includes private contracts entered into by State employees with a State agency. *Commission Op. No. 94-10*. "Full disclosure" requires sufficient information for the Commission to decide if the State employee's business interest raises a conflict of interest.

In deciding that a conflict of interest did not exist in her situation, we based our opinion on the following law and facts:

- (A) State employees may not review or dispose of matters in which they have

a personal or private interest which tends to impair independent judgment in performing official duties. 29 *Del. C.* § 5806(a). Here, the personal or private interest is the financial interest in a private contract with the State agency. She said that in her official capacity she did not review or dispose of the contract decision. In fact, the contract was not issued by her division or agency, as it was issued by another agency. The substance of the contract is for her to conduct medical chart audits as required for: (1) clients of the agency who file grievances about medical care and (2) departmental concerns. These are not matters that arise in her full-time State employment.

**(B)** State employees may not represent or assist a private enterprise before the agency by which they are employed. 29 *Del. C.* § 5806(b). Here, she is contracting with another agency, and therefore will not be representing or assisting her private enterprise before her own agency.

**(C)** If a State employee contracts with a State agency, the contract must be publicly noticed and bid if it is for more than \$2,000; if for less than \$2,000, “arms’ length negotiations” are required. 29 *Del. C.* § 5805(c). The agency said it would pay her on an “as needed” basis, with \$1,800 being the maximum amount she could earn during a year. Thus, arms’ length negotiations are required. 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”). She would be paid \$50 per hour, and said the average rate for such services are \$75-\$150 per hour.

**(D)** The Code restricts State employees from having any interest which may be in substantial conflict with the State employment. 29 *Del. C.* § 5806(b). Moreover, their other employment is restricted 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. *Id.* She will audit medical charts and anticipates that her audits could result in her being called as a witness in a grievance proceeding or litigation.

The Commission has held that to insure there is no “substantial conflict” with performing official duties, the individual should not perform functions related to the outside employment during the hours when the individual is obligated to be performing State duties. *See, e.g., Commission Op. Nos. 95-13, 95-30, 95-39, 96-48*. As litigation most

likely would occur during a normal workday, and the time to prepare as a witness to testify about government records can be time-consuming, we asked when she would be able to perform the work. Both she and the contracting agency's representative said that the total number of audits that would be conducted was not substantial. Accordingly, she will perform the work during hours when she is not working for the State, e.g., after normal duty hours; while on leave status, etc.

The issue of whether her judgment would be impaired in performing official duties has been addressed by our earlier comments that her official duties do not require making judgment decisions about medical chart audits for another agency. Thus, it does not appear that her judgment would be impaired. Nor does it appear that in her State position she would be able to give preferential treatment or make official decisions outside official channels to persons such as the clients whose charts she will audit as her official position does not entail any work with the population which constitutes those clients.

Finally, the issue of whether her private contract would result in "any adverse effect on the public's confidence in the integrity of its government," requires that we consider the total circumstances. *Commission Op. No. 98-31*. We have already concluded that her other employment is not in technical violation of any of the above provisions, regarding reviewing or disposing of matters; contracting with her own agency; etc. Additionally, we discussed with her and the other agency's representative if testifying at grievance hearings or in litigation could place her in direct opposition to the agency because we have held that where a State employee wanted to have outside employment as an expert witness, and that role could result in his testifying against the State, that it would be improper for him to engage in that other employment. *Commission Op. No. 91-19*. Her role as a contractor with the agency would be to review the medical charts and give her opinion on whether certain medical care should be provided. The medical care is provided by another contractor. There could be a difference in opinions between her and the medical care contractor. The agency might be asked to resolve the matter at a grievance hearing or the Court may have to resolve the matter in litigation. Based on those facts, we concluded that, unlike the individual in *91-19*, she would not be testifying in direct opposition to the agency. (***Commission Op. No. 99-53***).

## ***Personal or Private Interests***

### ***Personal or Private Interests of General Assembly Members***

A situation arose where an issue was whether a General Assembly member had a "personal or private interest" which tended to impair independent judgment. *29 Del. C. § 5805(a)(1)*. Our jurisdiction is limited to interpreting Title 29, Chapter 58; not other

statutes or the constitution. *Commission Op. No. 95-5*. We have no jurisdiction over conflict of interest issues of General Assembly members. *Commission Op. No. 94-14; 96-11; 97-14*. Thus, we cannot interpret the Legislative Conflicts of Interest Law or the State Constitutional provision which restrict legislators from participating in matters if they have a “personal or private interest.” *See, 29 Del. C. §1002(a) and Del. Const. Art II § 20. (Commission Op. No. 99-35)*.

***Wife’s Employment by Subsidiary when Another Subsidiary is Regulated by Agency Hiring Her Husband***

A State agency asked if there would be a conflict of interest if it hired an individual when his wife is employed by a wholly-owned subsidiary of a corporation which has another wholly-owned subsidiary regulated by the State agency. The Commission concluded that based on existing facts, if the individual were hired it would not violate the Code of Conduct; but he should be alert for possible conflicts.

For nearly a year, the agency had tried to hire someone for a position as a regulator of certain industries. Filling the position was a problem because of the tight market arising from certain industry restructuring laws, which resulted in, among other things, more private industries which are regulated coming into the market and hiring people with backgrounds which the agency also needs. Also, according to the agency, pay differences between government and private enterprises limit the field of candidates. The agency identified the best qualified candidate, who had many years of experience in the industry in both the public and private sectors. At the agency, he would deal with regulating suppliers. He would work to resolve regulatory matters. If he could not, the matter would be brought before the agency’s quasi-judicial board. He would be involved in those proceedings and the board would rely on him in making decisions. Among the regulated entities was a wholly-owned subsidiary for a parent company. The candidate’s wife works for another wholly-owned subsidiary of the same company. She did not work for the regulated subsidiary or the parent company, and the agency did not regulate the subsidiary where she was employed. She held stock in the parent company.

State employees are restricted from reviewing or disposing of matters where they have a personal or private interest which tends to impair independence of judgment in performing official duties. *29 Del. C. § 5805(a)*. Two interests which, by operation of law, tend to impair judgment are where:

- (1) Any action or inaction on the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of

persons; or

(2) The person or close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 Del. C. § 5805(a)(2).

The Code also restricts State employees from engaging in conduct which may raise suspicion that the State employee is violating the public trust. 29 Del. C. § 5806(a). Additionally, it restricts State employees from improperly using or disclosing confidential information. 29 Del. C. § 5806(f) and(g).

While the Code of Conduct requires recusal if a State employee or a close relative has a financial interest which would benefit to a greater extent than others of the same class or group of persons, the agency's statute provided, in essence, that no one was eligible to hold the job if they directly or indirectly controlled any stock of an entity regulated by the agency. Based on that provision, the spouse's stock would be sold if the individual were hired. While the Commission has no authority to interpret another agency's statute, the effect of her disposing of her stock means that, under the Code of Conduct, his "action or inaction" on matters related to the regulated subsidiary would not affect that financial interest.

Having disposed of the possibility of a conflict arising from the financial holdings, the Commission turned to whether the marital relationship was sufficient to create an interest which tends to impair independent judgment. The clear language of the statute requires more than just a relationship between the State employee and the close relative. It requires action or inaction by the State employee resulting in the close relative benefitting to a lesser or greater extent than other persons in the same group or class. 29 Del. C. § 5805(a)(2)(a).

This restriction insures that close relatives do not capitalize on decisions made by their relative, and insures that the State employee is unbiased in making decisions. The Delaware Superior Court has held that marital status, by itself, is not sufficient to create bias such that a State official on a regulatory board must recuse herself from a State decision, not impacting on her spouse, without facts to substantiate bias. Camas v. Delaware Board of Medical Practice, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995). In Camas, the Court noted that the State official had a statutory obligation not to discuss cases with any person or party and no facts suggested that had occurred. Similarly, the Code of Conduct prohibits improper disclosure of confidential information. Thus, to the extent his agency work would entail confidential information, the individual was advised not to discuss such matters with his spouse.

The Code also restricts conduct if it may raise suspicion that the public trust is being violated. 29 *Del. C.* § 5806(a). This is basically an appearance of impropriety restriction. However, Delaware Courts have held that “an unarticulated concern of an appearance of impropriety” is insufficient to establish a conflict of interest. *Seth v. State*, *Del. Supr.*, 592 A.2d 436 (1991). First, under the Code of Conduct, State officials are entitled to a presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, *Terry, J.* (June 30, 1995) *aff’d*, *Del. Supr.*, No. 304 (January 29, 1996). Second, the individual’s spouse is employed by a totally different subsidiary which is not regulated by the agency. Moreover, her subsidiary is not co-located with the regulated subsidiary, which limits the possibility that she will hear any company employees discuss regulatory issues that may come before her husband’s agency. Additionally, her employment is not related to the regulated matters: her subsidiary offers totally different services; she does not evaluate customer needs for the regulated services; she does not solicit the work or make decisions on company proposals relative to the regulated matters. Rather, she coordinates the schedules of sales representatives and marketers, and if a customer selects her subsidiary to perform the work, she coordinates that schedule. Nothing in those facts indicates that she or her employer would benefit from her husband’s regulatory decisions on a totally different wholly-owned subsidiary.

The agency said that the regulated industry has its finances audited so that there is no cost-shifting to other companies, including subsidiaries. However, an independent auditor, not the individual who was offered the State job, or the agency, audits the company or any of its wholly-owned subsidiaries. Thus, he would not be in a position to confer favors on the company regarding these matters.

The Commission must base its decisions on a “particular fact” situation. 29 *Del. C.* § 5807(c). Accordingly, it could not speculate on what issues may later arise if the individual accepts the position. Thus, because of the marital relationship, he should exercise caution in his activities, being sensitive to the Code restrictions. Additionally, he can seek guidance through the Commission’s prior decisions on close relatives. For example, as her company might have functions to which spouses are invited, he was advised to review the Op. No. 97-11, dealing with attendance by State officials at corporate functions of a regulated entity when matters are pending before the agency. (**Commission Op. No. 99-24**).

### ***Soliciting for Private Enterprise***

A State employee was a member of a private organization which asked her to solicit funding from private companies to pay for the organization’s annual conference. She was worried that such soliciting might violate the Code; declined to solicit for the

organization; and sought an advisory opinion for future guidance. Based on the following facts and law, the Commission held that it would be improper for her to solicit for the private organization during State hours, using State resources.

Her State job dealt with issues that also concerned the private organization. As part of the organization's activities, it hosts conferences on those issues. Persons invited to the conference include government administrators, policy makers, teachers and people in direct service for these issues. Because of the common dominator between her State job and the interests of the organization, she had joined it. The organization to which she belonged was not the only private enterprise which provides services, such as conferences on the issues. She had attended its conferences in the past, and this year was asked to serve on its conference planning committee. Planning committee members were to solicit funds to help pay for the conference. Funding opportunities ranged from an ad in the conference program to sponsoring the awards dinner. The organization asked her to solicit a specific company, and to identify herself as associated with the private organization, not as a State employee.

To the extent that she wanted to act for the private enterprise on her own time as a member of that private organization, this Commission has ruled that where an individual was associated with an organization and the activities engaged in were not related to his public duties, it had no jurisdiction over the matter because the statute refers repeatedly to "public trust," "public interest," "official duties," "government decisions," "official capacity," etc. *Commission Op. No. 91-20*.

However, acting for the private enterprise during State hours or using State resources raises a different issue. State employees are restricted from incurring any obligation of any nature which is in substantial conflict with the proper performance of State duties in the public interest, 29 *Del. C.* § 5806(b); using public office to obtain unwarranted privileges, private advancement or gain, 29 *Del. C.* § 5806(e); or engaging in conduct which may raise suspicion among the public that the public trust is being violated, 29 *Del. C.* § 5806(a).

While the private enterprise was having a conference which apparently some government employees attend, nothing indicates that the State had sanctioned the private enterprise's effort to raise money for its private venture. Thus, she had no State obligation to solicit for the private enterprise. Therefore, to use State time or resources (e.g., telephone) to solicit for a private organization in which she had a personal interest as a member could raise the public's suspicion that she was using public office to secure unwarranted privileges and that she had placed her personal interests in the private enterprise before her State duties. Further, if she solicited for one private company which offers this

service, then its competitors, and the public, could view her solicitation during State hours as preferential treatment to the private enterprise. (**Commission Op. No. 99-18**).

### ***Waiver Granted - Personal Interest in Private Employment***

Under the Code of Delaware Regulations (CDR), the Delaware State Secondary Athletic Association (DSSAA) is the Secretary of Education's official designee to implement the Department of Education's (DOE's) rules and regulations on interscholastic athletics, including a student's eligibility to participate in such sports. Disputes over interscholastic athletics rules and regulations are subject to final review by the State Board of Education (the Board). *CDR 72-000-003 (1999), Chapter 3 ¶ 6*. The Board, pursuant to its statutory authority, *14 Del. C. § 122*, and the Administrative Procedures Act, has established procedures for such proceedings. The procedures include time-lines, such as 20 days to respond to notice of hearings, etc. *CDR 72-000-003 (1999)*. The New Castle County Technical School District (hereinafter "District") submitted an application to DSSAA's Director, seeking a waiver of DSSAA's eligibility requirements so one of its students could participate in interscholastic athletics. DSSAA twice denied the waiver, and an appeal was filed with the Board. The named parties to the appeal are the student and DSSAA. The District is not a named party. Basketball, one of the sports the student wants to play, is already underway. If the normal procedural time-line for Board proceedings were adhered to, the final decision might not be obtained until after the season is over. The parties asked the Board to expedite the hearing, and they waived their rights to the time-lines established in the Board's procedures.

The Board appointed David Blowman, Executive Assistant to the Secretary of Education, as the hearing officer. After the hearing, he was to decide if a waiver should be granted and issue an order with his findings of facts and ruling, which would be a recommendation to the Board.

Ten days before he was appointed as the hearing officer, he applied for a job with the District. Two days before the hearing, he interviewed for the job with the District's Board of Education, its Superintendent, and its Deputy Superintendent. According to Blowman, they did not discuss the pending hearing at the interview.

The hearing was held as scheduled and "during the course of the hearing," Blowman "realized for the first time the potential conflict between my role as hearing officer and my application to the school district attended by the student in the appeal..." While recognizing a "potential conflict," he proceeded with the hearing. Immediately afterwards, he spoke with Deputy Attorney General (DAG), Louann Vari, expressing his concern about a possible conflict. At that time, he also said he intended to rule in the

student's favor. Within an hour after the hearing, he learned that he did not get the District job. This Commission's office was contacted and it was decided that he would seek an advisory opinion. That same day, he notified the parties of the employment situation; asked if they would object if he continued as the hearing officer; and advised that he was requesting an advisory opinion from this Commission. Subsequently, the parties notified him that they did not object.

At the time of this Commission's meeting, January 12, 2000, he had not issued his order to the parties or the Board. He did not believe his job application impaired his neutrality, and did not believe that the denial of the job would impair his judgment. He asks if his conduct violated the Code of Conduct, and if so sought a waiver.

The basis for a waiver is that the parties specifically asked the Board for expedited proceedings. The next Board meeting was set for January 20, 1999. If a new hearing officer must be appointed to re-hear the appeal, it could preclude a Board ruling in January. A delay would mean additional time and costs to reargue the appeal, and could negate the decision to expedite the hearing.

### **Applicable Law**

The State Code of Conduct restricts State employees from reviewing or disposing of matters if they have a personal or private interest which tends to impair their independent judgment in performing official duties. 29 Del. C. § 5805(a).

Delaware Courts, in interpreting 29 Del. C. § 5805(a), have held that whether the personal or private interest is sufficient to require a State employee to recuse himself from participating in a matter is an issue of fact. Prison Health Services, Inc. v. State of Delaware, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993).

### **ISSUE 1: Is Blowman's "interest" sufficient to require him to recuse himself?**

The "personal or private interest" was his pending employment in the same District which requested a waiver for its student. He interviewed with the District two days before the hearing. Government decisions are to be based on a "fair and unadulterated examination of the merits" and "any conduct giving the appearance that impropriety is involved therein should be studiously avoided." See, Kulesza v. Star Services Inc., Del. Super., C.A. No. 93A-01-002, n. 8, J. Toliver (December 20, 1993) (Court expressed concern for any deviation from the administrative process as provided by law or participating in ex parte communications between one party and those charged with reviewing the merits for the State agency).

In the specific context of restrictions against public officers or employees participating in decisions when employment is being negotiated, ethics laws have noted that the rationale is to avoid putting the official in a position where his public office could be exploited for private gain; and preferential treatment or an unfair advantage for a prospective employer. *See, e.g., Comment, Delaware Lawyers' Rules of Professional Conduct, Rule 1.11(c)(2).*<sup>1</sup>

There is no Delaware case, interpreting 29 *Del. C. § 5805(a)(1)*, directly on point where employment was pending. However, there are Delaware cases interpreting that provision where State officials, who participated in administrative proceedings, had an indirect interest as a result of existing outside employment. In both cases, it was held that they should not have participated, even though their participation was limited; they did not vote on the matter; and no facts indicated that they personally benefitted from their limited participation.

