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State Public Integrity Commission

Synopses of Opinions - 2000

Jurisdiction

Alleged Violations of Federal & State Criminal Laws

Complainant alleged irregular procedures and violations of federal and State criminal laws by several State officials. There were allegations of misuse of government funds; bribery; failure to pay child support; constitutional violations; inadequate qualifications for a job; sexual harassment, etc. The Commission's jurisdiction is limited to interpreting Title 29, Chapter 58. *Commission Op. No. 95-5*. Allegations of misuse of government funds, constitutional violations, sexual harassment, and personnel issues (e.g., job qualifications) are not within its jurisdiction. *Commission Op. No. 97-28*. Nor does it have jurisdiction over Title 11 criminal provisions (e.g., bribery, etc.). *Commission Op. No. 96-10*. Thus, the complaint was dismissed for failure to state a claim, pursuant to 29 Del. C. § 5809(3). (**Commission Op. No. 00-22**).

Elected School Board Members

Complainant alleged that: (1) four elected School Board members may have violated a Board Policy; and (2) while the Board was negotiating with school teachers, two Board members allegedly made "not-so-veiled threats" to a teacher. The Commission has no jurisdiction over local, elected School Board members. *Commission Op. No. 91-16*. As the complaint failed to state a claim, it was dismissed pursuant to 29 Del. C. § 5809(3). (**Commission Op. No. 00-23**).

Conduct of Legislator

Correspondence sent to the Commission alleged that a General Assembly member had a conflict of interest. First, to the extent the letter was meant as a complaint, the statute requires that complaints be sworn. 29 Del. C. § 5810(a). Second, even if it were sworn, the Commission has no jurisdiction over General Assembly members regarding conflicts of interest. *Commission Op. No. 97-14*. The General Assembly has a separate statute on conflicts of interest, and has House and Senate Ethics Committees to administer that law. 29 Del. C., Chapter 10. Thus, the matter was dismissed for failure to state a claim. 29 Del. C. § 5809(3). (**Commission Op. No. 00-28**).

Allegations of False Arrest, Perjury, etc.

It was alleged that local government officials were engaging in conduct such as false arrest, perjury, discrimination, etc. Complainant wanted the Commission to represent him in legal actions against the officials. The complaint was not a sworn statement as required by *29 Del. C. § 5810(a)*. Even if that legal formality were met, the Commission has no jurisdiction over the types of charges alleged. *See, Commission Op. Nos. 95-5; 96-38; 96-10; and 98-25*. Also, the Commission has no authority to represent private citizens in any legal action. (**Commission Op. No. 00-33**).

Campaign Finance

A candidate for a State office which regulated certain industries asked if those industries could make campaign contributions to candidates for that office. The Commission has jurisdiction over candidates for State office only under the financial disclosure law. *See, 29 Del. C. § 5812(a)(3)*. Campaign contributions and expenditures are governed by *15 Del. C., Chapter 80*. (**Commission Op. No. 00-14**).

Personal or Private Interests

Hearing Officer's Personal/Private Interest in Board Decision

The Commission was asked if any restrictions applied to a State Board's hearing officers, and the Board's members concerning participation in a claim against the State by one of the Board's hearing officers. The Commission found that some restrictions do apply. The agency, in most instances, had already implemented ways to avoid violating the Code of Conduct.

I. Applicable Law

State employees, officers and honorary State officials may not review or dispose of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties. *29 Del. C. § 5805(a)(1)*.

Such persons also may not engage in conduct that may raise suspicion that the public trust is being violated. *29 Del. C. § 5806(a)*. An actual violation is not required as this provision only requires conduct that "may raise suspicion," and is, therefore, basically an "appearance of impropriety test." *Commission Op. No. 93-12*.

II. Application of Law to Facts

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

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

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

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

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

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

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

(1) Effect on Board Members

The Code requires that the interest be "personal and private." We assume the relationship between the State employee and the Board members is official; not "personal and private." However, even assuming a conflict if Board members decided her claim, the statute provides that if there is a statutory duty that cannot be delegated, then the officials may proceed, if the matter was fully disclosed to the Commission. *29 Del. C. § 5805(3)*. Here, the Board has the statutory duty to decide these types of cases. (*Citation omitted*). The only clear delegation authorized by the statute is that the Board may delegate its authority to a hearing officer, if the parties consent.

However, if Board members have a conflict in this situation, the hearing officers would have even more of a conflict: They have the same status and authority as the State employee who filed the claim; she is their colleague; and unlike Board members, the

hearing officers work in the same office with her on a daily basis. Their participation as a hearing officer to decide her claim raises appearance that their relationship with her is closer than her relationship with Board members. Moreover, if they acted as hearing officer, as the single decision maker they would have the opportunity to make subjective decisions about their own colleague, e.g., credibility, etc. Because their decision would be subjective it could appear that the hearing officers would give their co-worker favorable treatment. Also, it puts them in an unnecessary and probably uncomfortable position of judging their own colleague.

Thus, given the two options, having it heard by the Board, or by a hearing officer, the latter is the least attractive. We, therefore, conclude that the Board members can proceed to make the decision based on the statutory exception which permits them to proceed if they cannot delegate. The agency had discussed with the law firms the possibility of having an independent mediator for the State employee's claim. Our ruling does not preclude the parties from pursuing other legal avenues that could result in the decision being made by someone other than the Board.

(2) Effect on Hearing Officers

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

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

First, by law, when an advisory opinion is issued, if the persons seeking the opinion fully disclose the matter to the Commission and act in good faith reliance on that advice, then they shall not be subject to discipline or other sanction under the Code with respect to those matters. 29 *Del. C.* § 5807(c). Thus, all Board members and hearing officers

should be made aware of this opinion in order to comply with it. Second, after reviewing the opinion, if there is additional factual information that needs to be disclosed to this Commission by a particular hearing officer or Board member, then they should so advise the Commission. For example, if a hearing officer or Board member has some “personal or private interest,” in the State employee’s situation, which creates a conflict for them, e.g., if they are related to her; if they expect to be called as a witness; if they have a close personal friendship outside the office, etc., then they should bring that to the Commission’s attention to insure full disclosure, and further guidance if necessary. (*Commission Op. No. 00-09*).

Board Member Cannot Hear Cases Presented by His Law Firm

The Chair of a State Board which regulated a certain industry sought advice on restrictions to participating in matters related to an industry member when the industry member was also a client of his law firm and is represented by his partners in the law firm on several matters, as described below. Based on the following law and facts, the Commission held that he should not, as an appointee to the Board, be involved in matters regarding this company while it is a client of his law firm.

I. Background to the Decision

Our jurisdiction is limited to interpreting the State Code of Conduct, and does not include authority to interpret the Lawyers’ Rules on Professional Conduct. *Commission Opinion 94-01*. Therefore, we do not decide what restrictions may be imposed under those rules of conduct. Moreover, Delaware Courts have held that where there is a possible conflict under the Lawyers’ Rules of Professional Conduct, and a possible conflict arising from an individual’s duty as a public officer, the ruling would be based on the duties owed by public officers. *In re Ridgely, Del. Supr., 106 A.2d 527, 530-31 (1954)*.

Ridgely was decided before the Code of Conduct was enacted; thus, it interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. The court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “his private interest must yield to the public one.” *Id. at 531*.

In *Ridgely*, the State officer derived a direct financial benefit from his outside law practice. Here, the appointee addressed at length the restrictions on participating in decisions when a State official has a financial interest in a private enterprise that would

be affected, to a lesser or greater extent than others similarly situated, by the official's action or inaction. *See*, 29 Del. C. § 5805(a)(2). By operation of law, such pecuniary interests tend to impair judgment. *Commission Op. No. 96-61*.

However, we need not focus on § 5805(a)(2), because § 5805(a)(1)--the restriction on reviewing or disposing of matters where there is a "personal or private interest" --is not limited to direct pecuniary benefits. *See, e.g., Commission Op. Nos. 97-24 and 97-30*. We based those decisions on both common law decisions on conflicts arising from "personal or private interests," and later decisions interpreting the codification of that common law.

At common law, Delaware Courts recognized that relationships between a government official and a law firm or other business or social interest can raise issues of conflicts. *Commission Op. Nos. 97-24 and 97-30*. Conflict of interest statutes generally do not abrogate common law conflict of interest principles. *Commission Op. Nos. 97-24 and 97-30 (citing 63C Am. Jur. 2d Public Officers and Employees § 253 (1997))*. Moreover, the common law restriction on participating where there is a personal or private interest was codified at 29 Del. C. § 5805(a)(1).

The common law concern against public officials participating in decisions if they have a "personal or private interest" is the same as arises under the State Code which restricts such officials from "reviewing and disposing of matters in which they have a personal or private interest that tends to impair independence of judgment." 29 Del. C. § 5805(a)(1).

Delaware Courts have twice interpreted 29 Del. C. § 5805(a)(1). *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995)*, *aff'd*, *Del. Supr., No. 304, Veasey, J. (January 29, 1996)*, and *Prison Health Services, Inc. v. State of Delaware*, *Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993)*. In both cases, Delaware Courts continued to hold that an outside business relationship of an official can raise a "personal or private interest" which tends to impair independent judgment, even where no facts alleged any direct financial benefit to the official.

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

In *Beebe*, a State appointee was one of a five-member committee which had to recommend whether a hospital's application should be approved. The agency made the final decision. The official said he thought he had a conflict, but proceeded to discuss the application. After the discussion, he declared a conflict and did not participate in the

vote. It was not alleged that he violated *29 Del. C. § 5805(a)(2)* because he or his private employer would experience a financial benefit to a lesser or greater extent than others similarly situated. Rather, it was alleged that the business relationship between the official's private employer and the applicant created a "personal or private interest" which tended to impair his judgment in violation of *29 Del. C. § 5805(a)(1)*. The Court found that his comments were "neutral and unbiased," but said he should have recused himself from the outset.

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

We apply those decisions to this situation as follows:

Like the *Beebe* official, this official was appointed to a State Board, and therefore, an "honorary State official" under the Code of Conduct. *29 Del. C. § 5805(13)*. His Board, like the *Beebe* Board, makes decisions about applications. Also, as in *Beebe*, his employer has an alliance (attorney-client relationship) with an applicant. However, while the *Beebe* Board only made a recommendation to the State agency, his Board is the final authority on whether applications will be approved. By statute, the applicant must file certain documents for his Board to review. (*Citation omitted*). Those documents include a statement of its resources and liabilities. (*Citation omitted*). Moreover, the Board is to have access at all times to the books, records and accounts of the applicant. *Id.* A partner at his law firm provides legal services to the applicant on financial and tax-related matters, business organizational questions, and some commercial transactions. His partner's work would be an underlying basis for the source materials of the applicant's resources and liabilities. Thus, in reviewing the application, his Board would consider the underlying work of his law firm. While this may seem remote, the *Beebe* situation appears to be more attenuated, as there was no indication that the official's outside employer was involved with the application being considered.

Also, the Board addresses complaints against the regulated company by users of the facilities, and can sanction the company. To date, no complaint has been filed. He said that if that situation arose, his law firm would not represent the company, but even if it did, he concluded that the disposition of the matter would not result in a financial benefit or detriment to his firm, “at least not directly.” However, that type of relationship is what created the conflict in Beebe—the outside employer was not involved in the proceedings and it was not argued that the official’s company was benefitting from the official’s participation in the application decision; rather, it was argued that the business relationship, by itself, tended to impair the official’s judgment, and resulted in a benefit to a party seeking the decision.

Here, the honorary official said there could be no matter pending before the Board where the disposition would augment or detract from the law firms’ compensation, although “it certainly might result in a financial benefit or detriment to the law firms’ client” (the applicant). Again, in Beebe, no facts indicated that the official’s outside employer would directly benefit from the Board’s decision; rather, the applicant who had an alliance with the official’s outside employer would benefit. Here, also, the appointee’s law firm might not directly benefit, but the applicant who has a business alliance with his firm could directly benefit from the Board’s decision.

Like the official in Beebe, his outside employment is his primary source of income; he has a duty to his private employer which has a vested interest in seeing its business alliance be successful. In Beebe, that relationship was enough for the Court to conclude that the official should not have participated even to the limited extent of making “neutral and unbiased” comments.

Aside from the partner who advises the company on its finances, a commercial transaction involving the applicant’s caterer resulted in litigation, and another of his partners represents the applicant in that matter. That litigation would not be considered by the Board. However, the litigation could impact on the assets/liabilities of the applicant, which are considered by the Board. We address the concerns that this raises in the latter part of our opinion dealing with appearances of impropriety.