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

One fact looked at by the *Beebe* Court was the timing of the hearing and when the

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<sup>1</sup> While Blowman is not a lawyer, reference is made to the lawyers' rules of professional responsibility because it spells out the ethics concerns raised when a government employee is negotiating for a job, and aids in interpreting the ethics laws of the State Code of Conduct. *See, Sutherland Stat. Constr. §45.15, Vol. 2A (5th ed. 1992)*(decision on statutory construction has relevance as precedent if language of one statute is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other).

discussions regarding an alliance occurred. The Court found that the record did not clearly establish bias because the record was not clear on when the concept of the alliance between the two hospitals was first discussed—whether before or after the favorable decision.

Here, the “concept of the alliance” (Blowman’s employment by the District) was discussed in his interview with the District’s Board of Education, its superintendent, and deputy superintendent two days before the hearing. At that time, Blowman knew he would be hearing the case.

Here, the District was not a party, just as Milford Hospital was not a party in *Beebe*. However, the District submitted the application to DSSAA for its student. If the student prevailed, the District would have the benefit of her participation in its interscholastic sports.

In *Beebe*, the Court noted that Delaware law holds that bias can be imputed and that since Davis ultimately declared a conflict, the court “would assume” he was biased and therefore had a conflict. It also noted that Davis’ comments were “extremely limited and neutral;” he did not vote; and the Council’s decision was a recommendation, not the final decision on the application. While it found that his conduct did not rise to the level of a due process violation, it said that “since Davis admittedly had a conflict he should have recused himself from participation in this matter at the outset.”

Here, Blowman, during the proceedings, like Davis, thought there might be a conflict. He proceeded to participate. Unlike the *Beebe* situation, where other State officials who were Council members made the decision to recommend approval of the application, Blowman was the sole hearing officer on whether to recommend approval on the eligibility waiver application, and wants to continue participating. Thus, his participation is not as “limited” or “neutral” as in *Beebe*.

In *Beebe*, no facts indicated that Davis could personally benefit from a favorable decision for Nanticoke. Rather, a favorable decision would benefit Nanticoke, a party to the hearing. Because Davis’ company was negotiating with Nanticoke, the indirect implication was that Davis’ employer could indirectly benefit, or that a party to the proceedings would receive preferential treatment because of the official’s outside employment interest. Similarly, in Blowman’s case, a favorable decision for the student would indirectly benefit the District which submitted the application on her behalf, as it would result in her playing sports for the District. Since Blowman’s employment was pending at the time of the hearing and when he told the DAG immediately afterwards that he intended to rule for the student, it could appear that a favorable decision for the

District's student may be the result of preferential treatment, and/or may result in a personal benefit to Blowman, since at the crucial time he did not know that the District did not select him.

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

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

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

Thus, *Beebe* and *Prison Health* narrowly construe the permissible activities under *29 Del. C. § 5805(a)(1)*. In both cases, although the officials' participation was limited to comments during the proceedings; they did not vote; the decision was made by other officials; and their interest was indirect, the Court still concluded that they should not have participated even to that limited extent.

In *Beebe*, the Court said that officials were entitled to a "strong presumption of honesty and integrity." Thus, Blowman is entitled to that "strong presumption." He states that there was no discussion with the District regarding the case when he interviewed for the job and that his judgment or neutrality were not impaired. However, as noted in *Beebe*, even neutrality does not preclude the need for the official to recuse himself.

Based on *Beebe* and *Prison Health*, we conclude that even though Blowman's interest was indirect, and no facts indicate that he benefitted from the decision or gave preferential treatment, etc., he should have recused himself.

**ISSUE 2: Does disclosure to the Parties permit Blowman’s continued participation, if the parties do not object?**

Blowman wants to continue participating and the parties do not object.

The plain language of the Code of Conduct does not have an exemption that permits a State official to proceed in the face of a conflict, even if the parties agree. This Commission is to be consistent in its opinions. 29 Del. C. § 5809(5). We have held that where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. *Commission Op. No. 95-001 (citing Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991))*. The only exception permitted by the plain language is that if a State official has a statutory responsibility that cannot be delegated, then he may proceed if he files a full disclosure with this Commission explaining why the matter cannot be delegated. 29 Del. C. § 5805(a)(3). No facts indicate that Blowman has a statutory responsibility that cannot be delegated.

Aside from the plain language, which does not include such an exception if the parties agree, the Delaware Supreme Court addressed a similar situation in *In re: Ridgely, Del. Supr., 106 A.2d 527 (1954)*. A State employee, who was an attorney, also held outside employment. Because of a conflict of interest between his State job and his outside employment, he was alleged to have violated: (1) the Canons of Professional Ethics for lawyers; and (2) his duty as a public officer by placing himself in a position where “his personal interests were opposed to his duty to the public.”

The Court noted that under the canons of ethics for lawyers, “in civil cases he may ordinarily choose between two clients whose interests conflict, with full disclosure when required.” However, the Court said that it need not address his conduct under the lawyers’ ethics, which would permit him to continue if the parties agreed, because as a public servant “his private interest must yield to the public one.” Thus, Delaware Courts have frowned on merely disclosing the conflict to the parties as a remedy when the conflict arises in the context of a public servant’s outside employment.

*Ridgely* was decided before the Code of Conduct was enacted. Thus, it interpreted the common law restriction on public officials having a “personal interest.” Again, this Commission is to be consistent in its opinions, and has held that:

“The concern under the common law restriction on public officials participating in decisions where they have a personal or private interest is the same as would arise under the State Code prohibition which restricts such officials from “reviewing and disposing of matters in which they have a personal or private interest that tends to impair

independence of judgment.” *See, 29 Del. C. § 5805(a)(1)*. Moreover, conflict of interest statutes generally do not abrogate common law conflict of interest principles. *63C Am. Jur. 2d Public Officers and Employees § 253 (1997)*. Thus, the State Code is basically a codification of the common law restrictions. (*Commission Op. Nos. 97-24 and 97-30*).

Thus, we conclude that merely informing the parties of the conflict, without more, is not a remedy.

### **ISSUE 3: Should a Waiver be Granted?**

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

#### **(A) Is the literal application of the law necessary to achieve the public purpose?**

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

#### **(B) Undue Hardship**

Regarding any “undue hardship,” we have held that “undue” means “more than required” or is “excessive.” *See, e.g., Commission Op. No. 97-18*. Here, the Board, pursuant to its statutory authority, has established procedural rights for the parties who seek an appeal. The parties specifically waived those rights so that the Board could

expedite the hearing because the student is in her Senior year and wants to play basketball. The basketball season is already underway and will end in February or March. The parties want the Board's final decision at its meeting on January 20, 2000, so that if an eligibility waiver is granted the student can participate in the last part of the basketball season. If Blowman could not participate by issuing his findings of fact, conclusion of law, etc., the Board could take two possible actions: (1) appoint a new hearing officer to re-hear the case and give the Board a recommendation; or (2) the Board, rather than a hearing officer, could re-hear the case and make a final decision. If option (1) were exercised, the parties would have to re-argue their cases, costing additional time and money, and it is not clear if all of that could occur before January 20. If the Board exercises option (2), it is possible that it would not re-hear the case on January 20, 2000; rather, it would just take that occasion to schedule a hearing before the Board.

If no waiver were granted, in effect, we would be negating the Board's decision to let the parties expedite the proceedings. The time-lines established by the Board in its rules and regulations are to insure that the parties know of pending actions; have an opportunity to be heard; and know there is a foreseeable finality. The decision to waive the Board's time-lines was so that the "opportunity to be heard" could occur at a meaningful time.

If a waiver is not granted, the "meaningful time" will have passed. Further, as we must base our opinions "on the particular facts" we note that the parties waived their rights to the Board's time-lines, and neither party objects to Blowman continuing. Moreover, when we grant a waiver, the proceedings become a matter of public record, so that the public understands the basis for letting the official proceed in the face of a conflict. Based on all those facts, we conclude that to, in effect, negate the Board's statutory authority to make rules and regulations regarding its hearings, including the authority to let the parties expedite the proceedings would be "excessive." Accordingly, we grant a waiver based on an undue hardship. (*Commission Op. No. 99-51*).

## ***Accepting Anything of Monetary Value***

### ***Private Enterprise as Sponsor of State/Federal Event***

A State agency asked if an alcoholic beverage company could sponsor a Division's festival that was to be open to the public. The festival would promote certain recreational safety matters, including restrictions on drinking while recreating. The company would advertise the event and provide such things as safety tip cards and door prizes.

The only Code provision that may apply is the one restricting State employees or officials from accepting anything of monetary value if it may result in: (1) impaired independence

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

Here, the things of monetary value would be the costs paid by the company for advertising and door prizes. The agency did not have the funding to launch the type of advertising campaign which the company could launch. It believed if the company advertised the festival, the publicity would draw a larger public attendance, resulting in wider exposure to recreational safety issues. Alcoholic beverages would not be served.

(A) **Impaired Independence of Judgment** - The division was, among other things, responsible for enforcing certain recreational related laws, regulations and rules regarding permits, licenses, and other program requirements for the agency. However, the division had no decision making authority or any dealings with the company. Thus, it did not appear that anyone in the division would have their judgment impaired as they made no decisions regarding the company.

(B) **Official Decisions Outside Official Channels** - As the division had no decision making authority over the company, it did not appear that anyone in the division would be in a position to make any official decisions outside official channels relative to the company.

(C) **Preferential Treatment to Any Person** - No other company had offered to sponsor the event. The agency said that if another company wanted to sponsor the event, the agency would look at their package and see how their offer would benefit the State. Thus, each offer would be treated the same as the offer from this company.

(D) **Any Adverse Effect on the Public's Confidence in the Integrity of its Government** - In deciding this issue, the Commission looks at the totality of the circumstances. *Commission Op. No. 96-78*. First, it noted that no agency employee had decision making authority over the company; and no facts indicated that acceptance would result in preferential treatment or official decisions outside official channels. Further, no State employee would personally benefit from the sponsorship because although the company said it would offer door prizes, the agency said that division employees would not be eligible for the prizes.

Based on these facts, a majority of the Commission's quorum found no violation of the restrictions on accepting anything of monetary value if it may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; or (3) preferential treatment to any person. However, those members concluded that

acceptance would have an adverse effect on the public's confidence in the integrity of its government, in violation of 29 Del. C. § 5806(b)(4). They concluded that it may result in an adverse effect on the public's confidence in the integrity of its government if an agency, which is responsible for enforcing certain recreational laws, accepted an alcoholic beverage company's offer to: advertise a State event; distribute literature on safety with its logo; and offer door prizes. (**Commission Op. No. 99-04**).

**Dissent:** I respectfully dissent from the conclusion that 29 Del. C. § 5806(b)(4) would be violated. I agree that it might constitute poor judgment to have an alcoholic beverage company sponsor a safety program, but in my opinion, the State Public Integrity Commission does not have jurisdiction to make this determination. Title 29 Del. C. § 5806(b)(4) is limited to acts which adversely effect "the public's confidence in the integrity of its government." (*Emphasis added*). The part of the decision from which I dissent does not deal with integrity or anything else over which the Commission has jurisdiction. *See, Commission Op. No. 93-17; Seth v. State of Delaware, Del. Supr., 592 A.2d 436, 442-443 (1991).* (**Commission Op. No. 99-04**).

## **Gifts**

### **Gift to State Employees from Former Boss**

A former State Officer asked if he could give his former employees a personal check to recognize their efforts as a State employee. His new employment is with a company which is regulated by the employees to whom he wanted to give the personal check. For the following reasons, the Commission held that it would violate the Code of Conduct for the State employees to accept a personal check from their former boss when his private employer is now regulated by those same employees.

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

The former employee had been the head of a section, and while employed by the State gave personal checks to each employee of the year in the amount of that year's last two digits. Shortly before leaving the State to accept a position with a private firm, which his former section regulates, he told his employees that he planned to continue the practice. Before that announcement, he asked for an opinion from this Commission on whether his post-employment conduct would violate the post-employment law. [He did not

mention that he was planning to continue giving money to his former colleagues and employees.] At that time, he told the Commission that controversies had arisen regarding the private company and his section had to advise staff members and the agency's Cabinet Secretary on these matters. Also, there were other matters connected to the private company over which there had been "much controversy involving many parties." Also, he had a direct policy role in certain State matters pertaining to this company. He had been the "point person" on most matters dealing with the controversial issues. Further, the project was "on-going" and could be so for several months.

The Commission found that he was directly and materially responsible for those matters while employed by the State and advised him that in accepting employment with the company regulated by his former agency, that he could not work on those matters "to insure undue influence is not exerted on those you leave behind, and to avoid any appearance of impropriety." *Commission Op. No. 98-12*. Thus, while controversies were still "on-going," he promised the employees who regulate the private firm that he was ensuring that his "Employee Recognition Fund" would continue "in perpetuity," when he knew: (1) he would be accepting employment with a company regulated by those same employees; (2) some matters were controversial and were on-going; and (3) while he could not represent the company on matters for which he had been directly and materially responsible, it was possible he would represent the company before his former agency on new matters.

The Commission is required to be consistent in its opinions. *29 Del. C. § 5809(5)*. It has noted that when government employees accept money from private sources it raises 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. *Commission Op. No. 97-10 (citing Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995))*.

The promise of money to employees who regulate his company, when there were "on-going" specific controversies could adversely effect the public's confidence in the integrity of its government because the promise could appear to result in: impaired independence

of judgment in performing their official regulatory duties; preferential treatment for his company; or undue influence exerted as a result of his former position as their supervisor.

Aside from the appearance raised by the promise of money when specific controversies were pending, his former employees have an on-going responsibility to regulate the company even after those specific controversies are resolved. Thus, the act of now giving the money could raise, at least, the appearance that their decisions on new issues may be influenced by his money and/or his former position or that the company would obtain preferential treatment on new issues.

Moreover, the Commission has held that accepting payment from private sources for performing State duties may raise the appearance that the State employees are in contravention of other laws. *Commission Op. No. 98-31*. 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. 83-1031*. 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. 87-1024*. 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*. Thus, if the Employee of the Year is a Merit employee and accepts compensation from a private source for performing State duties, it could appear that they are violating the Merit Rules. Such conduct could clearly have an adverse effect on the public's confidence in its government.

Also, the Attorney General'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. 87-1024*. 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 agency employees are required to regulate the company. 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.

Where the Commission previously held that compensation by a private source could result in the appearance that the State employee was violating other laws, this Commission noted that its authority to grant waivers applies only to the State Code of Conduct. *Commission Op. No. 98-31*. Thus, it has no authority to waive other laws, such as those referred to above, which impact on the appearance of impropriety. *Id.* (***Commission Op. No. 99-26***).

### ***Tickets to the Grand Gala***

A State officer received two tickets valued at \$225 each to the Grand Gala from a private corporation. Pursuant to the Executive Orders, the Commission is to decide if any ethical issue is raised by acceptance. *E.O. No. 19*. Based on the following law and facts, we concluded that no ethical issue is raised by acceptance.

In deciding if any ethical issue is raised, the Commission applies the Code provision which restricts State employees and officials from accepting gifts 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)*.

The officer said that in his official duties, he had no issues or matters with the private corporation, nor did he expect any future matters before him involving the private enterprise. As he would not be making decisions regarding the company, it did not appear that his judgment would be impaired in performing official duties. No facts were given that would indicate that he would show preferential treatment to the company or make official decisions outside official channels on its behalf.

The question of whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government is essentially an "appearance of impropriety" standard. We have previously noted that when a private source pays the expenses of a public official, it may evoke at least two ethical issues in the minds of the public:

- (1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*.
- (2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the

official is using public office for private gain. *Id.*

Here, the company was a registered lobbying organization. Thus, it had clearly expressed an interest in the decisions to be made on legislative and administrative actions in the State of Delaware. Certainly, some members of the public may view acceptance by a State officer, who gives input on legislative and administrative matters, of tickets to a rather lavish event from an organization which has expressed interest in legislative or administrative decisions, as creating “an appearance of impropriety” because it could be seen as an attempt to curry favor. However, we must base our opinions on a “particular fact situation.” 29 *Del. C. § 5807(c)*. Moreover, those particular facts must be placed within the framework of the law. First, we note that the General Assembly chose not to place a total ban on gift acceptance; rather, it requires that we evaluate, on a case-by-case basis, the acceptance of gifts. Second, the law requires that the Code be interpreted giving a legal presumption of “honesty and integrity” to State officials. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff’d, Del. Supr., No. 304 (January 29, 1996)*.