Consistent with Beebe, we hold that it would be improper for him to review or dispose of matters related to the company’s annual application for a license, or complaints against the company. As indicated in Beebe, he should recuse himself from the outset of such matters even if the Board’s ruling is only a recommendation, not a final decision; and he should not engage in even neutral or unbiased comments on the matters.

In Prison Health, the Court noted that the official’s spouse was a low-level employee, and

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

III. Appearance of Impropriety

While these restrictions may appear rather stringent, we believe they are consistent with the Court’s interpretations of 29 *Del. C.* § 5805(a)(1). Moreover, as the appointee noted, the Code also requires that he not engage in conduct that may raise suspicion among the public that the public trust is being violated. 29 *Del. C.* § 5806(a). It also restricts his activities if he has any interest that is in substantial conflict with performing official duties and if outside employment may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; and (4) any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

We have held that actual misconduct is not required; only a showing that a course of conduct could “raise suspicion” or “may result in” conduct that reflects unfavorably or adversely on the public’s confidence in its government. *See, e.g., Commission Op. No. 92-11*. Thus, it becomes a question of whether there is an appearance of impropriety. He was clearly aware of that issue and believed that acting on matters related to the company when it is a client of his firm may raise an appearance of impropriety. Moreover, he advised us that previously one of his partners represented another

company in a personal injury matter. That company, which is also regulated by his State Board, raised a concern about the involvement of his partner in the lawsuit because of his status as Chair of the Board. We know that matter was addressed by the Bar Association's Committee on Professional Ethics. It concluded that under the lawyers' rules of conduct he should not participate in his official capacity on matters that directly relate to that company and should recuse himself not only from any formal proceeding before, or decisions, of the Board, but his isolation should extend to any informal discussions, contacts or the like.

The significance of that situation is that he is now in a similar position where a partner in his law firm is representing another company in a civil matter, when that company is regulated by him in his State capacity. Clearly, under similar circumstances the law firm's client and the Committee on Professional Ethics thought his participation on the Board in matters related to the company, when his firm was representing it, "may raise suspicions" of at least an appearance of impropriety. Similarly, we believe that his participation on matters related to this applicant could raise the same suspicions.

His firm obviously has an interest in maintaining the company as its client, and in providing it with the legal services on finances, taxes, liability issues, etc., that can have some impact on decisions by his Board. Also, his firm has an interest in the outcome of the litigation referred to above. His law firm's connection to the company, combined with his official responsibilities which can impact on the company's application, complaints against it, etc., could raise suspicion that: his judgment may be impaired; he would be in a position to make official decisions outside official channels; or the company may receive preferential treatment in Board decisions because of its status as a private client with his law firm. For example, if he participated in State decisions affecting the company, such as ruling on complaints, it may appear that he would give it a favorable decision because he would not want to sanction his law firm's client, or if he continued taking calls from the company to discuss various matters, it may appear that while officially recusing himself, he was making decisions outside official channels. These are merely examples of how the public may perceive the conduct, and are certainly no indication that he would actually engage in such activities. However, by imposing these restrictions, the possibility of such perceptions is greatly diminished.

IV. Conclusion

Based on the foregoing, he should recuse himself from participating as a Board member in "matters" relating to the company as long as it is a client of his firm. "Matters" is broadly defined as "any application, petition, request, business dealing or transaction of any sort." 29 *Del. C.* § 5804(6). "Matters" are not limited to just formal

proceedings. Thus, as indicated above, he should recuse himself not only in formal proceedings, such as the company's annual application or complaints against it, but refrain from discussing matters related to the company, even if the comments would be neutral and unbiased; delegate discussions of matters pertaining to the company to the Board's administrator; and exercise caution even in purely ministerial matters dealing with the company. (*Commission Op. No. 00-04*).

NOTE: Generally, requests for advisory opinions are confidential. 29 Del. C. § 5807(d). However, an exception to the rule of confidentiality is that the applicant for an advisory opinion may give the Commission written authorization to release the information. 29 Del. C. § 5807(d)(1) and § 5810(h)(1)(I). In the instance below, such authority was given.

Personal Interests Arising from Outside Hobby & Employment

Dear Mr. Schrader:

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

I. Applicable Law

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

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

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

(D) Officials are restricted from participating in official decisions if as a

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

II. Facts Applied to the Law

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

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

Mr. Orem may participate in the decision on the home-occupation ordinance. For Mr. Orem to have a conflict, he must have a "personal or private interest" in the home-occupation ordinance. "Home occupation" means: "any enterprise or activity conducted solely by one or more members of a family." That definition does not say if the ordinance applies only to commercial enterprises. However, another ordinance section refers to "Business Licenses." Reading the business license ordinance in conjunction with the zoning amendment, leads to the conclusion that the zoning ordinance applies to commercial ventures, not hobbies.

Mr. Orem's "personal and private interest" is in maintaining a hobby, not in making money. Thus, his interest is not one that would be affected by the ordinance.

The citizens who wrote the letter of complaint said that he had "a possible conflict of interest" because "he may, in the future, have a home based craft workshop for the sale of handcrafted items." This is a speculative and conclusory allegation. Delaware Courts, in interpreting the Code of Conduct, have noted that is a "strong presumption" of honesty in the actions of public officials. Beebe Medical Center v. Certificate of Need Appeals

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

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

Because Ms. White has a home-owned business, she contacted the Public Integrity Commission in December 1999 and was sent information on the Commission’s prior rulings, Delaware Court decisions, etc., which discussed when officials should recuse themselves. In that correspondence, she was advised that the Commission had never specifically ruled on what limits would apply to officials **after** they recused themselves, and that she may, therefore, wish to seek an advisory opinion. Based apparently on that correspondence, she decided to recuse herself. However, her post-recusal conduct was questioned because, among other things, she was attending and participating in public meetings, and had signed the “letter of protest” which said she and Orem may have conflicts of interest and they should obtain an advisory opinion. Those events occurred at a public meeting and were reported in *The Wave*. The editorial concluded that if Ms. White had truly recused herself on the home-based business ordinance, then her obligation was to remain neutral—even outside of Council Chambers.

At that point, your request had been sent to the Commission, identifying some post-recusal conduct which you believed required advice from this Commission. The facts regarding Ms. White’s signature on the “letter of protest” were not in your request as that event happened after your request was submitted. A private citizen sent *The Wave* article to this Commission on the date before it met. That information was given to the Commissioners and you at the meeting, so we could decide if those facts had relevance.

As the Town Attorney, you recommend to Town Council members who have been recused that they leave the meeting during consideration of the matter. This precludes them from participating in any way in the deliberation. Further, you advise them not to express oral opinions on the matter; not to gesture or request third parties or others to participate or express opinions on their behalf; and to generally conform themselves to the standards expected from judiciary members. You asked if you should continue

giving that advice to your Town clients in this matter.

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

First, the statute clearly states that even if an official recuses himself, he may respond to questions if asked. *29 Del. C. § 5805(a)(1).* From that language, it appears the official would not have to leave the meeting, and could comment if asked. However, it appears that Delaware Courts have indicated that where it is proper for the official to recuse, it is then improper to comment even if the comments are "neutral and unbiased" and even if the participation is "indirect and unsubstantial." *See, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996) and Prison Health v. State, Del. Ch., C.A. No. 13,010, V.C. Hartnett, III (June 29, 1993).*

Also, the Code restricts officials from representing or otherwise assisting a private enterprise before their own agency. *29 Del. C. § 5805(b)(1).* The purpose of that restriction is to insure that there is no undue influence and/or that they will not receive preferential treatment from their colleagues. Thus, to the extent Ms. White's participation could be construed as "representing or otherwise assisting" her private enterprise before her own agency (the Town Council), then her participation should be restricted.

We note that "representing and otherwise assisting" after a recusal is discussed not only in Delaware cases, but also in a federal court decision interpreting a similar federal ethics law. *Van EE v. EPA, D.C. Dist. Ct., 55 F. Supp. 2d 1 (1999).*

In *Van EE*, the employee wanted to speak at public meetings regarding the use of certain federal lands. The meetings were not before his own agency. The Court held the government had a compelling interest in restricting a federal employee's speech before federal agencies. It said his speech was not prohibited in all circumstances, only before the federal agencies. The applicable Delaware law, in this situation would only restrict her activities before her own Town agency. The government's interest is to insure not only compliance with the law, but also insure that there is no appearance of impropriety. The concerns of improper appearances "surely are greater" when an employee addresses their own agency, and when the audience is aware that the speaker is an employee of

that agency. Van EE.

Here, Ms. White wants to engage in conduct which the Code restricts--representing or otherwise assisting a private enterprise before her own agency. Moreover, as noted in Van EE the appearance of impropriety is "surely greater" because she would not only be addressing her own agency, but certainly the audience at the Ocean View town meeting will know she is a Town official because they elected her to that position.

Other federal case law supports the restriction on her activities, such as having others speak on her behalf. Where one purpose of the ethics restrictions is to insure the official does not exercise undue influence on their colleagues, even if the official does not participate at all in the meeting, by being in attendance he potentially could have used his inside knowledge to help direct the statements and activities of those participating. United States v. Schaltenbrand, 11th Cir., 922 F.2d 1565(1991). Accordingly, based on the above law and facts, we conclude that the advice you have been providing to your Town Council clients regarding post-recusal conduct comports with the Code of Conduct in this particular situation.

III. Conclusion

We find and hold as follows: (1) Mr. Orem does not have a "personal or private interest" in the zoning matter, and, therefore need not be recused; (2) Ms. White has properly recused herself from participating because of her "personal or private interest" (her private business); and (3) Ms. White should continue complying with the Code by not "representing or otherwise assisting" her private enterprise before her own agency. (*Commission Op. No. 00-10*).

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

Personal Interests Arising from Ownership in Business

I. INTRODUCTION

The State Public Integrity Commission issued a ruling on March 31, 2000 holding that Dale R. Dukes, a Sussex County Council member, and the other Sussex County Council members did not have conflicts of interest which would disqualify them from

participating in a re-zoning matter scheduled for presentation at the April 4, 2000 meeting of Sussex County Council. That ruling stated that an opinion providing a more detailed discussion of the law would be forth coming. What follows is that further discussion of the law.

II. JURISDICTION AND FACTS

On March 7, 2000, a complaint was filed with the Public Integrity Commission alleging that Mr. Dukes (hereinafter "Respondent"), a Sussex County Council member, may have a conflict of interest and should not participate in a vote on a re-zoning matter on April 4, 2000 or thereafter. The matter to be considered is Carl M. Freeman Communities' (hereinafter "Freeman") proposal to develop approximately 887 acres near Fenwick Island into a 2,895-home development. The Freeman proposal needs County Council's approval to re-zone the acreage from its present Farm and Agriculture status to a high-density zone. It is alleged that if Mr. Dukes' participates, his private company, Dukes' Lumber Co., might profit if the development is approved, and if Freeman or his subcontractors then decide to buy building supplies from his company. By statute, when a complaint is filed the Respondent has statutory rights to such things as personal service of the complaint, a specific time to answer, an opportunity to be heard, and the right to subpoena witnesses, etc. *See, 29 Del. C. § 5810.* Mr. Dukes waived such rights so the Commission could expedite its proceedings and render a decision before the April 4, 2000 Sussex County Council meeting. Mr. Dukes did, however, request an advisory opinion under *29 Del. C. § 5807(c)* concerning the issue.

Because other County Council members have private business interests which also might allegedly profit, the County's legal counsel, Richard Berl, also asked for an advisory opinion on their situations. The other Council members and their private enterprises are: (1) Lynn J. Rogers, President, Rogers Sign Company, Inc., a commercial sign and outdoor advertising company; (2) Finley B. Jones, Jr., President, M.A. Willey & Sons, a steel material supply company; (3) George B. Cole, Realtor, Sea Coast Realtor (Eastern Sussex County) and owner, Beach Plum Antiques; and (4) Vance C. Phillips, president, Vance Phillip, Inc., Woodrow W. Phillips Spray Co., V.P. Produce, and Realtor, Laurel Realty (Western Sussex County).

The only Council member who has had a contract or an account indirectly with Freeman is Mr. Rogers, who did approximately \$1,000 worth of sign work as a subcontractor for a company which contracted with Freeman on an earlier and different project. All Council members deny that they have: (1) an agreement with Freeman for future contracts; (2) sold any real property to Freeman; or (3) own or have an interest in any land in the vicinity of the development which will benefit from this project if it is

approved.