Thus, while the company had expressed an interest in government decisions, the officer said he presently had no decisions pending regarding the company; nor had he made decisions about it before accepting the tickets. Because the company dealt with matters on which there was recent legislation regarding certain private industries, the Commission asked about his office’s involvement on those matters. He said that persons in his office were involved in the legislation. However, the legislation did not apply to this company. This company might enter the market which was affected by the legislation, but such action was purely speculative. We cannot base decisions on speculative facts. *Commission Op. No. 97-11*. Accordingly, based on the particular facts, it did not appear that the tickets were offered to curry favor in decision making since he had not been and was not making decisions about the company.

Regarding whether acceptance may create the appearance that an official is using public office for private advantage or gain, we have previously noted that when a private source pays for State officials to attend events, the public may suspect that the officials are using their public position for social advantage or private gain. *See, Commission Op. No. 97-33*. We also noted that the differences in appearance of impropriety can vary depending on whether the evening’s event consists of a reception of juice and cookies as compared to cocktails, dinner, etc. *Id.* We note that this was an evening of rather lavish entertainment from a lobbying organization to a person who holds a key position in the administration. Even some of our Commission members struggled with this. However, we must place that fact within the total factual circumstances. Here, as noted, the company was not seeking official action by his office; does not do business with or seek

to do business with his office; is not regulated by his office; and has no interests pending that may be substantially affected by the performance or nonperformance of his official duties. Moreover, he was entitled to the presumption of honesty and integrity. No facts indicate that such presumption was overcome. (**Commission Op. No. 99-05**).

### ***Random Drawing for a TV***

A State employee asked if he could accept a television from a private company after his name was selected at a random drawing during a conference he attended.

As a State employee, he attended a safety conference and trade show. The Association sponsoring the conference permitted vendors of safety-related products to have a booth. One vendor, aside from displaying products, gave a 15-20 minute presentation on safety issues. The company issued "invitations" to the presentation, and to encourage attendance, it held a drawing for a television.

Attendees who went to the presentation dropped forms in a barrel, and after the presentation a drawing was held to award the television. The Delaware State employee's name was selected. The invitation to participate in this event was open to "eligible" attendees. The vendor called the Commission's office to find out if, under Delaware laws regarding gift acceptance, the Delaware State employee was "eligible." The company advised the Commission that it had contracts with the employee's State agency. The company was sent a copy of the statute and told that the State employee could seek an advisory opinion on whether acceptance would be proper. *29 Del. C. § 5807(c) (the Commission may issue advisory opinions based on a written request from a State employee, officer, honorary official or State agency)*. The company also sent a letter detailing how the selection was made and its contract obligations to the State agency.

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

The State employee was "an end user" of some products which his agency obtained through contracts with the company. Specifically, in the computer systems used by the State employee, among other things, was a device from this company which was partially responsible for controlling certain computer operations and the result was monitored by the employee. He was not in a supervisory position and did not have any decision making authority over any company which contracts with his agency. Thus, he was not exercising any judgment over the company, nor did it appear that he was in a position to

give the company preferential treatment over any competitors for the contract, or make official decisions outside official channels which favor the company. Based on those facts, the Commission found no violation. (**Commission Op. No. 99-10**).

## ***Payment of Expenses***

### ***Corporate Aircraft Travel***

A State Officer was asked to be the guest speaker at an out-of-state annual meeting of a research and manufacturing association. He was asked to speak not only because of his State position but because he also chaired a national organization, which dealt with legislative and policy issues of interest to the group.

The Code of Conduct restricts acceptance of payment of expenses 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;
- (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

In his State capacity he had no direct or immediate decision-making authority over the association. No facts were given indicating that in his State capacity he had any significant indirect or anticipated future decision making authority relative to the association. Based on those facts, it did not appear that his judgment would be impaired in performing official duties.

He spoke on certain legislative and policy issues, emerging trends in Delaware, and possible changes in federal and State programs. The association is registered as a lobbying organization in Delaware, and therefore clearly has an interest in Delaware laws and administrative actions in areas which may impact on its membership. However, no facts indicated any issues affecting the association were supported by his office, or that the association was seeking to have any legislation or administrative action introduced or drafted by his office. Based on those facts, it did not appear that he would give the association preferential treatment or make official decisions outside official channels.

Whether acceptance would have any adverse effect on the public's confidence in the integrity of its government is based on the totality of the circumstances. *Commission Op. No. 96-78 and 97-23*. When a government official accepts travel expenses from a private party it may evoke at least two ethical concerns:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional “favors” in return. *Commission Op. No. 97-33* (citing *Sanjour v. EPA*, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995)).

(2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official’s acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

Here, the association was registered as a lobbying organization in Delaware. Thus, it clearly has expressed an active interest in Delaware’s legislative and administrative actions which could impact on its membership. Thus, the public could view the payment of expenses as an attempt to curry favor with an official who could be in a position to help them on either legislative issues or administrative actions. However, against that concern, we must balance the remaining facts. Specifically, as noted above, no legislative or administrative actions were pending which diminishes the possibility that his judgment would be impaired; that he would give preferential treatment; or would make official decisions outside official channels. Moreover, the time spent at the conference was basically limited to the time during which he was speaking, leaving little, if any, possibility for association members to lobby him. Further, he received no personal benefit, such as honoraria, nor did he engage in activities such as golfing, etc. Thus, no facts indicate that he used his public position for private gain. The Commission also noted that the reason for accepting the corporate aircraft was because he had a long-standing commitment to participate in a program back in Delaware. Because of that commitment, he could only accept the speaking engagement if arrangements were made for him to return to Delaware in time to meet his prior commitment. Moreover, he was invited not just because of his State position, but also because of the broader perspective he could bring to the proceedings as chair of the national organization. This also aids in diminishing the possibility that he was sought as a speaker just as a means of currying favor with him because of his State position. (***Commission Op. No. 99-17***).

### ***More Travel on Corporate Aircraft***

A Senior Executive Branch official notified the Commission that he accepted travel on a corporate aircraft under circumstances essentially identical to those addressed in a 1996 Commission Opinion. *Commission Op. No. 96-26*. The Commission must strive for consistency in its opinions. 29 *Del. C.* § 5809(5). As there were no distinctive factual differences between the 1996 situation and this situation, the Commission held that for the reasons given in its earlier opinion, the value should be disclosed in the official’s annual financial disclosure statement and no ethical issues were raised by acceptance.

***(Commission Op. No. 99-39).***

### ***Tickets to an Exhibition***

A Division Director accepted two tickets valued at \$200 each from a private enterprise to attend an exhibition. The official could use the second ticket to bring a guest. Aside from viewing the exhibition, presentations were made by public officials, a meal was served, and there was entertainment. The issues were whether: (1) the tickets were to be reported under the financial disclosure statute; and (2) any ethical issue was raised by acceptance.

(1) **Was There “Consideration of Equal or Greater Value”?** Under the financial disclosure statute the value is reported as a “gift” unless there is “consideration of equal or greater value.” *29 Del. C. § 5813 (a)(4)(e)*.

The Commission is to be consistent in its opinions. *29 Del. C. § 5809(5)*. “Consideration” generally means that something is given in exchange to the gift giver. *Commission Op. No. 99-26 (citing Merriam Webster’s Collegiate Dictionary, p. 246) (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); and 17A Am. Jur. 2d Contracts §§ 113 and 114)*.

In a prior opinion to this official, addressing similar circumstances, we held that the value of the ticket for a guest was to be reported. *Commission Op. No. 97-33*. Regarding the official’s own ticket, several reasons were given for the offer of the tickets. However, the “motive” behind an offer and acceptance is distinct and different from “consideration.” *See, e.g., Commission Op. Nos. 96-26 & 97-01 (citing 17A Am. Jur. 2d Contracts § 115) (where sponsor gave tickets to an official to attend because of his status as a public official, consideration was not of equal or greater value)*. While public officials spoke at the event, it was not suggested that this particular official gave a presentation. As “consideration” means that “something is given in exchange,” and the facts did not indicate an exchange between the official and the private company for a presentation, there was no “consideration” on that basis.

In later correspondence, the official said a Senior Level Executive Branch official, who was involved in matters related to decisions concerning State funds for the organization, asked her to observe and assist the company to insure the success of its projects as the State had invested substantially. Where the benefit accrues to the public officer personally and to some extent to the State, with the gift giver receiving little or no benefit, then the consideration is not “equal to or greater than” as required by the statute.

*Commission Op. No. 97-01.*

Here, the benefit passed personally to the official and the guest, who attended an evening's entertainment. The benefit obtained by the State was that it might gain some insight as to the success of the program. As the State may have benefitted from the official's attendance, any "consideration" was to the State, not to the gift giver. Therefore, the ticket value would be reported under the Financial Disclosure Statute.

**(2) Were any Ethical Issues Raised?** As the official was in the Executive Branch, the Commission reviewed the facts to decide if any ethical issue was raised under the Code of Conduct, as required by Executive Orders 5 and 19.

Again, we must be consistent in our opinions. In prior opinions, we said that when private sources confer benefits on public employees to perform agency related functions, it may raise, at least, an appearance of impropriety. *Commission Op. No. 97-33(citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), F.3d 85, 94 (1995)(interpreting federal ethics restrictions on accepting payment from private sources for performing official duties).* Two ethical concerns noted in *Sanjour* are:

(1) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.*; and

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

In that prior opinion, we noted that, by statute, officials from this particular office were entitled to reimbursement for expenses incident to official duties. *Id.* Thus, to the extent a Senior Level Executive Branch official asked her to attend, attendance may have been incident to official duties for which the State could have paid the official's expenses (but not necessarily those of her guest). *Id.* When the State pays, the ethical concerns raised when payments are made by private enterprises do not arise because it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the "watchful eye" of the agency. *Commission Ltr to Public Officers, January 21, 1997.* At least one Commissioner believed that payment might have been obtained from the State in this situation.

We have urged officials to "exercise great caution" if tickets are accepted from a private enterprise if the official makes decisions about the private enterprise, because it could appear that the offer is to curry favor or influence decisions. *Commission Op. No. 97-33.*

We noted that offering additional tickets may also raise the appearance that the offer was to curry favor or influence the decision maker. *Id.* Moreover, accepting the additional tickets may raise suspicion that the official is using public office to obtain “private perks.” *Id.* We noted that the concerns increase if the event is rather lavish. *Id.*

Here, the official attended because she was asked to observe and assist the company to insure the success of its projects. Logically, if asked to “observe and assist the company,” it could be expected that the official would develop and express an opinion on the project. As the State “has invested substantially in this project,” the official’s opinion could impact on future decisions regarding State funding to the company. Thus, it could appear that the offer was to “curry favor” because of the official’s significant, indirect decision making authority. Further, the tickets she received were valued at \$200 each, while the tickets for the general public were \$13. This indicates that the event the official attended was likely more lavish than what the public receives.

However, to decide if acceptance may have an adverse effect on the public’s confidence in its government, we first note that there is a legal presumption of honesty and integrity in the conduct of government 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, Veasey, C. J. (January 29, 1996). We also must place the concerns about currying favor in decision making and using public office to obtain unwarranted privileges, private advancement or gain within the totality of the circumstances. *Commission Op. No. 96-78*. While the event apparently was more lavish than what is available to the general public and while she had significant, indirect decision making authority which could affect the company’s State funding, the official said a higher level official asked her to go; and the evening was not solely directed at entertaining as official presentations were made. Thus, we distinguish this situation from one where we found it improper for a government official to accept tickets and solicit another ticket to a musical concert where there were no official activities, and he had decision making authority over the gift giver. *Commission Op. No. 98-35*. Moreover, the nature of this official’s position was that the matters over which she had authority were ones connected to the particular type of exhibition. Additionally, no facts indicated that any matter concerning the company’s funding was under review when she attended, as it was in No. 98-35. *Compare also*, *Commission Op. No. 97-11* (members of a State agency which routinely made decisions regarding private company should not attend company’s “gala” when the company had matters pending before the agency).

Accordingly, while we still encourage “great caution” in accepting payment of expenses from an organization over which an official has even an indirect, but significant, decision making authority, we find no violation in this instance. **(Commission Op. No. 99-20).**

## ***Panelist at a Conference***

A Senior Executive Branch Official attended an out-of-state conference for government officials and business organizations. He was a panelist for an evening business session and participated in a morning business session to present the Executive Branch's perspective as part of the discussions. After the morning session, he played a round of golf and then returned to Delaware. A private company which was also a registered lobbying organization, paid his expenses for overnight lodging, meals, and the round of golf, valued at approximately \$530. While the conference lasted for 3 days, he went late on Friday and returned on Saturday.

His dealings with the private firm in his official capacity, consisted of: regularly participating in meetings and forums sponsored by the private enterprise to discuss public policy issues; working with the private firm on public policy studies; and meeting with this firm, and other businesses and civic groups to present information on certain policy issues.

Two issues were raised: (1) whether the value of his expenses should be reported under the financial disclosure law; and (2) whether accepting the payment raised any ethical issue under the Code of Conduct.

**(A) Financial Disclosure Law Evaluation:** State officers must report gifts of more than \$250. *29 Del. C. § 5813(a)(4)(e)*. "Gift" includes payment or anything of value unless "consideration of equal or greater value" is given in return. *29 Del. C. § 5812(o)*. If it is a "gift" then it is to be reported; if sufficient consideration is given, it is not a "gift" and need not be reported.

Based on the facts, there was "consideration of equal or greater value" given where in return for payment of his expenses, he participated in both the evening and morning business sessions. Although he received the additional benefit of playing a round of golf, this activity was not the primary focus of the time spent at the retreat. As there was consideration of equal or greater value, he was not required to report the payment as a "gift" under the financial disclosure statute. *Compare, Commission Op. No. 96-07 & 96-37 (No consideration of equal or greater value where business meetings were incidental as compared to the majority of the conference time which was not directed at business)*.

**(B) Were any Ethical Issues Raised?** The Code restricts acceptance of payment of expenses if it may result in: (1) impaired independent judgment in performing official duties; or (2) official decisions outside official channels; or (3) preferential treatment to any person; or (4) have any adverse effect on the public's confidence in the integrity of

its government. 29 *Del. C. § 5806(b)*. The concerns addressed by the Code of Conduct restrictions are that when private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d. 85, 94 (1995))*. Two ethical issues noted by the *Sanjour* court were:

(1) when a public official accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “favors” in return. *Id.*

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

In prior opinions, we noted that lobbying organizations, through their registration, have indicated a clearly expressed interest in the State’s legislative and administrative activities. *Commission Op. Nos. 99-05 & 99-17*. We urged that caution be used in accepting benefits from such entities. *Id.* However, the question is if that clear interest in State decisions, based on the particular facts, may raise the appearance that the recipient is beholden to or prone to provide favors to the private enterprise. Here, it did not appear that the official had any decision making authority over the private enterprise. It had no contracts with his agency. He advised this entity and other private enterprises of various State fiscal issues. Thus, it did not appear that the interactions he described could result in official decisions about the private enterprise in which his judgment would be impaired or that he was in a position to give it preferential treatment or make official decisions outside official channels.

The issue of whether an official’s acceptance of benefits from a private source may raise the appearance that such officials are using public office for private gain, also must be considered based on the particular facts. While an overnight trip out-of-State and the accouterments (lodging, golf, and meals) valued at \$530 might be considered fairly lavish by some, the Commission also notes that he left Delaware late on Friday to participate as a panelist that evening. He did not seek the benefits of staying all three days; or payment of expenses for his spouse, although apparently the private enterprise would have paid those costs. On Saturday morning, he also participated in official meetings. At the end of those meetings, he played a round of golf before returning to Delaware that day. Based on the particular facts, we find no violation of 29 *Del. C. § 5806(b)*. **(Commission Op. No. 99-38).**

## ***Recognition as an Alumnus***

A private foundation paid the expenses for a Public Officer to return to his alma mater to be a special guest speaker when he was honored as an alumnus. Based on the following facts and law, we concluded that the value need not be reported as a “gift” under the financial disclosure law and acceptance does not raise any ethical issue.

**Financial Disclosure Requirements:** The Foundation paid for travel, lodging, parking and dinner for two when he was honored as an alumnus and was the event’s special guest speaker. The total value was \$866.69. Under the financial disclosure law “gift” includes “payment” or “anything of value.” 29 *Del. C.* § 5812(o). However, an item is not a “gift” if consideration of equal or greater value is given. 29 *Del. C.* § 5812(o). “Consideration” generally means that something is given in exchange. *See, Merriam Webster’s Collegiate Dictionary, p. 246 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); See also, 17A Am. Jur. 2d Contracts §§ 113 and 114.*

In return for paying his expenses, he attended the function and was a speaker. Where individuals serve as speakers such activity constitutes “some consideration”. *See, e.g. Commission Op. No. 99-17.* Whether it is consideration of “equal or greater value” depends on the particular facts, e.g., length of the event, portion of event spent engaging in official activities versus portion of event not engaged in official activities. *Id.* Here, he left for the out-of-state event late in the afternoon, for an early evening reception. The ceremony at which he was introduced and spoke started an hour later. He stayed overnight and caught a 7:30 a.m. flight. Based on these facts, there was consideration of equal or greater value. Thus, the payment need not be reported as a “gift” on his financial disclosure report.