III. APPLICABLE LAW

Complainant alleges that common law decisions prior to the enactment of the State Code of Conduct are not applicable. We decided that issue in 1997. *See, e.g., Commission Op. Nos. 97-24 and 97-30.* We held that the Code of Conduct provision which restricts government officials from reviewing or disposing of matters before their government entity if they have a personal or private interest which tends to impair their independent judgment in performing official duties is a codification of the common law.

Conflict of interest statutes do not generally abrogate the common law unless expressly so provided. *Id. (citing 63 Am. Jr. 2d Public Officers and Employees § 253).* The General Assembly did not expressly abrogate the common law. Nor did it impliedly repeal the common law restricting officials from participating when a conflict of interest was alleged in a zoning situation. Delaware courts have recognized that there must be order, certainty, and stability in land use laws. *See, e.g., Stafursky v. County Council of Sussex, Del. Ch., C.A. No. 1242, C. Allen (August 12, 1987); Acierno v. Folsom, Del. Supr., 337 A.2d 309 (1975).* To hold that the common law does not apply could result in this Commission destabilizing long-standing Delaware decisions on zoning and conflict of interests restrictions.

At common law, when government officials act on zoning matters and a conflict of interest or personal interest is alleged, the standard to be applied depends on whether the government officials were acting in a: legislative, ministerial, or quasi-judicial capacity. *(See cases cited herein).* The decision on which standard to apply turns on the particular facts--e.g., what is the alleged "personal or private interest"; how would such an alleged interest affect the official's judgment; what type of zoning interest is being considered; and what is the official's capacity (role) in deciding the zoning issue.

Having concluded that common law decisions apply in this situation, we next address the facts in the context of the three common law standards which Courts have applied when an alleged conflict results from a zoning matter.

IV. BACKGROUND TO THE DECISION

(A) Zoning Decisions in General

Council Member Dukes' authority to vote on the zoning issue is being challenged because he has a private business which allegedly might benefit from a

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

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

A more probing standard is used if the act is characterized as quasi-judicial. *Id;* *See, e.g., Shellburne, Inc. v. Roberts, Del. Supr., 238 A.2d 331(1967)* (when quasi-judicial body acts, there is a presumption of honesty and integrity and court will look at motive if complainant establishes a prima facie case to overcome the presumption).

A “matter” is considered “ministerial” when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Darby v. New Castle Gunning Bedford Education Assoc., Del. Supr., 336 A.2d 209, 211(1975)*. Where government officials are bound by zoning regulations, there is no discretion of choice involved. *State ex rel. Rappa v. Buck, Del. Super., 275 A.2d 795 (1971)*. Thus, if the matter is merely “ministerial” the presence or absence of a conflict of interest is immaterial. Since Mr. Dukes and the other Council members do exercise discretion and judgment in ruling on zoning matters, we hold that the “ministerial” standard does not apply.

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

Having disposed of the “ministerial standard,” the threshold issue is now whether the County officials would be acting in a legislative or judicial capacity.

Delaware Courts decide if an official is acting on a zoning matter in a legislative or quasi-judicial capacity; or a combination thereof by looking at the specific structure of the land use laws. There is no Delaware case dealing directly with which test would be applied to Sussex County Council members in a re-zoning situation. However, Delaware Courts have decided the standard to be applied under the specific zoning laws of other counties and cities. *See, Lawson, C.A. No. 1615-S (zoning is a “legislative function,” but some aspects are “quasi-judicial”); Conner, 281 A.2d 608 (zoning hearings of Levy Court are quasi-judicial); East Lake, 655 A.2d 821 (comparing site development decision to subdivision decision, Court recognized that the City’s Planning Board could act, in part, in all three capacities).*

From those decisions it is clear that the capacity in which an official acts turns on the complexities of the particular area’s zoning laws. As this Commission finds no authority interpreting which capacity would apply to Sussex County Council members based on the structure of the Sussex County Zoning laws, we test the issues under both the legislative and quasi-judicial standards.

(1) LEGISLATIVE CAPACITY STANDARD

Delaware Courts will not inquire into the motives of public officials who act in a legislative capacity on zoning actions if they act within the scope of their admitted powers, unless the complaining party proves bad faith or fraud on the part of the official. *Campbell v. Commissioners of Bethany Beach, Del. Supr., 139 A.2d 493 (1958).*

In *Campbell*, it was alleged that zoning Commissioners approved the zoning of a new state highway through Bethany Beach, because it would increase their individual property values. *Id. at 496-497.* The Delaware Supreme Court said there was “absolutely no evidence of capriciousness or bad faith or fraud.” *Id. at 496.* It noted that as a matter of law, the Commissioners had complete power to act on the matter. *Id.* Regarding the allegation that they were motivated to approve the request because of their desire for personal gain, the Court said “[T]he short answer is:” most of the property lying east of Delaware Avenue would presumably benefit from any increase in value as a result of a new highway. *Id. at 497.* “The mere fact of possible enhancement” of their personal properties did not preclude their participation, because as a practical matter, no Board of Commissioners could then be obtained to validly consent to a new highway since, by law, all Commissioners were property owners. *Id.*

As in *Campbell*, it is “possible” that all Council members could personally gain if the ordinance is passed. For example, Freeman “might” decide he wants: Mr. Dukes’ building supplies; Mr. Findley’s steel materials; Mr. Cole and Mr. Phillip’s real estate sales expertise; Mr. Cole’s antiques to dress up the developer’s show home; or Mr. Rogers signs to announce the coming of the new development or identifying the location, etc. But Mr. Dukes and the other Council members have each represented that they: (1) have no agreement with Freeman for future contracts; (2) have not sold any real property to Freeman; and (3) do not own or have an interest in any land in the vicinity of the development which will benefit from this project if it is approved.

Under the statute, and at common law, to prove that an official has a “personal interest,” sufficient to impair his judgment, complainant must overcome “a strong presumption of honesty and integrity.” *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Supr., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff’d*, Del. Supr., No. 304 (January 29, 1996); *See also, Shellburne*, 238 A.2d 331 (when acting within scope of authority, there is a rebuttable presumption of good faith and propriety of conduct that inures to all public officers); *Mack v. Kent County Vocational-Tech Sch. Dist.*, Del. Supr., C.A. No. 86A-AU-2, J. Bush (May 20, 1987). However, the complaint recites “the mere fact” that if the ordinance is passed, then Mr. Dukes “might” profit.