**Code of Conduct Requirements:** The Executive Orders require us to decide if any ethical issue is raised by acceptance. *E.O. 19 ¶ 5.* State officials may not accept gifts, payments of expenses, or anything of monetary value, if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

In his official capacity, he had no decision making authority over the Foundation and no dealings with it other than using the opportunity as its guest speaker. Where a government official has no decision making authority over an organization which gives them something of value, it is unlikely that their independent judgment will be impaired or that the person will receive preferential treatment in the official’s decisions.

*Commission Op. No. 97-43.* Thus, the remaining issue is if acceptance creates any appearance of impropriety. To decide if acceptance raises an appearance of impropriety, we look at the totality of the circumstances. *Commission Op. No. 97-23.* Here, based on the reason for attending, the limited time spent as the organization's guest, the activities engaged, that he had no decision making authority over the organization, etc., the acceptance does not raise any appearance of impropriety. (***Commission Op. No. 99-46***).

### ***Briefcase and Painting***

A State officer accepted two gifts valued at more than \$250 each: (1) a painting by a local artist; and (2) a briefcase from a national association. Based on the following law and facts, we find: (a) the source and value of the painting should be reported as a gift on his annual financial disclosure report; (b) the source and value of the briefcase need not be reported as a gift on that report; and (c) no ethical issues are raised by the acceptance of either item.

**Financial Disclosure Requirements:** Under the financial disclosure law, the source and value of "gifts" valued at more than \$250 must be reported. *29 Del. C. § 5813(a)(4)(e)*. "Gift" includes "anything of value." *29 Del. C. § 5812(o)*. Here, the estimated values are: \$700 for the painting; and \$310 for the briefcase. However, an item is not a "gift" if consideration of equal or greater value is given. *29 Del. C. § 5812(o)*.

#### **(A) The Painting**

Traditionally, the local artist gives certain Senior Level officials an original painting before they leave office. The State officer planned to take the painting and other personal belongings when his term ended. No facts suggested that he gave anything in return for the painting. As he gave no consideration, the item, its source, and its value should be reported.

#### **(B) The Briefcase**

The national association gave the briefcase to him as a token of its appreciation for his work as its Chair. As Chair, he managed the organization's activities, such as forums on education reform, tobacco litigation settlement, served as host when the organization met in, Delaware, led its efforts to inform Congress on certain issues, etc. Many hours were spent on these functions. This Commission has held that where a State official was an officer of a national organization and was expected to participate in planning organizational activities, preside over meetings, attend and participate in the

organization's activities, etc., that the actual performance of those duties was "consideration of equal or greater value" where the "thing of value" received was the costs of his travel, hotel, etc. *Commission Op. No. 96-40*. Here, the "thing of value" is a briefcase, but the exchange—performing the required organizational functions in return for something of value—is the same. To be consistent with our prior ruling, we find that his participation is equal to or greater than the value of the briefcase.

**Code of Conduct Requirements:** State officials are restricted from accepting "gifts" or "any other thing of monetary value" if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. As both items are "things of monetary value," the statutory provisions are applied as follows.

**(A) The Painting**

In his official capacity, he had no direct or immediate decision making authority over the artist. Where a State official has no decision making authority over the entity which gives them a thing of value, it is unlikely their independent judgment will be impaired or that the entity will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. The remaining issue is if acceptance may create an appearance of impropriety, e.g., would it appear that he was using public office for unwarranted privileges or private gain, which *29 Del. C. § 5806(e)* prohibits. Obviously, the painting was given because of the public office he held. By accepting, he privately gained the painting and its value. However, this is a gift traditionally given to the occupant of this Senior Level position before the official leaves office, diminishing any perception that he used public office for unwarranted privileges or private gain.

**(B) The Briefcase**

Again, in his official capacity, he had no direct or immediate decision-making authority over the association. Thus, it was unlikely his judgment would be impaired or that the association will receive preferential treatment in his official decisions. *See, Commission Op. No. 97-43*. Again, the issue is whether acceptance may result in any appearance of impropriety. Based on the particular circumstances under which the "thing of value" was given--in return for performing duties as Chair of the association; and the fact that he had no decision making authority over the association--it does not appear that the item was given or accepted as a result of any special or unwarranted privileges or personal gain.

## **Conclusion**

The painting should be reported as a “gift”; the briefcase need not be reported as a “gift”; and no ethical issues are raised by accepting these things of monetary value. (*Commission Op. No. 99-50*).

## ***Point-to-Point Tickets***

A company, regulated by the State, gave two tickets to Point-to-Point at Winterthur to a State officer who was involved in regulating the industry of which the company was a part. The Commission concluded that the tickets should be reported under the financial disclosure reporting law, and that acceptance raises ethical issues for the reasons detailed below.

### **(A) Financial Disclosure Law**

Under the financial disclosure law, gifts valued at more than \$250 are to be reported unless consideration of equal or greater value was given. 29 *Del. C. §§ 5812(o) & 5813(a)(4)(e)*. The two tickets were valued at \$681.50. He attended the event because he was encouraged to develop good relations with the regulated industry, due to its importance to the State’s economy and such events were attended by persons who previously held his position. The motive prompting one to enter an agreement is distinct and different from “consideration.” *Commission Op. No. 96-26 (citing 17A Am. Jur. 2d Contracts § 115)*. As “motive” is not “consideration,” and no facts indicate that anything was given in return, than the item is a “gift” and reportable under the financial disclosure statute and the Executive Orders. *Id.* Here, no facts indicated that he gave anything in return. Accordingly, the source and value would be reported as a gift in his annual financial disclosure report.

### **(B) Are any Ethical Issues Raised by Acceptance?**

When gifts are reported pursuant to Executive Orders 5 & 19, we decide if any ethical issues are raised by acceptance. *E.O. No. 19 ¶ 2*. To decide if accepting a gift raises ethical issues, we apply the Code of Conduct. State officers may not accept any compensation, gift, payment of expenses or any other thing of monetary value under circumstances where acceptance may result in:

- (1) Impaired independence of judgment in exercising of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or

- (4) Any adverse impact on the confidence of the public in the integrity of the government of the State. 29 Del. C. § 5806(b).

The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or gain. 29 Del. C. § 5806(e).

By law, his official duties included responsibility for regulating the industry of this company. (*Citation omitted*). The statute also gave him authority to visit and examine each of the industry's institutions as frequently as deemed necessary or expedient. (*Citation omitted*). Thus, normally his official duties entail exercising judgment on such matters as examinations over those institutions. However, the particular company in the industry was out of state and its own State is its primary state regulator. While his office would normally have concurrent jurisdiction, it entered an agreement with other State regulators in this industry if they had branches in more than one state. Basically, the agreement is that the "home State" will be the primary regulator. Thus, his office did not examine the company. However, despite the agreement, the Commission noted that because it was a highly regulated industry; his authority as a Senior Level Executive Branch official could have a significant impact on how, and by whom, such companies will be regulated; and the company had identified its interest in Delaware's legislative and administrative actions by registering as a lobbying organization. Clearly, it, like other institutions in the industry, would be interested in administrative actions taken by his office.

For example, his office regulated another company in Delaware, which was a small affiliate of the company giving the tickets. Also, by law, he collected certain fees from the company giving the tickets and its small affiliate in Delaware. (*Citation omitted*). The rate is set by State statute, and based on a percentage of the company's net income. (*Citation omitted*). In reviewing the payments, he had some latitude in deciding if the entity had submitted the proper amount. Specifically, by law, the assessment was to be reviewed and corrected by him upon application by any party involved. (*Citation omitted*). Thus, he reviewed the entity's statements and determined if the report complies with the statute. If a regulated entity challenged its assessment, by statute, he was charged with deciding if the assessment would be corrected. He had no recollection of the company or its Delaware affiliate submitting any application for an assessment correction.

The assessments are reviewed at least on a quarterly basis. (*Citation omitted*). The Point-to-Point was on May 2, 1999. It is not clear if any quarterly tax reports by the company or its Delaware affiliate were pending review when the tickets were offered. Obviously, the timing of the gift can impact on a determination of whether independent judgment would be impaired. However, even without that information, the Code restricts

acceptance if it may result in any adverse effect on the public's confidence in the integrity of its government. We have held that this is basically an appearance of impropriety test. *Commission Op. No. 96-78*.

In interpreting federal regulations similar to the State Code of Conduct, which address private parties paying for activities of government employees, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns about appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995)*.
2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the specter that the employee is using public office for private gain. *Id.*

He agreed that attending an event hosted by an entity over which he had decision making authority creates a different appearance than if he attended an event hosted by an entity over which he had no decision making authority. That difference is indicated by the terms which require that we look at "whether acceptance would result in impaired independent judgment in performing official duties." We have held that where there is no official duty to make a decision over the gift giver, then judgment cannot be impaired. *See, e.g., Commission Op. No. 97-43.*<sup>2</sup>

Here, the gift was given by an entity regulated by him. Moreover, the assessment decision alone is an on-going issue before him. Beyond that, when the gift is to a rather lavish event, it also raises the concern in the mind of the public that the official may be using public office to obtain unwarranted privileges, private advancement or gain. *See, Sanjour at 95-96 (noting the difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area)*. Here, the event was rather lavish with food, drinks, etc., set up in a special tent for the company to entertain its invited guests. These were not

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<sup>2</sup>We note that while the question of whether his judgment would be impaired can be easily resolved when no judgments are to be made, but the statute is not limited to just that criteria. For example, whether acceptance may have an adverse effect on the public's confidence in the integrity of its government is decided based on the "totality of the circumstances." *Commission Op. No. 96-78*.

tickets which the general public could obtain. Thus, it could appear that the gift giver was trying to curry favor or that he was receiving a “private perk” from a company which has a substantial interest in the decisions made by him. Based on the facts, we conclude that acceptance was improper because it raises an appearance of impropriety.

However, based on the particular facts, he was not required to repay the company because he was not aware of the value of the tickets when he accepted them; officials who previously held his position attended such events which affected his decision to accept the tickets; he was encouraged by higher level officials to develop good relations with the industry because of its importance to Delaware’s economy; and upon learning of the value of the tickets and reviewing our opinions which raised some concerns in his mind, he immediately came to the Commission for a ruling. However, we caution that: (1) as he was entitled to rely on the gift givers’ value, he should always be alert to ascertaining the value when offered anything of monetary value; (2) participation in certain events by officials who previously held the same job does not negate the fact that the Code of Conduct places the responsibility on each individual State employee or officer to comply with the law; and (3) while he may be encouraged to develop good relations with the industry, when an entity which is regulated by his office pays for him to socialize with its officials and representatives at a rather lavish event, that is apparently by invitation only, it can take on appearances beyond developing good relations for the reasons stated herein. *(Commission Op. No. 99-52).*

## ***Concurrent Employment***

### ***State Employee Serving as a Local Elected Official***

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

#### **(A) General Guidance**

First, as a general matter of guidance, this Commission must base its opinions on a “particular fact situation” pursuant to *29 Del. C. § 5807(a)*. Thus, it addressed only the facts available relative to one property. The State employee was

advised to use the decision on those facts as an aid in his future conduct, and as specific issues arose in his State capacity, he was advised to review the pertinent Code sections. The Commission also enclosed synopses of its opinions from previous years to use as a reference guide. In particular, it was suggested that he may wish to review the Commission's prior decisions dealing with persons who seek elective office while employed by the State. *See, Commission Op. Nos. 92-2, 96-02, 96-22, 97-06.* If he encountered a particular issue which he could not resolve, he could return to the Commission for guidance based on the particular facts.

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

### **(B) Applicable Law**

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

- (1) using public office to secure unwarranted privileges, private advancement or gain, 29 *Del. C. § 5806(e);*
- (2) engaging in any activity beyond the scope of his public position which might reasonably be expected to require or induce him to disclose confidential information acquired through his public position; 29 *Del. C. § 5806(f);*
- (3) disclosing, beyond the scope of his public position, confidential information gained by reason of that public position or otherwise using such information for personal gain or benefit. 29 *Del. C. § 5806 (g).*

### **(C) Facts and Discussion**

As it related to his elected position, the particular property was expected to be considered for re-zoning from commercial to residential by the municipality. The issues of re-zoning and subdivision of the property would go to the City's Planning and

Zoning Board. It would make a recommendation to City Council. Thus, as a Council member, he might be involved in future debates and decision making concerning re-zoning/subdivision. According to the City Solicitor's letter, the outcome may be influenced by certain aspects of the property, and the State employee would have "special insight" into those particular aspects that "**may not be a matter of public record**," but "may be highly relevant in terms of the outcome of discussions." However, at present, no particular issue was pending before the City.

In his State job, his staff conducted certain studies of this property, but the studies were not related to re-zoning/subdivision. The study was conducted before he was elected to his municipal position. Thus, when the decision on the study was made, he did not hold the other employment so no facts indicated even a potential conflict at that time.

The property is being sold and the new owner would become responsible for certain regulatory requirements resulting from the State study. If the sale did not go through, the old owners would be responsible. In his State job, he would be involved in developing and approving a proposed plan regarding compliance with the State agency's requirements, which his office would issue to the public after its plan was prepared. He would have a significant role in developing/approving the plan. After that plan is issued, his State agency must accept public comments and then issue a final plan. Again, he would have a significant role. He was not the final decision maker. However, the Commission has held that the Code does not limit its parameters to only those who make final decisions. *Commission Op. Nos. 96-78 and 98-12*. For example, it restricts officials from **reviewing** or disposing of matters if there is an interest which tends to impair independent judgment. *29 Del. C. § 5805(a) (emphasis added)*. This was pointed out as a matter of clarification to aid him in making any future decisions relative to any conflict. No facts indicate that any decisions made in his State capacity regarding the particular property were impaired by his other employment. His supervisor is monitoring the decisions on this property and other properties which may be subject to review and/or action by him and his office, which may also arise before the City. The Commission said that while it cannot dictate personnel management procedures within his office, this may serve to reduce "any adverse effect on the public's confidence in the integrity of its government," under *29 Del. C. § 5806(b)(4)*.

The State employee indicated that the public will have 20 days to appeal the State agency's decision regarding the plan for the particular site. It is possible that he would testify before an appeals board. However, it was not probable because in the nine (9) years in his State job, he has never been called to testify. After the final plan, the property owner is to take action based on the plan and the State employee's technical staff would oversee compliance. No civil action or criminal action is pending regarding the problems

with the property which are regulated by his agency. However, the law permits both possibilities. If either should occur, his office would be looked to as a source of information on the actions. While most of this activity would be a matter of public record, he said sometimes proceedings relative to the regulatory matters may not be matters of public record. Thus, in his State capacity, as indicated in a letter from the City's attorney, he might obtain information that is not a public record which may be relevant to his decisions as a Council member. However, from his statements at the Commission's meeting he was clearly aware of his obligation not to improperly disclose or use confidential information as provided by 29 Del. C. § 5806(e) and (f). Aside from that issue, the possibility of his testifying or being involved in his State capacity in a civil or criminal action related to the issues, was merely speculative. Thus, there were no "particular facts" on which to base a concrete decision as required. 29 Del. C. § 5807(a).

Also, there were building and housing code violations being brought against the present owner, which would come before the City Council. He, as any other Council member, would receive status reports on the prosecution of the violations. However, such violations were entirely unrelated to the issues being handled by his State agency. His State office was not in any manner involved and does not even have authority over buildings. Thus, it did not appear that as to those matters he would be in a position in his State capacity to review or dispose of the issues; to obtain any confidential information, etc. Accordingly, no facts indicated a conflict relative to those matters.

As to the issues of re-zoning/subdivision, as noted, no particular facts were available on what the issues may be and we cannot give any concrete guidance on speculative matters. He was again advised that as issues began to frame themselves he should be cognizant of his involvement on the State level with this property and of the Code provisions to aid him in deciding, for example, if he should recuse himself from participating as a result of the State Code restrictions. (**Commission Op. No. 99-06**).

### ***Employment with Temporary Agency which has State Contract***

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

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

Here, the State employees do not make any official decisions about which private company will contract with the State to provide temporary services. Thus, their judgment in performing official duties could not be impaired. It also did not appear that they would be in a position to make an official decision outside official channels because the selection of the contractor is not even made by their agency. It also did not appear that they would be in a position to give preferential treatment to the company because they cannot control when the Division will need temporary help, so they cannot “throw work” to the temporary agency. Also, the Division Director said that if the private enterprise is called and more than one person is available to work, if one of those persons is one of his State employees, he could select someone else. Thus, the agency would not act to insure that as a result of their State position its employees would get the temporary assignments. Under these facts, the Commission found no violation. (**Commission Op. No. 99-12**).