All well-pleaded allegations must be accepted as true. *Kershaw Excavating v. City Systems, Inc.*, Del. Supr., 581 A.2d 1111 (1990). However, inferences and speculative facts are not to be assumed as true without specific allegations of fact to support such inferences or conclusions. *Bergstein v. Texas Int’l Co.*, Del. Ch., 453 A.2d 467 (1982), *appeal den.*, Del. Supr., 461 A.2d 695 (1983) (*alleged Board member’s private enterprise would benefit from decision*). Here, it is merely alleged that the officials “might” profit if the ordinance is passed and if the developer then decides to do business with one or all of those officials. This allegation is more tenuous than in *Campbell*, where the Court ruled that there was no evidence of fraud or bad faith. *Id.* at 139 A.2d 493. Where there is no showing of bad faith or fraud, Courts will dismiss the complaint. *Klaw v. Pau-Mar Construction Co.*, Del. Supr., 135 A.2d 123 (1957).

Accordingly, we dismiss the complaint against Council Member Dukes, and advise Mr. Dukes, and all Council members, that to the extent any action on the re-zoning matter would be in their legislative capacity, they are not precluded from participating.

(2) JUDICIAL CAPACITY STANDARD

We find that even under the stricter judicial/quasi-judicial standard there is no violation of the State Code of Conduct. When the judicial standard is

applied, complainant must again overcome “a strong presumption of honesty and integrity.” *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff’d*, Del. Supr., No. 304 (January 29, 1996). Delaware Courts have noted how remote and nebulous alleged conflicts can be. Thus, for the interest to be sufficient to require an official to recuse himself, the claim cannot be merely conclusory. *Shellburne*, 238 A.2d 331; *Camas v. Delaware Board of Medical Practice*, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995). We have held that claims cannot be based on suspicion and innuendo. There must be hard facts. *Commission Op. No. 96-75*(citing *CACI, Inc-Federal v. United States*, Fed. Cir., 719 F.2d 1567(1967)). Here, the hard facts support the presumption of honesty and integrity.

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

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

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

The next question is whether the speculative, prospective interests would be sufficient

to create any associational relationship “personal or private interest” between the Council members and Freeman which would tend to impair judgment under 29 Del. C. § 5805 (a)(1). “The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case.” *Prison Health Services Inc. v. State, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993)(citing Van Itallie v. Borough of Franklin Lakes, N.J. Supr., 146 A.2d 111, 116 (1958)).*

In *Van Itallie*, it was alleged that an official who participated in a zoning decision had a personal interest because his brother-in-law held a low-level position with the company seeking the zoning action. The Court held that the official’s familial relationship with an employee of the company which was seeking the decision was not an interest sufficient to require recusal. Similarly, Delaware Courts have held that the mere allegation of a relationship without additional facts to support a charge of a conflict of interest is insufficient to state a claim. *Camas v. Delaware Board of Medical Practice, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995)(no facts were given to support an allegation that a State officer’s marital relationship created a conflict of interest where her spouse investigated a claim of improper medical practice for his employer, a private hospital, against a doctor of that hospital, and the same matter came before her State board).*

Here, all Council members deny that they have any agreement with Freeman for future contracts, etc. No facts indicate any personal or private ties to Freeman. Thus, the allegations of a personal or private relationship are speculative and conclusory, without facts to support the type of relationship between the officials and Freeman that is sufficient to create the type of interest which Courts deem to be sufficient.

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

As the conclusory and speculative allegations are insufficient to establish that the officials have the requisite “personal or private interest,” the question becomes whether the facts are sufficient to support the allegation of an appearance of impropriety.

In deciding if there is an appearance of impropriety, we consider the totality of the circumstances. *Commission Op. No. 96-78.* However, those circumstances must be contained within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. § 5802(1) and 5802(3). To achieve that balance, we must start with the strong legal presumption of honesty and integrity to which public officials are entitled. *Beebe.* Added to that presumption are the following

legally significant facts:

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

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

Similarly, we have held that in deciding if there is an appearance of impropriety because of an alleged prior professional or social relationship, it is improper to ascribe evil motives to a public official based only on suspicion and innuendo; not on hard facts. *Commission Op. No. 96-75(citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567(1967)).*

That conclusion is consistent with a Delaware decision where it was alleged that there was an appearance of impropriety under a provision of the Lawyer's Rules of Professional Conduct because of the business relationship created by the individual's State role and his private employment. The Court said: Absent the existence of a conflict, it would not disqualify the individual based on an unarticulated concern for the "appearance of impropriety." It noted that appearances of impropriety claims have been criticized as being too "imprecise, leading to ad hoc results." Moreover, such unsubstantiated claims were sometimes used as a tactical tool just to disqualify an official from participating when, in fact, there was no conflict. *Seth v. State of Delaware, Del. Supr., 592 A.2d 436 (1991).*

As in *Seth*, here, the public position and private employment created the alleged appearance problem, but there were no articulated, specific facts to support the claim. Just as the rules of conduct for lawyers are not to be used for tactical purposes to disqualify officials when there is no conflict, so too the State Code of Conduct should not be used for tactical purposes to disqualify public officials when there is, in fact, no conflict. Here, based solely on appearances without any supporting facts, it is alleged that Mr. Dukes should be disqualified because he “might” profit--if the developer’s proposal is approved; and if the developer or if his subcontractor decides to buy supplies from Mr. Dukes’ company. Apparently no other Council members were questioned about the possibility that their private businesses might be enhanced. The only complaint filed was against Mr. Dukes. After he was charged, the Town attorney, understanding that if the charges against Mr. Dukes constituted a conflict of interest, then all Council members would have the same conflict, sought an advisory opinion not only for Mr. Dukes but for all Council members.

Delaware Courts have noted that zoning decision makers are residents of the town or county for which they are responsible. As such, they bring their experience as citizens and residents of the town or county. When exercising judgment they are required by their office to follow a process set-out by statute or dictated by due process. They need not approach their duties with no preconceptions about the course that would best promote the public good. *Pettinaro Enter. v. Stango, Del. Ch., C.A. Nos. 1488, 1501, C. Allen (July 24, 1992).*

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

As zoning laws limit the discretion of those making land use decisions, such “limits on discretion” are of importance when it is alleged that there may be an appearance that an official’s discretion/judgment would be impaired because of a mere possibility that he might benefit from a land use decision.

(3) Like Delaware, other jurisdictions have held that claims of conflicts of interest in the zoning context can be too remote and nebulous to require an official to recuse. A review of case decisions from other jurisdictions, reveals that before the courts would hold that an interest in the zoning “matter” being considered, was sufficient to create a conflict, they required some ascertainable benefit; not speculative benefits based on conclusory allegations. *See, “Zoning: Proof of Bias and Conflict;” Van Itallie 146 A.2d 111 (1958) (cited by Delaware Court in Prison Health); Moody v. University Park, Tex. App., 278 S.W.2d 915(1955); and Touphoeus v. Joy, N. J. Super., 196 A.2d 250 (1963).*

Complainant must overcome a strong legal presumption of honesty and integrity. *Beebe, C.A. No. 94A-01-0004; Mack, C.A. No. 86A-AU-2.* Here, the presumption of honesty and integrity is bolstered by facts which Delaware Courts have found to be legally significant, such as the legal restraints imposed by State and local zoning laws. In stark contrast, is the conclusory allegation that the activity could create a strong potential for a conflict.

V. CONCLUSION

Based on the foregoing law and facts, the complaint against Council Member Dale Dukes is dismissed as the speculative allegations fail to establish either a conflict of interest or even the appearance of a conflict. Further, we find that all Council members, like Mr. Dukes, might possibly enhance their private interests if the re-zoning request is approved. However, they, like Mr. Dukes, can only be said to have a potential speculative interest, which is insufficient to require recusal. **(Commission Op. No. 00-18).**

Representing Private Enterprise Before Own Agency

NOTE: When a waiver is granted, proceedings before the Commission become a matter of public record. 29 Del. C. § 5807(a).

Writing a History Book - Waiver Granted

Dear Mr. Carter:

The State Public Integrity Commission, based on the following law and facts, grants a waiver for you to accept a grant from the Delaware Heritage Commission (DHC), of which you are a member, to update a history you wrote in 1984 on former Governor John Townsend.

When a State employee, officer or honorary official does business with the State, they must submit a “full disclosure” to the Commission. 29 Del. C. § 5806(d). “Full disclosure” means sufficient information to decide if the conduct violates the Code. Here, you and the agency acknowledged that accepting the grant would result in a violation, and asked for a waiver. The prohibitions requiring a waiver are: (1) the restriction on contracting with the agency to which you are appointed, 29 Del. C. § 5805(b)(1); and (2) the requirement for public notice and bidding, 29 Del. C. § 5805(c).¹

The Commission may grant a waiver if the literal application of the prohibition is not necessary to achieve the public purposes of the statute or would result in an undue hardship on the employee or the agency. 29 Del. C. § 5807(a).

The public purpose served by prohibiting contracting with one’s own agency was noted in a 1971 Court opinion. W. Paynter Sharp & Son v. Heller, Del. Ch. 280 A.2d 748, 752 (1971). In Heller, the Court upheld an agency’s decision not to contract with one of its appointees, saying that when State officials contract with their own agency the concern is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” The Court noted that, at that time, the State had no conflicts of interest law. Subsequently, the Code of Conduct was passed, and restricted State officials from dealing with their own agency. 29 Del. C. § 5805(b)(1). This insures that State officials do not use their influence within their own agency to affect the decisions of their colleagues or employees or use their access to information or influence within their own agency to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. *Commission Op. No. 98-23*.

As the public purpose is to insure the contract does not result from favoritism, undue influence, etc., we looked at why DHC wants to contract with you. DHC selected you to update the history of former Governor Townsend because in 1984, many years before

¹The Code also provides that State officials may not review or dispose of matters in which they have a personal or private interest. 29 Del. C. § 5805(a)(1). No waiver is required for that provision as you have recused yourself from participating in DHC’s decision to contract with you.

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

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

Regarding the requirement for public notice and bidding, Delaware Courts have held that: "Statutes dealing with bidding on public work are to be construed in the light of their primary purpose--to protect the public against the wasting of its money. These statutes seek to prevent waste through favoritism and yet permit proper supervision over the qualifications of the bidders. Thus, there is the desire to see that public officials have public work done as cheaply as possible." *Fetters v. Mayor and Council of Wilmington, Del. Ch.*, 72 A.2d 626(1950); *Heller, supra*; and *Delaware Technical and Community College v. C&D Contractors, Inc., Del. Supr.*, 338 A.2d 568 (1975).

The Code of Conduct includes two methods by which the Commission can address the issue of expenditure of funds on a State contract: (1) public notice and bidding or (2) insuring that there is arms' length negotiation. 29 *Del. C.* 5805(c). Public notice and bidding aids in avoiding favoritism by creating a public record that insures such things as qualifications of bidders and fairness in prices. Here, public notice and bidding would be merely perfunctory because of the reasons given above concerning why your qualifications resulted in your selection. Thus, to insure the public purpose is served we review your situation under the arms' length negotiations standard.

Delaware Courts, in ruling on arms' length negotiations, have noted that the "most economically meaningful way to judge fairness is to compare the price paid with the price

likely to be available in alternative transactions.” *Commission Op. Nos. 98-23; 99-17 (citing Oberly v. Kirby, Del. Super., 92 A.2d 445(1991))*. Here, DHC plans to contract with you for \$4,000. It said that authors of history books on other former governors are being paid \$3,000, but the additional money is because you will make your book camera ready, while the other authors will not. DHC will undertake the tasks and associated costs to make the other authors’ books camera ready. Thus, the actual costs to the agency is essentially the same for all authors. Accordingly, your contract appears to be no more favorable than what is being paid as the market price to other authors writing histories of former governors.

We also note that when a contract is publicly noticed and bid, the results become a public record so that the public has access to information on the contract. Access to this information instills public confidence that the contract was not issued out of favoritism, etc. While public notice and bidding will not occur in this case, by law, when we grant a waiver the proceedings become a public record. *29 Del. C. § 5807(b)(4)*. Thus, the public will know that its concerns, such as the potential for favoritism, use of public office for an unfair advantage or gain, etc., were addressed. Therefore, the literal application of the requirement for public notice and bidding is not necessary to serve the public purpose, and a waiver of that prohibition is granted. (***Commission Op. No. 00-32***).