### ***“Other Employment” includes Dual Employment by the State***

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

At common law, it was incompatible for an individual to hold dual government positions if in one position the individual could act upon the appointment, salary and budget of his superior in the second position. *See, e.g., People Ex. Rel. Teros v. Verbeck, Ill. App. 3 Dist., 506 N.E. 2<sup>d</sup> 464 (1987)*. The common law ban on holding two government positions under such situations was because of the potential for influencing their superior's salary and budget, and ultimately their own salary. *Teros; People Ex. Rel. Fitzsimmons v. Swailes, Ill. Supr., 463 N.E. 2<sup>d</sup> 431 (1984); People Ex. Rel. v. Claar, Ill. App. 3d, 687 N.E. 2<sup>d</sup> 557 (1997); Mead v. Board of Review, Ill. App. 2d, 494 N.E. 2<sup>d</sup> 171 (1986)*. In such situations, Courts said there could be “conflict of duties” between the two offices and a “conflict of interest,” or at least the potential for such conflict if the individual held both jobs. *Teros, Swailes, Claar, and Mead*. Some courts held that recusal from participating in such decisions was not a sufficient remedy; rather, one of the jobs must be relinquished. *Teros at 466*. It held that banning dual government employment under such situations “insures

that there be the appearance as well as the actuality of impartiality and undivided loyalty.” *Id.* (citing *Rogers*; *See also, O’Connor v. Calandrillo*, N.J. Super., 285 A.2d 275, *aff’d.*, 296 A.2d 325, *cert. denied.*, 299 A.2d 727, *cert. denied.*, U.S. Supr. Ct., 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed. 2d 399). The common law rule also had application if the individual held a government post and a second job in the private sector. 63C *Am. Jur. 2d Public Officers and Employees* § 62. The doctrine arises out of the public policy that an officeholder’s performance not be influenced by divided loyalties. *Id.*

Subsequently, States began to change the common law by adopting statutes regarding concurrent employment in both the public and private sector. 63C *Am. Jur. 2d Public Officers and Employees* § 62, *et. seq.*; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers*, 62 ALR 5<sup>th</sup> 671. Regarding holding a second job in the public sector, the statutes identified certain positions where a government employee could not hold dual positions. In other situations, it permitted dual employment, but restricted the conduct of persons holding dual positions. 62 ALR 5<sup>th</sup> 671 and 63C *Am. Jur. 2d Public Officers and Employees* §§ 62 thru 70. Moreover, Courts acknowledged the distinction between a “conflict of duties” and a “conflict of interest.” *Claar* at 217; *Reilly v. Ozzard*, N.J. Supr., 166 A.2d 360 (1960).

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

This approach to dealing with concurrent employment was meant to allow citizens, including government employees, an opportunity to hold a second job to supplement their income and, in the case of dual government positions, permit them to more fully participate in politics. 62 ALR 5<sup>th</sup> 671 and 63C *Am. Jur. 2d Public Officers and Employees* §§ 62 thru 70.

Delaware’s General Assembly adopted this less restrictive approach. In some instances, it identified government positions where dual occupancy is prohibited by law. *See, e.g., 29 Del. C. § 5808 (b) (Public Integrity Commission members may not hold elected or appointed office under the government of the United States or the State or be a candidate for such offices; 15 Del. C. § 301(d) (Board of Elections Commissioner may not hold or be a candidate for office).*

Where dual government positions were not expressly prohibited, the General Assembly restricted the conduct of government employees. For example, when State employees also seek an elected office, the General Assembly restricted their conduct regarding political activity. *See, e.g., 29 Del. C. § 5954 (no person shall use or promise to use, directly or indirectly, any official authority or influence, to secure or attempt to secure for any person an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration).*

More significant to this Commission, is that the General Assembly, in enacting the statute we administer, said the purpose was to insure that the conduct of such persons holds the respect and confidence of the people, and therefore such persons are to avoid conduct which violates the public trust or which creates a justifiable impression among the public that such trust is being violated. *29 Del. C. § 5802(1)*. However, it also recognized that it is both “necessary and desirable that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed.” *29 Del. C. § 5802(3)*.

To balance the protection of the public’s interests and at the same time encourage citizens to take public office, it said that State employees must have the benefit of specific standards to guide their conduct. *29 Del. C. § 5802(2)*. Among the “specific standards” is the restriction on “other employment.” *29 Del. C. § 5806(b)*.

That standard provides that: No state employee, state officer or honorary state official shall...incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment ... under circumstances where such acceptance may result in any of the following: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in its government. *29 Del. C. § 5806(b) (emphasis added)*.

As noted, we have held that “other employment” restriction applies if a State employee also holds elected office. *Commission Op. Nos. 97-06; 96-02; 96-22*. Those holdings are consistent with: (1) the plain language of the provision; and (2) the statutory purpose and intent. First, the plain language refers to “any” obligation in substantial conflict with performing official duties. The term “any” is all encompassing. *Commission Op. No. 95-006*. Also, the plain language does not refer to employment by a private enterprise, rather it refers to “other employment.” Had the General Assembly desired to restrict the provision only to employment by a private enterprise, it could have said so because in other Code of Conduct provisions it clearly and specifically refers to standards to be

followed where the individual is a State employee, and at the same time has an interest in a private enterprise. *See, e.g., 29 Del. C. § 5805(a)(2)(b); § 5805 (b); § 5805 (c) and (d); § 5806(c) and (d).*

Reading those terms in the context of the whole statute, we note that the General Assembly inserted a specific subchapter addressing procedures to insure that persons holding elected positions and are “also employed” by the State are not paid by more than one tax-funded source for duties performed during coincident hours. *29 Del. C., subchapter III.* Thus, the General Assembly is presumed to have been aware of such dual positions when it enacted Title 29, Chapter 58. To hold that “other employment” did not include elected positions would not only be contrary to the plain language but would mean that State employees with a second job in the private sector would be subject to having their other employment curtailed if there was a conflict, while State employees whose second job was with another government agency would not be so curtailed. Such interpretation would ignore the fact that the law recognizes that conflicts can arise when the “other employment” is another government job. *See, Teros, et. al, supra.* Where an interpretation would lead to an absurd or unreasonable result, such interpretation could not be the expressed legislative intent. *Commission Op. No. 96-08; 96-14.*

Accordingly, we hold that “other employment” in the Code of Conduct applies to State employees who concurrently are General Assembly members because to do so is consistent with the plain language and the expressed statutory purpose. (*Commission Op. No. 99-35*). The effect of this interpretation is that the Commission can decide if the person in their full-time State job has a conflict of interest on that job. However, it does not mean that the Commission can decide if the person in their capacity as a member of the General Assembly has a conflict because conflicts for members of the General Assembly are governed by other laws. *See, Commission Op. No. 99-35, “Personal or Private Interests of General Assembly Members,” supra at pp. 20-21.*

Having concluded that we have jurisdiction, the next issue is whether participating in decisions regarding the salary of a superior creates an obligation “in substantial conflict” with performing public duties and/or whether the other employment may result in: (1) impaired judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in its government. *29 Del. C. § 5806(b).*

Here, because of the dual employment, a State official was in a position to influence his

supervisor's salary at hearings in the General Assembly.<sup>3</sup> His supervisor has the authority to hire, promote, or fire him in his State position. Thus, actions he may take on the matter could impact on his own full-time employment. Consequently, it could appear that he had a "personal or private interest" in the matter. The statutory remedy under the Code of Conduct, 29 Del. C. § 5805(a)(1), if there is a personal or private interest which tends to impair independent judgment, is that the State employee not participate.<sup>4</sup> Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993). The question of whether an interest is sufficient to warrant recusal is an issue of fact. Prison Health.

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

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

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

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<sup>3</sup>We stress that this is not a situation where the decision affects a broad class or group. Rather, it individually addresses the supervisor. As we must base our decisions on a "particular fact situation." 29 Del. C. § 5807(a), we do not address what conduct would be appropriate if a class or group were involved.

<sup>4</sup>The restriction on State employees participating where there is a personal or private interest appears broader than a similar restriction on General Assembly members. State employees may not participate **on behalf of the State** in matters **pending before the State** if they have a personal or private interest. Legislators may not debate or vote **on any measure or bill pending in the General Assembly** if they have such interest. 29 Del. C. § 1002(a).

**(3) Official Decisions Outside Official Channels**—It could, at a minimum, appear that the dual employment holder could operate outside official channels to obtain the salary increase for his supervisor; or that the supervisor could use his authority and power over the employee to obtain such decision.

**(4) Any adverse effect on the public's confidence in the integrity of its government**--This provision and the one against raising suspicion among the public that a State employee is engaging in conduct violating the public trust, 29 *Del. C.* § 5806(a), are basically an “appearance of impropriety” test. *Commission Op. Nos. 98-11; 98-23; 98-31*. This is not to say that, in fact, his judgment would be impaired, or that he would give or receive preferential treatment, etc. However, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. It only requires that it “may result in an adverse effect on the public’s confidence” or that it may “raise suspicion” that the dual employment holder is acting in violation of the public trust. *Id*; *See also*, 29 *Del. C.* § 5811(2) (*public officers and employees should avoid even the appearance of impropriety*); 63C *Am. Jur. 2d Public Officers and Employees* § 252 (*actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict*). Courts have held that there is at least a potential for a conflict of interest when a government employee is a subordinate to another government employee, and in his other government position would have the opportunity to make decisions regarding his superior’s salary. *See, cases cited herein*.

Because of at least the potential for a conflict of interest, the remedy mandated under the Code of Conduct is that: No State employee may participate on behalf of the State in the review or disposition of any matter pending before the State in which he has a personal or private interest which tends to impair his independent judgment. 29 *Del. C.* § 5805(a)(1). *See, Beebe Medical Center v. Certificate of Needs Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, *Terry, J.* (June 30, 1995) *aff’d*, *Del. Supr.*, No. 304 (January 29, 1996) (*interpreting 29 Del. C. §5805(a)(1) as requiring State official to recuse himself, where a conflict was “assumed,” although his participation consisted of neutral comments and he did not vote on the matter*); *Prison Health Services v. State*, *Del. Ch.*, C.A. No. 13,010, *Hartnett V.C.* (June 29, 1993) (*interpreting 29 Del. C. § 5805(a)(1) as requiring that State official should not have participated in a meeting, even though he was not the final decision maker and did not vote on the matter*). (**Commission Op. No. 99-35**).

### ***Out-of-state Contract with a Company which Contracts with Agency***

A State employee asked if it would violate the Code of Conduct for her to privately contract with a firm to consult on another program, when she occasionally dealt with the firm several years ago. Based on the following law and facts, we conclude that such

conduct would not violate the Code.

**(A) Applicable Law**

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

**(B) Application of Law to Facts**

As a State employee, she was responsible for operations and programming for a program run by her agency. For other employment, she wanted a 2-year contract with a private firm to consult on another State's similar program. She would consult on: organizational structure, training, program services, policy and procedures, pilot programming, and staffing.

To insure there is no substantial conflict with performing official duties, the individual should not perform functions related to the other employment during the hours when the individual is supposed to be performing State duties. *See, e.g., Commission Op. Nos. 95-13, 95-30, 95-39.* She said she would perform the work for the private company during non-State duty hours, e.g., weekends, annual leave.

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

**(1) Impaired judgment in performing official duties** – In her official capacity she had no decision making authority over the company. It does not presently contract with her agency. It does not expect to contract with her agency anytime within at least the next two years. However, it had subcontracted with a firm which had a contract with her agency. She did not participate in the decision in either putting together that contract or awarding the contract. Once the contract was undertaken, she dealt with the contractor and occasionally dealt with the subcontractor. Most of her dealings were with the contractor. The contract was completed in 1997. The Commission has given “some weight” to the lapse of time between when the government official last had dealings with the company to decide if an ethical issue is raised when a State employee contracts with a private enterprise which previously dealt with his agency. *Commission Op. No. 99-31.* Here, she was not involved in the contract decision; had few dealings with the subcontractor which now seeks to hire her; and those dealings were more than two years ago. This reduces the possibility that in her few dealings with the company that her

judgment was impaired as nothing indicates that two years ago she was entertaining any prospective contract with the firm.

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

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

(4) **Adverse effect on the public's confidence in its government** - The Commission looks to the totality of the circumstances to decide this issue. *Commission Op. No. 96-78*. It also must show consistency in its opinions. *29 Del. C. § 5809(11)*. Last month, the Commission ruled on a similar situation where a State employee, in a similar situation, sought to contract to consult for a company which was contracting with another State. *Commission Op. No. 99-34, "Scope of the Code when Working for State Contractor," supra at pp. 9-15*. In that instance, the private company had an existing contract with his agency. Under those facts, the Commission held that to avoid an adverse effect on the public's confidence in its government, he should recuse himself from participating in his agency's decisions regarding the private enterprise. Here, that issue would not arise because the company she wanted to contract with has no contracts or other matters before her agency in which she would participate in her official capacity. Accordingly, to be consistent with our prior rulings, it does not appear that, under these facts, there is a violation of the Code. (***Commission Op. No. 99-41***).

### ***No Representation of Private Employer Before Own Agency***

A State employee wanted to privately contract with a firm and represent it on contract matters before her own agency. The Code specifically and clearly prohibits representing or assisting a private agency before one's own agency. Thus, the concurrent employment she sought would violate that provision. Moreover, such employment may

result in an adverse effect on the public's confidence in its government because: (1) it is clearly contrary to the law; and (2) it could appear that she would be in a position to unduly influence her colleagues in making any contract renewal decision; could give the company preferential treatment; and could obtain official decisions outside official channels. (*Commission Op. No. 99-42*).

### ***Driving for a State Contractor***

A State employee asked if he could accept employment with a company which contracts with his agency. Based on the following law and facts, he could accept employment as a driver, but based on the company's State contract, if it again offered to hire him as a counselor, such employment would violate the Code of Conduct.

#### **(A) Facts**

Initially, a State employee was offered a job with a private company which contracts with his agency to make home contact with State clients as well as provide organized activities for them. However, at the Commission's meeting, he said that the company changed its employment offer and wanted to hire him to transport its clients to various locations. He said that the company's administrator also indicated that he might be used to make home contacts, etc., if he was needed as a backup.

The company's clients are the result of a contract with his agency. In his official capacity, he had no decision making authority over the terms of the contract, selecting the contractor, etc. This was confirmed by his supervisor.

The employee's supervisor provided a copy of the company's contract and spoke with the Commission's legal counsel regarding the company's contractual duties and the employee's State duties. Under the contract, the company works with clients who were previously assigned to certain State centers. The employee's job is as a shift supervisor. As such, he supervised staff, maintained time records, wrote employee evaluations, etc. Additionally, he had some limited dealings with the clients at the center, but his primary responsibility was supervising the staff.

The employee's supervisor said that in performing his duties, the State employee was not responsible for referring any State clients to the company's program. He said that each client is assigned a case manager when they come to the facility. The case managers meet weekly to discuss what programs, treatment, etc., are appropriate for their assigned clients. These may include a decision that the client should be recommended for some of the contractual programs offered by private companies, including the one which offered the

employee a job. If the case managers conclude a particular contract program offers an appropriate program, they can make that recommendation to the Court and the Court decides what program the client will follow.

The State employee did not attend the case managers' meetings to discuss placement; did not make recommendations on placements; and did not participate in Court appearances where placement recommendations are made. Moreover, the employee's supervisor said the case managers were on a different shift than the employee.

### **(B) Applicable Law**

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

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

Regarding whether the other employment would result in impaired independent judgment in performing official duties, as previously indicated, he had no involvement in making decisions over the terms of the company's contract, selecting the contractor, determining if it is complying with the contract, etc. Moreover, he did not make decisions or recommendations on what program a client would be placed in. He is not a case manager; does not attend their meetings; does not supervise them; nor did he work on the same shift. Thus, in his official capacity, he would not be in a position to make official decisions about the company's contract. Now would he be able to give it or the State clients preferential treatment in such matters as recommending the company's program to the Court, or funneling clients to its program.

In light of these facts, the Commission did not believe that employment with the company to transport its clients raises a problem. However, if he were involved in aspects such as home visits, etc., it believed that conduct could violate the Code for the reasons below.

The contract states that on a monthly basis, the agency's case managers are to review the clients' progress on identified service/treatment goals, and on an annual basis the agency's contract administrator will review the performance measure data with the company. The information is also subject to review by another entity within his department. If he were involved in home visits, etc., to the extent that such work involves dealing with the clients' program, their service, and treatment, etc., it appears that such work is the substance of the company's contract. Thus, his work, if he were a counselor, might be evaluated by his own agency. The Code prohibits a State employee from representing or otherwise assisting a private enterprise on matters before his own agency, 29 Del. C. § 5805(a)(1), and it restricts other employment if it may result in any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b)(4). To the extent that employment with the company in the capacity of conducting home visits, etc., would entail work in areas that are, in essence, the substance of the contract with his agency, it could appear that he would be assisting the company on matters involving his agency. This may result not only in a violation of 29 Del. C. § 5805(a)(1), but may also result in an adverse effect on the public's confidence in the integrity of its government, which is prohibited by 29 Del. C. § 5806(b)(4). (**Commission Op. No. 99-49**).

**Note:** If a State employee has other employment as a private contract with a State agency, see cases under the heading "*Disclosure of Business Dealings with Government Entities*," *supra*.

## ***Post-employment***

### ***State Job Required Interacting with Contracting Agency's Division***

A State agency asked if one of its divisions could contract with a former State employee to provide staffing services on a division project. Based on the following law and facts, the Commission held that it would not violate the post-employment provision.

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

While employed by the State, the former employee did not work for the agency which sought to contract her. However, her State duties required her to work with one of its divisions on certain budget matters. The same division wanted her to contract on its

project. The matter on which she gave an opinion for the division while employed by the State related to its budget. If she contracted with the division, she would not be responsible for its budget. Rather, she would write requests for proposals for certain aspects of the agency's programs; arrange community forums; perform staff work for the agency (e.g., put together agenda, draft minutes; and participate in meetings); attend agency meetings; work on assignments from those meetings; act as liaison with contractors; assist in writing contracts; and perform day-to-day project coordination.

As the matters for which she would contract were not matters on which she gave an opinion; conducted an investigation, or was otherwise directly and materially responsible for while employed by the State, the Commission found no violation of the post-employment provision. (***Commission Op. No. 99-11***).

### ***Serving as a Mediator***

A former State officer was asked to mediate between his former agency and a company regulated by that agency. The dispute concerned implementing a regulation. While employed by the State he was directly and materially responsible for the regulation that the company later challenged in Court. He was asked by another State to mediate because the dispute could effect other States in regulating similar companies.

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

While he was employed by the State, a regulation was passed, which the company contested in court. The Court found the official record supporting the regulation was insufficient and remanded the regulation to the agency. The agency re-drafted the regulation, with minor adjustments, and resubmitted it with a more robust record. The proposed regulation was signed by the individual who took over his former position.

The State requesting that he mediate was one of 13 States, including Delaware, which comprised a regional commission created by the U.S. Congress. Its purpose was to make recommendations for federal measures to be applied in all or part of the region if such measures were needed. Consequently, the member States of the commission have an interest in seeing a resolution reached because of a possible regional impact on their States. Moreover, States outside the commission's area have an interest in seeing the matter

resolved because if the region cannot resolve compliance problems, States outside the region could go to the federal agency involved and argue that if this region were not complying then their regions should not have to comply with the federal measures.

He was approached by one of the commission States to mediate because of his knowledge and understanding of the control measures, with the understanding that both parties (the State of Delaware and the private enterprise) must agree to having him as the mediator. Mediators act as a neutral third party to help disputing parties reach agreement and normally cannot impose a decision on the parties. *Black's Law Dictionary*, p. 981 (6th ed. 1990). The concern which the post-employment provision seeks to address in restricting former employees from representing or assisting a private enterprise before their former agency is to insure they do not use their influence to obtain a decision or action favorable to their private enterprise. Here, the former employee would not be seeking a decision or action favorable to his private enterprise as a result of his mediation. Based on these facts, the Commission concluded that his conduct did not constitute "representing or assisting a private enterprise." (*Commission Op. No. 99-13*).

### ***Waiver Denied--Agency Has Hiring Options without Violating Post-employment Law***

A State agency wanted to contract with a former State employee to perform portions of the job she had with the State. As such activity would violate the post-employment law, the agency asked for a waiver. The Commission did not grant a waiver.

#### **(A) Applicable Law**

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

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

## **(B) Facts**

Early last year, a State employee told her agency that she planned to retire around mid-summer/early fall of this year. She had been assigned for about six years to a project which the agency had convinced the General Assembly to implement. Implementation required changes in computer programs and the State employee was to take existing requirements and ensure that the programmers had the modifications. The agency thought it had convinced her to wait to retire until after the project was implemented.

Anticipating her retirement, the agency developed “a transition plan” to ensure “knowledge transfer” before she left. “Knowledge transfer” meant having her replacement “become knowledgeable in the new system” because the exiting State employee knew how the system worked and how it effectively implemented the program. The agency assigned her replacement to start working with her so it would have the “knowledge transfer.” However, the agency said the problem was that her replacement was responsible for other matters that had to be completed on a continuing basis. It also said there had been a tremendous challenge because so many of its people were working on the new program.

The agency said that she was “going back and forth between commitment to the project that she’d worked on for 5 or 6 years, and just her desire to start to phase out and enjoy retirement.” To convince her to stay, it emphasized that it would work on phasing in someone else and phasing her out so she did not “have the burden of the management responsibilities on her shoulders, and then she could also run down the amount of time that she was spending on the project and ease her way out.” It said that someone, it did not know who, would have to “backfill” for the person who would be working with her.

In the fall of 1998, she announced that she was leaving in January, instead of late summer-early fall 1999. The agency “talked about using those two months to have a crash course” with her replacement. It started the process, but did not continue. Rather, it convinced her to stay by asking her to “think about the things, if you would, that we could do that might get you to stay.”

In early winter, she said she would retire in January but agreed to work up to 30 hours per week through the middle of the year to provide the knowledge transfer and help implement the new system. She would be paid \$75 per hour. Her salary was never negotiated, and “she did not have a specific number,” but the agency said it believed that she wanted to be paid comparable to what private sector contractors who contract with the agency were paid. Its software vendor had employees that received \$140 to \$250 an hour and its programmers, who were with another company, were paid about \$125 an

hour, but some were paid \$90 an hour. The agency told her to keep the total contract below \$50,000, because if it went over that amount, it would have to publicly notice and bid the job under the procurement rules. The employee agreed, with the conditions that she not: (1) work full time; (2) function as project leader; and (3) be responsible for daily operations. She also did not want any pension offset.

As a full-time State employee, she made more than \$65,000 per year, which equated to just over \$33 per hour for a 37½-hour week. The agency said she probably worked more than 60-75 hours a week while employed full-time, so the dollar per hour should not be compared to a 40-hour week. It said that many of its employees were working those kinds of hours, and were not paid by the hour, as are consultants.

The Commission noted that as a matter of law, employees at her level, and many other State employees with such salaried positions, are not entitled to overtime pay.

After she retired at the beginning of the year, she was hired as a temporary State employee, receiving \$75 per hour.<sup>5</sup> By law, retirees hired as temporary State employees are subject to a pension offset. 29 *Del. C. § 5502(a)*. However, if she privately contracted with her agency there would be no pension offset. The agency said it knew that privately contracting with her would violate the post-employment law and would require a waiver.

The agency said that “replacement knowledge” can be obtained, either internally or in the competitive market. However, it later said it cannot find one or even several persons to replace her “knowledge of the application of the vendor product to accommodate Delaware’s unique process and legal requirements.” It said that any combination of hiring, reassignment or contractual arrangement that did not include her would either delay implementing the system from six (6) months to one (1) year or terminate the project. It said that “in any scenario, [she] would need to be retained to train her replacement.” However, it later said that if she did not continue, it would not terminate the project. It also said that the Governor and General Assembly were aware of the resources needed for implementing the system and had given it substantial financial

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<sup>5</sup>It is unclear how the agency could pay her \$75 per hour as a temporary State employee. Personnel rules say that temporary State employment is “an appointment to a classified position” and “classified positions” are “positions substantially alike in duties and responsibilities, requiring essentially the same knowledge, skills and abilities...and the same rates of pay under similar working conditions shall be applicable thereto.” Merit Rule definitions and Rule 3.0100. She was hired as a temporary to perform the duties of her full-time position--minus the responsibilities of managing and day-to-day operations--but the pay is more than double the hourly wage for a “position substantially alike in duties and responsibilities, requiring essentially the same knowledge, skills and abilities.” While we have no authority to interpret personnel laws, it appears to be subject to only one interpretation--the temporary salary is to be related to an existing State position, not the salary of private vendors.

resources to obtain software, etc., but it was more difficult to obtain persons to “backfill” so that knowledge transfer could occur.

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

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

In the context of post-employment, it has been noted that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain, particularly after leaving the government. “*Ethics in Government Act*,” *United States Senate Report No. 95-170*, p. 32. The main reason for public concern is that former employees may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id.* at 33. Reflecting that concern, post-employment laws set a “cooling off period” in areas where the ex-employee dealt with the agency on certain matters. *Id.* Here, if a waiver were granted, she would receive more than double her hourly wage when she was employed full-time, while working fewer hours and having significantly less responsibilities, and receive her entire State pension.

While the agency pointed out that she was being paid less than its private vendors who program the system, those private vendors are not subject to the Code of Conduct. Moreover, she is not a programmer. The agency had stated that it knew the marketplace for those programmers bears out the kind of hourly rates that they get. Thus, not only was her work not comparable, but the field selected by the agency on which to base her pay is one of the best paying of all career fields.

No facts indicate what the “marketplace” would bear for her “knowledge transfer,” nor was such information sought. The agency said “there wasn’t any negotiation over price.” Rather, “it was willing to do whatever it took”; but “we had to stay within the \$50,000 bid requirement” so that the contract would not require public notice and bidding.

While the agency states that comparing her State salary of just over \$33 per hour is not justified, there are several reasons why her State salary has bearing:

- (1) That is the job she is doing [except for fewer hours and fewer responsibilities] and that is the pay rate she would have received if she

- stayed full-time with the State until the project was completed.
- (2) The General Assembly acknowledged a relationship between the State salary and the salary to be paid when a State retiree turns around after retirement and is re-hired to perform the same State job because it provided specific laws for such persons and connected the salary to existing State positions, and directed that they have a pension offset. *29 Del. C. § 5502(a)*. We have noted that the effect of those laws is to prevent State employees from experiencing a windfall as a result of their public position. *Ethics Bulletin 007*.
  - (3) Using the State salary as the pay base is, in our experience, a common method used by agencies in negotiations. In every situation where an agency has sought and been granted a waiver of the post-employment law, they have used the former employee's State salary to establish the pay rate. *Commission Op. Nos. 91-18; 95-11; 96-60; 97-41; 98-15*. Basing the salary on the State pay serves to diminish the perception that former employees are using their former State job to financially capitalize and obtain an unfair advantage.

Here, the public could suspect that she used her public position involving access to information on the program, access to colleagues, etc., to create a very favorable employment opportunity for herself, giving her an unfair advantage over other possible competitors, especially as the agency acknowledged that the "replacement knowledge" can be obtained either internally or in the competitive market, but then eliminated the possibility for persons in the competitive market to compete by keeping the total below the procurement law's public notice and bidding requirement. The public could see this as preferential treatment by her former colleagues, or using public office for private gain. This is not to say that she, in fact, used her public position to capitalize, but the public purpose is to "avoid any justifiable impression" that the public trust was violated. *29 Del. C. § 5802(1)*. Thus, the literal application of the statute is necessary to achieve the public purpose, and no waiver is granted on that basis.

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

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

The basis for the alleged hardship for the agency is that she has job knowledge which needs to be transferred. The agency based its request on her knowledge of both the old and the new system. Basically, it is saying that she knows the system. What any former

employee brings to the table in a post-employment situation is that they have an understanding of the policies, procedures, etc., and can arguably do the work faster and cheaper because of their prior work in the same area. *Commission Op. No. 97-18*. However, the very hardship imposed by the statute is that the former employee's familiarity with the work is lost. Logically, the "loss of knowledge" argument could be used any time a former employee is contracted with to perform the same function for which such employee was directly and materially responsible. *Id.* If those facts alone created "an undue hardship," then the two-year restriction would never apply. *Id.*

The agency also states that it has time constrictions to meet. We first note that the agency said that she has worked on this program "for the last 5 or 6 years." During that time, certainly knowledge of the system was imparted by her to others working in the agency. Additionally, the agency was alerted to her retirement a full-year ago. The agency said it had started the transition plan, so there should have at least been some "knowledge transfer." Further, it has hired her replacement who knows the current system, thus, reducing the "knowledge transfer" that needs to occur. The function of project leader has already been transferred to her replacement. The agency also said that the "crash course" with the replacement had started before the former employee was enticed to stay. Thus, some "knowledge transfer" had occurred. Additionally, it has had her for more than three months as a part-time employee since her retirement to make this "knowledge transfer."

There were other options the agency could have pursued, but did not implement. According to an agency representative the agency could have kept her on at her old salary and reduced her hours and responsibilities. It also could have stayed within the confines that the General Assembly provided in the statute on temporary hiring of retirees and avoided a post-employment violation. It could have explained to her that her condition that the pension not be offset, which would require a private contract, would result in a violation of the post-employment law. We note that when it informed her that she would have to keep the contract below \$50,000 so that they did not "run into the problem" of the procurement law requirements, she agreed to stay within those confines. It also could have continued the "crash course" since it knew what she wanted would violate the post-employment law.

However, in the face of knowing that contracting with her would violate the Code of Conduct, the agency did not try to negotiate. On the day the agency came to this Commission for a waiver, it still had never spoken with her about remaining as a temporary employee rather than violating the Code. It had not even asked what she would do if the Commission did not grant a waiver. Where we have granted waivers as a result of time restrictions, the agencies have at least negotiated with the former State

employee to try to keep the salary in line with their State salary to reduce the actual or perceived possibility that the former employee has turned their public position into a means of financial gain. Moreover, in those cases, agencies tried to find other sources through internal sources or public notice and bidding, etc., before seeking a waiver. *See, e.g., Commission Op. No. 97-18.*

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

- (1) stay within the confines of the statute regarding temporary hiring of retirees, and there will be no violation of the post-employment provision;
- (2) negotiate an agreement, like other agencies, that is based on a salary that diminishes the actual financial capitalization of the former State position and the appearance of favoritism in the award of the contract.

**(E) Conclusion**

No waiver was granted based on the foregoing facts because: (1) the literal application of the prohibition is necessary to achieve the public purpose; (2) no facts indicate an undue hardship on the former employee; and (3) the facts do not substantiate an undue hardship on the agency when there is a legal means to achieve the same result--having her continue with the agency--without violating the post-employment law and there are means of diminishing the very concerns which the post-employment law is meant to prevent--having former employees capitalize on their past relationship with the State. *(Commission Op. No. 99-15).*

***Working on a “Matter” Years Before Retirement***

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

**(A) Applicable Law**

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

employed by the State for personal gain or benefit. *Id.*

## **(B) Facts**

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

## **(C) Application of Law to Facts**

The agency said it was unclear if the two-year restriction applied because although she developed and designed a system to accomplish the work during her State employment, she had not worked on such matters for the past several years.

The statute is clear that the time restriction begins after the person leaves State employment. It says: “for a period of 2 years **after** termination of his employment or appointed status with the State if he gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such **matter** in the course of his official duties as a state employee....” 29 *Del. C.* § 5805(d) (emphasis added). If the language is clear and unambiguous, the words must be given their plain meaning. *Coastal Barge Corp. V. Coastal Zone Indus. Control Board*, Del. Supr., 492 A.2d 1242, 1246 (1985).<sup>6</sup>

However, Courts have given “some weight” to the argument that the lapse of time is one factor to consider in deciding if the activity is the same “matter.” *CACI, Inc.-Federal v. The*

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<sup>6</sup>This ruling is consistent with interpretations of the federal ethics post-employment provision which has a similar restriction. *See, United States of America v. Coleman*, 3rd Cir., 805 F.2d 472 (1986)(federal statute restricts post-employment conduct “within two years after his employment has ceased....” Court held that the element to be proved was “that within two years after his retirement” individual engaged in prohibited activity).

United States, Fed. Cir., 719 F.2d 1567(1983) (post-employment contract was not the same “matter” because of elapsed time and difference in scope and approach).

Thus, the issue is if the post-employment contract with her covers a “matter” on which she gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for while employed by the State.

First, as to the contract in general, no facts indicate that she developed the concept or formulated the contract which she now seeks, or was in any manner involved in making State decisions regarding the contract.

Second, as to the subject matter of the contract as compared to her activities while employed by the State, we have held that where the general subject “matter” is the same, there must be a factual overlap between the activities as a State employee and the post-employment activities. See, Commission Op. No. 96-75 (citing Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry J. (June 30, 1995) aff’d, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). Here, the general subject matter is the same--the contract is to work on a system which she worked on in a State position. In fact, she developed the system, and later, had some managerial related responsibilities pertaining to the system. However, in more recent years, her work was unrelated.

The significance of the time lapse is that during that time, the system she developed is being eliminated and a system is being implemented. The new system has different software; new calculation methods, etc. In converting to the new system, some data did not convert. She will lead a team to clean up the conversion errors. There are fundamental differences in the new system for which she had no responsibility while employed by the State, and the old one which she developed. Also, the scope of the work is different in that she was responsible for overall development of the old system, but would now be responsible for cleaning up conversion errors. Thus, we conclude that the post-employment activity is not a “matter” for which she was directly and materially responsible for while employed by the State. (**Commission Op. No. 99-16**).

### ***Non-Profit with State Contracts***

A former State employee wanted to accept a job with a non-profit private enterprise which had contracts/grants with her agency. Some of the contracts/grants were with her former office. She was involved with each of those contracts/grants, as part of her State position. The private enterprise also had other contracts with other sections of her Department, but she was not involved in those matters. Based on the following facts and law, the Commission concluded that she could accept employment without violating the

post-employment law if: (1) she did not represent or assist the private enterprise on certain contracts; and (2) she worked on contracts issued by other sections of her Department because she was not involved in those matters.

**(A) Applicable Law**

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

**(B) Facts**

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

**(C) Application of Facts to Law**

**Contracts 1, 2 and 3:** In each case, she was involved in writing the RFPs and was on the review panels which selected the non-profit as the contractor. Thus, she gave an opinion and was otherwise directly and materially responsible for the matters while employed by the State. If she represented or otherwise assisted the non-profit on those matters, it would violate the post-employment law. First, regarding any contract renewal, she said two of the contracts would not come up for renewal before the State within two years, at which point her 2-year post-employment restriction would have ended. The other contract is re-bid annually, but she would recuse herself from the

competitive process on that contract. Thus, she would not be representing or assisting the non-profit in any contract renewal process during the 2-year restriction period.

Apart from not participating in the contract renewals, she said that all proposals and contract budgets are prepared by the non-profit's contract administrator who is: well-experienced; has worked on this particular contract for a number of years; and can seek consultation on contract aspects from other parties in the company. The administrator would normally handle all issues requiring interaction with her former State agency, but she was concerned that her level of involvement would increase if there were unforeseen circumstances, such as a catastrophic illness. No facts indicated a reason to expect such an event. We must base our opinions on a particular fact situation. *29 Del. C. § 5807(c)*. Thus, we cannot speculate on what may be proper if a catastrophe occurred. Should that occur she could seek further guidance if needed. Thus, limiting the opinion to the particular facts, it did not appear that she would be representing or assisting the private enterprise on these matters because those duties are delegated to another employee who has handled these contracts for a number of years, and she was recusing herself from any contracting renewal activities.

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

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

to which the former employee was privy.

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

It could appear to competitors and the public that if she wrote the non-profit’s response to the RFP it would have a “leg up” because she developed the grant proposal--the essence of the RFP. Additionally, competitors and the public could perceive that the non-profit could receive preferential treatment during the selection process because the RFP resulted from her project and her former colleagues would be involved in deciding who gets the contract. Thus, it appeared that her activity would violate both the letter of the law and the spirit of the post-employment provision.

**Other Contracts with her Agency** - The non-profit has other contracts with another section of her former agency, but she was not involved in those activities. As the post-employment provision is only triggered by working on matters where the individual gave an opinion, conducted an investigation, or was otherwise directly and materially responsible, we have held that where a former State employee had no input to or control over contracts with his former agency, it would not violate the post-employment provision if he worked on those matters for the private enterprise. *Commission Op. No. 94-11*. Accordingly, it would not violate the post-employment provision for her to represent or assist the non-profit on those matters. (***Commission Op. No. 99-21***).

### ***Waiver Granted with Some Restrictions: Home Visiting Program***

A State agency asked if the Commission would grant a waiver for one of its former employees to work for her private employer, a non-profit organization, on some matters

for which she had been directly and materially responsible for while employed by the State. The non-profit had a number of contracts/grants with her former agency, but she did not intend to work on most of them. Rather, the agency sought a waiver so she could work on two matters for which she had been responsible.

### **Applicable Law**

Former State employees may not represent or otherwise assist a private enterprise on matters involving the State for two years, if on those matters they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. 29 Del. C. § 5805(d). They also may not improperly disclose or otherwise improperly use confidential information gained in their State position. *Id.* “Private enterprise” includes both for profit and non-profit organizations. 29 Del. C. § 5804(8).

However, the Commission may grant a waiver to particular prohibitions if the literal application of the law is not necessary to achieve the public purpose, or there is an undue hardship on the State agency or the employee. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings become a matter of public record. 29 Del. C. § 5807(a).

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

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

budgeting, planning, proposal development, and participating in complex partnership and interactions with high level officials that this project involves. To the extent that this evidenced a hardship on the private enterprise, the statute only gives us authority to grant a waiver based on a hardship for the State employee or State agency. *See, 29 Del. C. § 5807(a).*

However, the State agency pointed out that the contract is a new initiative for the State, involving a number of State agencies and three non-profit organizations. When the contract was awarded, the agency anticipated that Ms. Tudor would be in-house and it would have the benefit of her 30 years of State experience in overseeing the program. We have held that the very hardship imposed by the post-employment provision is that a State agency loses the benefit of the experience of its former employees. *Commission Op. No. 97-41*. Thus, to have an “undue hardship” requires more. *Id.* What is significant about losing her expertise is that it comes at a critical stage--when the program is in its “start-up” phase. Moreover, apparently the agency had little lead time to make the transition because of her retirement shortly after the contract was awarded. We also placed the facts in the context of the purpose of the post-employment provision which is to ensure that State employees do not use their public office for personal gain by making decisions that could result in employment opportunities for them or would result in giving the private enterprise a “leg-up” on competitors, or give them an unfair or improper advantage in later dealings with their former agency. *Id.* Here, although she was involved in developing the contract, she did not participate in the review process of the various bidders, and did not select the contractor. Also, the selection of CFF and the other non-profits involved was made by others before she was aware of any employment opportunity with CFF. Thus, no facts indicated that her decisions in developing the contract resulted from any prospective employment opportunities or so that CFF would have an advantage over its competitors. On a broader scope, she had made every effort to identify other matters with CFF where she could recuse herself, which indicated that where possible she did not seek to even create the appearance that she was trying to use her former position to give CFF a “leg up.” Thus, the public concerns are diminished by this multitude of facts. Further, when a waiver is granted, the proceedings become a matter of public record so that the public can be assured that its concerns have been considered. *29 Del. C. § 5807(b)*. For all these reasons, we granted a waiver for her to represent and assist CFF on this matter.

A waiver was also sought so that Ms. Tudor could represent CFF on a Community Resources Committee which would do such things as develop: a common language between prevention providers, citizens, and government; training for prevention professionals; and a means to assess prevention programs. The Community Resources Committee is comprised of more than 60 entities, both State and private, and anyone who wants to participate can do so. From that group, working groups were established and will

report back to the Committee. Her former agency will have a representative working with each working group as staff. She, nor her agency, expect that the Committee or the working groups will generate any funding opportunities. In her State job, she worked on the planning and led the initial Committee meetings. Thus, it appeared that she was directly and materially responsible for the matter while employed by the State.

Waivers may be granted if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the former employee or the State agency. *29 Del. C. § 5807(a)*. As noted above, the public purpose is to insure that former employees do not “get a leg up” on other competitors or capitalize on their former employment and unduly influence former colleagues in their decision making. Here, CFF, through her representation and assistance, will not achieve a “leg up” on other competitors because the Committee is open to anyone, thus all have the same opportunity. Moreover, it does not appear that CFF, through her representation and assistance, would financially capitalize from her former employment, because the Committee will not be generating funding opportunities for any participants. It also does not appear that CFF would capitalize in any other manner because the nature of the Committee is to develop a cohesive program on common language, training and assessment based on input from a multitude of State and private organizations. Also, there will be few people from her former agency participating on the Committee by comparison to persons from approximately 60 other organizations, both private and State. Thus, we concluded that the literal application of the provision is not necessary to serve the public purpose and granted a waiver for her to participate in this Committee, which: (1) is open to anyone; (2) will not generate funding opportunities for CFF or any other organization that is involved; (3) would not permit the people from her former agency, who will serve as staff to the Committee, to generate or decide funding opportunities; and (4) because of its structure and nature, does not appear likely to result in the people from her former agency showing any preferential treatment to CFF. ***(Commission Op. No. 99-21)***.

### ***YMCA - Waiver Granted***

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

Former State employees may not represent or otherwise assist a private enterprise on matters involving the State, for 2 years after terminating State employment, if they gave an opinion, conducted an investigation or were otherwise directly and materially responsible for such matter in the course of official duties. State employees also may not

improperly use or disclose confidential information gained by their public position. 29 Del. C. § 5805(d). “Private enterprise” includes both “for profit” and “not for profit” organizations. 29 Del. C. §5804(8).

Here, as Chief of Community Services for the Division of Youth Rehabilitative Services (YRS) in the Department of Services to Children, Youth and Their Families, Dr. Brandeau wrote the request for proposal (RFP) for a contract that was awarded to the Resource Center. He also was on the contract selection panel which selected the YMCA. That action occurred in 1996. The contract will be re-bid in FY 2002 (calendar year 2001).

Because he wrote the RFP and served on the contract selection panel, he clearly gave an opinion and was directly and materially responsible for the contract. He said that if he were prohibited from accepting employment with private enterprises which contract with the State on such matters, he would not be able to work in this field in Delaware, because he has been responsible for approximately 40 contracts dealing with services for delinquent youth. To the extent that his statement reflected a belief that the post-employment law prevented him from working for any private enterprise which contracted with his agency, the Commission wished to clarify that the post-employment statute is not that broad. Rather, the provision is only triggered if former State employees represent or assist a private enterprise on matters in which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. Thus, he could accept employment with the YMCA without violating the post-employment provision if he did not represent or assist them on the singular contract for which he was directly and materially responsible. *Commission Op. No. 94-05 (former State employee may work for private enterprise which contracts with his agency, but not on contract where he gave an opinion)*; *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super., C.A. No. 94A-01-004*, Terry, J. (June 30, 1995), *aff'd*, *Del. Supr., No. 304*, Veasey, C.J. (January 29, 1996).

However, he said the YMCA could not isolate him from that single contract, and sought a waiver. The Commission may grant a waiver if the literal application is not necessary to serve the public purpose, or there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a).

Ms. Babette Racca, YMCA’s Vice President of Operations, stated that it would be a hardship on the YMCA because the YMCA has numerous contracts with State agencies and it would be a hardship if State employees were not available. Again, to the extent this reflects a belief that private enterprises are banned from hiring former State employees just because the company has State contracts, it is a broader interpretation than what is provided by the statute. Moreover, the authority to grant a waiver based on an undue hardship is limited to undue hardships on the State employee or the State agency. 29 Del. C. § 5807(a). Thus, we have no statutory authority to grant a waiver based on any

hardship on a private enterprise.

The purpose of the Code of Conduct is to instill the public confidence in the integrity of its government. *29 Del. C. § 5811*. The specific concern of the post-employment provision is to address the concern that public confidence in government has been weakened by a widespread conviction that government officials use their office for personal gain. *Commission Op. No. 97-18*. The main reason for public concern is that while employed by the government, an official may make decisions favorable to a private enterprise to secure subsequent employment or may use information, influence, and access acquired during government service for improper and unfair advantage in later dealings with that department or agency. *Id. at 33*. Reflecting that concern, post-employment laws set a “cooling off period” in areas where the ex-employee dealt with the agency on certain matters. *Id.*

Here, the contract decision was made in 1996. Thus, his decision on that contract does not appear to have been predicated on a job opportunity with the YMCA which did not occur until some three years later. This minimizes the appearance that the decision was made for personal gain. Additionally, while the contract is with his agency, the contract is actually a Statewide program and the bid panel consisted of multiple agencies, such as the Attorney General’s office, the Public Defender’s office, and others, again minimizing the possibility that he could use this opportunity for personal gain. Also, the possibility of giving the YMCA a “leg up” over competitors in the award of the contract was limited because the YMCA was the only bidder to submit a Statewide proposal, which more effectively achieved the contract purposes because otherwise the State would have had to have two or three contractors. Moreover, the contract will not be re-bid until FY 2002, which means he would not have the opportunity to influence former State colleagues on the re-bid decision during the two-year “cooling off” period.

Since the contract was awarded, he has had limited interaction with the YMCA, as its Vice President of Operations said that the YMCA had dealt with him perhaps five times in three years, as there were two levels of organization between him and the state employee who manages the contract. Similarly, at the YMCA, the person who will actually manage the contract will be two levels of organization removed from him. We also note that when a waiver is granted, the rationale for permitting the State employee to engage in conduct which contravenes the statute, becomes available to the public so that they have the opportunity to realize that their concerns have been addressed. *29 Del. C. § 5807(b)*.

Based on the multitude of facts which limited the possibility of any personal gain for him because of his State position, and limit the possibility of the YMCA obtaining a “leg up” over its competitors if he were permitted to work on that singular contract, when he will not be responsible for managing the contract, we grant a waiver on the basis that the literal

application is not necessary to serve the public purpose. (*Commission Op. No. 99-22*).

### ***Employment with Agency Contractor***

A State employee accepted employment with a private enterprise which contracts with his agency. He asked for a waiver if the employment violated the Code. Based on the following law and facts, the Commission concluded that his employment would not violate the Code, if he did not represent or assist the private enterprise on certain matters, as detailed below.

#### **(A) Applicable Law**

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

#### **(B) Facts**

The State employee said that he managed certain contracts from award to completion. In managing the contracts, he had daily contact with contractors, material producers, subcontractors, and consultants on manpower requirements.

Also as part of his duties, a number of years ago he was on a three-member Shortlist Panel. The panel reviewed responses to Request for Proposals (RFPs) to his agency and discussed the abilities of the various companies to perform the contracts, e.g., which was best suited for the job based on facts such as competence, availability, manpower, etc.

The firm he wanted to work for was one of more than a dozen which submitted responses to the RFP for a services agreement. It was primarily for another section in his agency, but his section piggybacked so it could staff projects for peak demands. After the discussions, the Panel recommended five (5) applicants to the final selection committee. The firm which seeks to hire him was one of the five (5). He was not on the final selection committee. The agreement was awarded to the company in 1997.

Approximately two years ago, he removed himself from the Shortlist Panel to avoid making decisions regarding contractors because he was aware of the post-employment law. He has not served on a Shortlist Panel since then, and has made no decisions on responses

to RFPs from the firm or any other contractors which submit responses.

After the agreement was awarded, his involvement with the company consisted of working with his supervisor and subordinates on staffing requirements and notifying the company of those requirements to meet the contract demands. In essence, he was a “people mover”:  
identifying the people skills needed at a particular site; contacting the firm regarding the need; and insuring that it provided the right people, at the right place, at the right time. Neither he, nor his district, evaluate the company’s contract performance; that is done by another section. He has had no dealings with the firm on matters other than this particular agreement.

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

### **(C) Application of Law to Facts**

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

enterprise which has dealings with the State. Rather, the former State employees may not work on those matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible. Former State employees are also restricted from improperly disclosing or using confidential information gained from their State employment. 29 Del. C. § 5805(d).

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

Regarding his expected involvement in the other agreement, while that may constitute representing or assisting the private enterprise on matters involving the State, he did not give an opinion, conduct an investigation, and was not otherwise directly and materially responsible for that matter while employed by the State. Delaware Courts have held that such representation does not violate the post-employment statute. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).

### **(C) Conclusion**

As the Commission found that he would not be representing or assisting the firm on matters in which he gave an opinion, conducted an investigation, or for which he was otherwise directly and materially responsible, it found no violation based on the proposed activities. It noted that the firm had not “finalized” his assignments. Accordingly, he was advised to remain alert to the post-employment restrictions, and if necessary, return to the Commission if he needed further guidance. (**Commission Op. No. 99-25**).

### ***Engineering Work for a Private Firm***

A former State employee asked it if he could work for an engineering company without violating the post-employment law, since he would not work on the same projects he worked on for the State. Based on the following law and facts, the Commission found

no violation.

**(A) Applicable Law**

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

**(B) Application of Law to Facts**

A former State employee held a position in the State in the area of engineering. He did not immediately go to work in that field, but later decided to pursue a career in engineering and was offered a position with a firm which contracts with his former agency. While employed by the State, he was not involved in selecting contractors. Thus, while employed by the State, he did not give an opinion and was not directly and materially responsible for selecting the firm for any contract.

The substance of his work for the State dealt with engineering aspects on a number of State projects. Those projects had been completed, so it was not expected that he would be representing or assisting the firm on those matters.

The projects the company wanted him to work on were not projects he worked on while with the State. Thus, he was not responsible for these matters.

If the company were selected for other agency projects it was not expected that they would be projects on which he worked while with the State. However, he and the representatives of the private company indicated that in the unforeseen event that such a project should arise, he would remain aware of the post-employment restrictions and return to the Commission if additional advice is needed. (***Commission Op. No. 99-27***).

***Responding to Agency's RFP dealing with Federal Regulations***

A former State employee went to work for a private consulting firm which wanted to respond to a Request for Proposal (RFP) issued by an agency other than her former Department. For the following reasons, we concluded that participation, on behalf of the firm, would not violate the post-employment law.

**(A) Applicable Law**

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

**(B) Application of Facts to Law**

An agency issued an RFP seeking technical assistance in implementing a particular program. The contractor would be required to:

- (1) Analyze the final Federal Regulations relevant to the substance of the contract;
- (2) Prepare documents for: (a) waivers if there were inconsistencies; (b) the FY 2000 State Plan for the project; and (c) a Caseload Reduction Report; and
- (3) Recommend budget and program modifications to an existing relevant program.

The legal issue was whether as a State employee, she gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for the same matter while employed by the State. The “matter” is the RFP and the substance thereof.

First, as to the RFP in general, it was issued by an agency other than hers. It deals with issues in which her former agency was not involved. She was not involved in putting together the RFP. Thus, she did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for the RFP while employed by the State.

As to the RFP content matter:

(A) **Item 1**--The Federal Regulations to be analyzed were issued four months after she left her State position. She was not involved in these Federal Regulations during her State employment. Rather, her understanding of the federal laws on this particular program resulted from employment with the federal government before coming to work for the State.<sup>7</sup> The regulations were to be analyzed within the framework of a waiver on

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<sup>7</sup>The Commission noted that the federal government also has a post-employment provision. *18 U.S.C. § 207*. It did not rule on whether that provision applied to her situation as it is not within its jurisdiction.

the subject matter obtained by the State when she worked for the federal government. She was not involved in putting together the waiver request or implementing the request while employed by the State, as her Department was not responsible for such matters. Thus, she did not give an opinion, conduct an investigation and was not otherwise directly and materially responsible for that matter while employed by the State.

**(B) Item 2:**

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

(2) **FY 2000 State Plan** - While employed by the State, she had no direct responsibilities for developing or implementing this program; nor did she participate in or have input into the State Plan. However, there were two circumstances which resulted in a connection between her State Division and program clients or funds.

(a) Her division investigated certain allegations and it might have investigated some clients who were eligible for the program under the contract. However, her division investigated matters other than whether the clients were eligible for the contracting agency's program. Thus, in her State capacity, she did not give an opinion on whether the clients were eligible for the program, as that decision was made by the contracting agency; nor did her division's authority or decisions to investigate entail consideration of program eligibility.

The legislation relating to the program also sets time limits on receiving benefits and imposes certain sanctions that may result in families losing program benefits. The contracting agency decides if families will lose eligibility. It continues to track families after they lose program benefits, and hires a private contractor to periodically contact and assess the families. Among other things, the contractor must assess the families on matters related to the area investigated by her agency. Her agency did not develop the contract or select the contractor, as that was done by another agency. However, in developing the contract, the agency worked with her staff to develop an interagency agreement to identify procedures and protocols to be used by the contractor in particular areas that her agency investigated. If the contractor, in assessing the families, also found problems related to the area investigated by her agency, a referral was made to her division for investigation. Again, the client's loss of program benefits or eligibility had no bearing on her agency's investigatory decisions. If no problems were found, the contractor issued a report to her and to the agency which hired the contractor. The RFP to develop the FY 2000 plan did not encompass procedures and protocols to identify areas investigated by

her former agency. Thus, while she worked on that matter while employed by the State, it is not a matter that would be addressed by the RFP.

(b) The RFP will institute a plan for the use of program funds. As a State employee, she did not make decisions about the use of the program funds. However, her division, as part of its FY 99 budget request sought an increase in the number of State employees in her division through the General Fund. Although her agency sought the positions, the Budget Office, in negotiations with another agency, decided to fund the positions from the program funds, not the General Fund. As she did not participate in that decision, she did not give an opinion, etc., on the use of any program block funds for the positions.

Although the program funding for the positions began six months after she left employment, a supervisor was hired for one of the program-funded positions before she left. Tracking the use of the program funds for the position was the responsibility of another division within her Department, without input from her Division. Thus, she did not give an opinion, etc., on any financial accountability for the funds.

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

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

(D) **Item 4--Duties after responding to the RFP.** If her company is selected as the contractor, the follow-on duties will include working with a team which will work with the State to prepare the FY 2000 State plan; attend public hearings on the program; help the State maximize the percentage of clients who are participating in appropriate work; and keep the State from suffering any penalties under program guidelines. She was not responsible for these matters while employed by the State.

(E) **CONCLUSION**

For the above reasons, we find no violation if she participates on behalf of her private employer to respond to another agency's RFP regarding the particular program. ***(Commission Op. No. 99-28).***

***Private Employer Contracts with Former Agency***

A State employee asked if it would violate the post-employment provision if, after retiring from the State, she accepted employment with a private company which contracts with her agency. Based on the following law and facts, we concluded that it would not violate the post-employment provision.

**(A) Applicable Law**

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

**(B) Application of Law to Facts**

The private company she wanted to work for contracts with her State agency. She was not responsible for selecting any contractor, including that company, or for overseeing if the company complied with the contract. Thus, as to those matters, she did not give an opinion, nor was she directly and materially responsible.

Some duties with the private company did not include representing or assisting the private company before the State, as the duties were internal with the private company.

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

One interaction she expected to have with her former agency was to provide information on the private company's programs in Delaware to unit meetings of certain State employees with whom she had worked while employed by the State. Thus, she would be representing the company before her former employees. She said that all contractors meet with the agency's staff at least once a year to update them on changes that occur in the contract services. For example, contractors may introduce new staff members; discuss services they have added; or discuss services they will no longer provide. The post-employment restriction on representing or assisting private enterprises is designed to prevent former employees from getting a "leg up," through undue influence on their former colleagues, on other private enterprises that deal with the State. *Commission Op. Nos. 95-*

11 and 97-18. Here, she clearly would be representing the private company on matters before her former staff. However, the Commission noted that the agency staff before whom she would appear does not decide which contractors will be used; the company already has the contract with the State; every contractor gives these presentations; the meetings are limited in number; and the substance (introducing new staff, etc.) of her representation, were facts that diminished the possibility that she would be using her former State position to obtain a “leg up” for her private company.

She also said that in the 30 years she worked for the State, every private agency in Kent and Sussex County for which she could go to work has contracted with her Department, which would make it next to impossible for her to secure employment in her career field.

### **(C) Conclusion**

The Commission concluded that there was no technical violation of the post-employment restriction, and even if there were an improper public perception, it would grant a waiver because her interaction with her former Staff would be on a limited basis; all contractors have this opportunity; the staff does not make the contracting decisions; and her employment opportunities would be severely limited. (**Commission Op. No. 99-29**).

### ***Time Can Sometimes Change “Matter”***

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

### **(A) Applicable Law**

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

## **(B) Application of Law to Facts**

Twelve years ago, a State employee for an agency dealt with its accounting system. She left that agency and worked in a number of different agencies in subsequent years. In her most recent State job, the agency was not on the State's financial management and payroll system.

The passage of time can be given "some weight" in deciding if the activity is the same "matter." *Commission Op. No. 99-16* (citing *CACI, Inc.-Federal v. United States, Fed. Cir., F.2d 1567 (1983)*). In applying the passage of time, the question is if, during that time, the "matter" underwent a change sufficient in scope such that it is not the same "matter." *Commission Op. No. 99-16*.

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

## **(C) Conclusion**

As we find that the former employee is not contracting to work on the same "matter" because of fundamental changes in the system, we find no violation of the post-employment provision. (*Commission Op. No. 99-33*).

### ***Time Again Changes "Matter"***

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

The substance of the contract was conceived years after he left one agency and went to

work for another before retiring, he was not involved in any funding decisions; the drafting of the agreement; or the substance thereof. Moreover, he said that the decisions in implementing the program, obtaining funding, and writing the contract, etc., were not made by any of the agency's employees with whom he worked more than 20 years ago, as the only person still in the agency with whom he worked holds a secretarial position. The contract would require him to deal with some non-government entities which he dealt with 20 years ago, but the substance of the project was different from the substance of his work 20 years ago. The project also required work on strategic planning, which he had not done.

As the contract called for him to work with non-government agencies, he would not work on any issue dealing with the agency which most recently employed him. Thus, he would not be representing or assisting his private entity before his more recent employer.

Based on those facts, he would not be working on matters in which he gave an opinion, conducted an investigation, or was otherwise directly and materially responsible while employed by the State, which is prohibited by the post-employment law, *29 Del. C. § 5805(d)*. (**Commission Op. No. 99-47**).

### ***Two Year Post-employment Restriction is Not a Total Ban on Working on "Matters" Involving the State***

A former State employee accepted a job with a company which does business with his former agency. In his request, he said that the post-employment law "prohibits former employees to work on any state job, for two years."

#### **(A) Applicable Law**

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

#### **(B) Application of Law to Facts**

First, in his correspondence, he said that the post-employment restriction "prohibits former employees to work on any state job, for two years." He was informed

at the Commission's meeting that the law does not impose a complete ban on working on matters involving the State. Rather, the General Assembly recognized that to encourage citizens to assume public office and employment, the standards of conduct must not "unduly circumscribe" the activities of State employees. *29 Del. C. § 5802(3)*. We have noted that to achieve that purpose, the General Assembly, rather than placing a total ban on working for a private enterprise on matters before the State, chose to limit the restriction to the three discreet triggering provisions identified in the statute. *Commission Op. Nos. 98-12; 97-21; 96-75*. Thus, we consider the particular facts in the context of whether there has been an infringement in any of those three discreet areas.

During his State employment, he worked for a number of years in a section that dealt with private consulting firms. During that time, he was not involved in the consultant selection process. Thus, he did not give an opinion and was not directly and materially involved in awarding any contract to the private firm which sought to hire him.

As to the matters for which he was responsible, his work was such that he worked on very specific projects. He identified 11 projects he worked on for the State. Nine of those projects had been completed, at least in his area of expertise. The private company had no involvement in the other two projects. Thus, he would not be representing or assisting the private company before the State on those matters.

He expected the private company would be involved in new projects and would want him to work on those matters. New projects would not be matters on which he worked while employed by the State. Moreover, the work the company would want him to perform on the projects was not in the same area of his expertise on the State projects. Thus, as to those new matters, he would not be representing or assisting the company on matters on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible for while employed by the State.

### **(C) Conclusion**

As he would not be representing or assisting the company on those matters on which he worked for the State, and as any new projects would not be matters on which he gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for at his State agency, we find no violation of the post-employment restrictions. (*Commission Op. No. 99-40*).

***River and Bay Authority is Not a "Private Enterprise" Under the Code of Conduct***

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

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

The Delaware River and Bay Authority (the "Authority") is a bi-state agency created by a compact between the States of Delaware and New Jersey, 17 Del. C. § 1701, *et seq.* (the "Delaware-New Jersey Compact"). Delaware Courts have held: “The Authority is a creature of an interstate compact entered into between the State of Delaware and the State of New Jersey and it is a governmental agency of both states.” The Delaware River and Bay Authority v. Gauntt Construction Company, Del. Ch., C. A. No. 9952, Hartnett, V.C. (January 19, 1989). As the authority is a governmental agency of Delaware and New Jersey, it is not a “private enterprise” as defined in the Code of Conduct. Thus, the two-year post-employment restriction would not apply to employment with the Authority.

Even if the post-employment law applied, the employee would not be working on projects for the Authority which were worked on at the other State agency. The River and Bay Authority writes its own construction contracts and the individual would work on its contracts. That would not constitute representing or assisting it on the other agency’s matters on where the individual gave an opinion, conducted an investigation or was otherwise directly and materially responsible, which are the circumstances set forth in 29 Del. C. § 5805(d). (**Commission Op. No. 99-44**).

### ***Working for Firm that No Longer Has State Contract, but May in the Future***

A State employee accepted employment with a company which previously contracted with her former agency. It no longer had the contract. Based on the following law and facts, such employment would not violate the post-employment provision.

For two years after leaving State employment, State employees are restricted from representing or assisting a private enterprise on matters involving the State, if those matters are ones on which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. 29 Del. C. §

5805(d). Former employees also may not improperly use or disclose confidential information gained as a result of their public position. *Id.*

Her employment with the private company would be in business development. She would prepare the company's documents; develop and present business proposals; and research new business opportunities. Because the company deals with many government agencies, not only from Delaware, but other States, she could be developing business proposals that would be presented to Delaware State agencies. However, the company would not assign her to work on any projects related to her former agency during the 2-year restricted period.

Thus, while she put together parts of the agency's contract as enhancements were made, the private company no longer has that contract. Accordingly, she would not be representing or assisting them on that matter. Even if the company were re-selected under a blanket bid, since she would not be working on **any** projects related to her former agency, she would not, during the 2-year restricted period, be working on matters on which she gave an opinion, conducted an investigation or was otherwise directly and materially responsible, which is prohibited by the post-employment law. 29 *Del. C. § (Commission Op. No. 99-45)*

***If No Contact; No Representation; No Assistance--Then No Violation***

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

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

The company's attorney, contacted this Commission's legal counsel for information on its interpretation of the post-employment law. Having reviewed the statute and the Commission's interpretations, the company's attorney wrote to the State agency, and advised it that the private company would isolate her not only from working on the contract, but on anything concerning her former office. The company's attorney believed

those restrictions would avoid a violation of the post-employment law. Although the State agency apparently was no longer saying the private company could not seek the contract, the former employee decided to seek an opinion from the Commission.

As the company's attorney observed in her letter to the State agency, the statute does not ban a private enterprise from seeking State contracts merely because they hire a former State employee. Rather, it restricts the former employee's conduct on behalf of the private enterprise on matters in which they gave an opinion; conducted an investigation; or were otherwise directly and materially responsible for while employed by the State. *29 Del. C. § 5805(d)*.

The restriction is meant to balance two concerns: (1) that State employees do not use their former position as a means to obtain a "leg up" for the private enterprise over its competitors by using their prior connection to exert undue influence on former colleagues, while (2) encouraging citizens to seek public employment by giving them the latitude to find employment in the private sector without "unduly circumscribing their conduct." *See, 29 Del. C. § 5802*. Thus, we have held that the statute is not violated if the former employee is employed by a company which contracts with the State as long as that former employee does not work on matters which fall within the three discreet areas identified in the statute. *See, e.g., Commission Op. Nos. 94-05; 96-71(B)*.

Here, the former employee did not make the final decision on the terms of the contract, but she gave input on tasks that became part of the contract. Thus, she gave an opinion on those matters. However, she has agreed not to represent or assist the private company on that contract. Moreover, while the statute restricts her activities in only those three discreet areas, she has agreed not to contact her former office regarding any business matter for the two-year period.

As the former employee will not represent or assist the private company on **any** matter involving her former State office, then she clearly would not be representing or assisting them on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible for while employed by the State. Accordingly, her conduct does not violate the post-employment law. (***Commission Op. No. 99-48***).

### ***Consulting on Matters for Which an Employee Was Responsible***

A former State employee asked if it would violate the Code of Conduct if he started a consulting business to assist clients in improving certain areas of their businesses including obtaining State contracts. Based on the following law and facts, we concluded that representing and assisting clients to obtain State contracts raised ethical issues

because of his former State position.

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

As a consultant, he wanted to consult with Delaware businesses to assist them in, among other things, obtaining State contracts. He did not plan to represent clients before the agency by which he was most recently employed, but wanted to represent clients before the Division he worked in for many years before moving to the other agency.

As noted above, for two years after leaving State employment, he could not represent or assist a private enterprise on matters **involving the State**. *29 Del. C. § 5805(d)* (*emphasis added*) From his description, apart from helping clients obtain contracts, he wanted to help clients improve their management practices and strengthen their customer service. These activities would not involve the State. He also would help his clients get business with the private sector. Again, that activity would not involve the State. Accordingly, he could engage in such activities.

However, because representing and assisting his clients in obtaining State contracts, would clearly be matters involving the State, the issue became whether such activity involves matters on which he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible. If so, then the two-year restriction applies.

The Commission had issued a previous opinion to him recognizing that, by law, he was responsible for duties and functions relating to contracting. *Commission Op. No. 98-30*. Also, he said he was a “policy maker.” He also was a nonvoting member of an advisory council which was created to advise as on certain aspects of procurement laws, policies and practices. He appointed people to the council, and also chaired a committee which monitored the effectiveness the procurement process, recommended changes, and established other policies and procedures. He also was intimately involved in legislation impacting on procurement.

To permit him to engage in the proposed activities would distort the purpose of the post-employment provision. The post-employment restriction is designed to prevent former employees from getting a “leg up” on other private enterprises that deal with the State. *Commission Op. No. 95-11*. We have noted that the post-employment law, like other

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

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

Because representing and assisting private clients in obtaining State contracts would constitute matters for which he was directly and materially responsible, such activity would violate the post-employment law. (***Commission Op. No. 99-43***).