Representing Clients before Own Agency

An individual was considering accepting an appointment by a Cabinet Secretary to serve on the agency’s strategic planning policy subcommittee to develop policies by one of the agency’s Divisions and one of its Commissions. He asked if accepting the appointment raised any Code of Conduct issues. Based on his correspondence, the Commission found that the appointment would raise an issue under the provision which restricts honorary State officials from representing or assisting a private enterprise on matters before the agency to which they are appointed. *29 Del. C. § 5805(b)*. The State appointment would require him to develop policy for the particular Commission and Division, and he and members of his private enterprise would be representing complainants or respondents before the same Commission and Division on issues dealing with the policies. Under those circumstances, it would violate the Code of Conduct if he accepted the appointment and he or his law firm represented clients before that same agency. (***Commission Op. No. 00-11***).

For another case dealing with representing or assisting a private enterprise before one’s own agency, see “Contracting with the State - Violations Found,” p. 56.

Accepting Anything of Monetary Value

Gifts & Payment of Expenses

Payment of Costs to Attend Private Association's Annual Dinner

The Commission concluded that it would not violate the Code of Conduct if a State officer accepted payment of his expenses from the a private Association to be its guest at its annual meeting dinner. Funding for his agency came from the Association members rather than from the State's general fund. As the officer had raised the issue of this Association paying his expenses at a prior meeting, when we had no particular facts on which to rule, and he expected the Association would offer to pay his costs to attend future events, this opinion should provide guidance not only on these particular facts but in making those future decisions.

(A) Restrictions on Accepting Things of Monetary Value

The Code of Conduct restricts acceptance of other employment, gifts, payment of expenses or anything of monetary value if acceptance may result in:

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

(B) Application of Law to Facts

(1) May acceptance result in impaired independent judgment?

In deciding if an official's judgment in performing official duties is impaired, Delaware Courts look at the official's decision making authority and the events surrounding the exercise of such authority, including the timing of the decision, as it relates to the outside interest that raises the question of a conflict. *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). In *Beebe*, it was alleged that an official's judgment was impaired in participating in a decision concerning a private entity. The Court noted the official's decision making authority over the entity,

and pointed out that while the record was not clear when the relationship creating the conflict arose, that about two weeks after his favorable decision for the entity, the official's private employer announced a business arrangement with that entity. The Court held that the official should not have participated even though his comments were "neutral and unbiased."¹

Here, we placed his decisional authority as it relates to Association in the context of the events leading to the question of whether acceptance may impair your independent judgment.

He nor his office regulated the Association, but it is registered as a lobbying organization. When an organization registers to lobby, it has clearly expressed an interest in matters over which State officials exercise decisional authority. *Commission Op. Nos. 99-05 and 99-17*. The Association membership consists of persons from an industry which his office regulated. The Commission addressed his significant and constant regulatory authority over this industry in a prior opinion. *Commission Op. No. 99-52*. He confirmed that the Association does lobby his agency and the General Assembly on issues related to the particular industry and other issues every year. Thus, he routinely deals with matters affecting the Association and its members.

Two specific issues of interest to Association this year were: (1) legislation giving him more authority over the industry the Association members represent, and (2) legislation extending for five more years a particular program under the laws governing this industry. On the first matter, apparently he and the Association supported the legislation, but there was an indication of contention on the legislation from other lobbyists. He believed that arose from misunderstanding the law. No facts indicated that he was deciding issues on implementing that law at present or in the near future, or that it would be raised at Association's annual meeting. The second bill extends the life of an existing tax credit program. The Association's interest is in the tax credit for the industry it represents. His office's interest arises because it collects certain taxes from this particular industry. No facts indicated that extending the life of that law impacts on his existing decisional authority. Also, similar legislation has been introduced to extend tax benefits to other businesses qualifying for a tax credit as a result of job creation and economic investment in Delaware. Thus, extending the tax credits for those purposes was not unique to this industry. Based on the facts, the Commission did not

¹While the outside interest creating the alleged conflict in *Beebe* was the official's private employment, the four criteria applied to whether it is proper to accept gifts or anything of monetary value, also applies to other employment. *See, 29 Del. C. § 5806(b)*. The restriction on involvement in decisions if there is impaired judgment is found at *29 Del. C. § 5805(a)*.

find that accepting payment of his expenses to attend the Association’s annual meeting would impair his independent judgment in making official decisions concerning those issues known to be pending. We address the more general issue of whether acceptance raises any appearance of impaired judgment, etc., in Section (3) below.

(2) May acceptance result in preferential treatment or official decisions outside official channels?

As head of a State agency with decisional authority impacting on Association, which lobbies his agency, he is in a position to engage in preferential treatment or make official decisions outside official channels. However, there is a “strong presumption of honesty and integrity” in the conduct of public officials. *Beebe*. Moreover, there must be facts to substantiate actual or perceived preferential treatment or official decisions outside official channels. Here, no facts suggested that he has or will actually engage in such activities. Again, we address the more general issue of appearances of improper conduct below.

(3) May acceptance result in an appearance of impropriety?

The restriction on accepting things of monetary value if acceptance may result in any adverse effect in the public’s confidence in the integrity of its government is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In a prior opinion where a lobbying organization paid an official’s expenses, some Commission members “struggled” with the appearances when officials accept things of monetary value from lobbying organizations. *Commission Op. No. 99-05*. However, the Code does not ban gifts from lobbyists, so the question of appearances raised when accepting gifts from lobbyists is the same as when any private source makes such offers. They are: (1) the official may be beholden to the private interest and prone to provide “favors” in return; and (2) even if there is no reason to suspect the private payor is trying to curry favor, the employee’s acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain.² To evaluate whether acceptance results in such improper appearances, we look at the totality of the circumstances. *Commission Op. No. 96-78*.

His decisional authority and dealings with the Association on a routine basis on matters of interest to the Association and its members, places him in a position where he could

² We noted those concerns in our prior opinion to him on having entities he regulates seek to pay his expenses as he is the regulator. *Commission Op. No. 99-25* (citing *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995)*).

provide “favours.” However, we balance that fact against other relevant facts, which include: (1) the nature and status of the matters of interest to the Association; (2) the nature of the Association’s event; (3) the reason his attendance; etc.

The facts did not indicate that the Association’s annual meeting would provide a significant chance to lobby him on any matters; the legislation over which there was contention has been passed; the other legislation extends existing law and is not unique to the banking industry; and no facts indicate any pending decisions on those matters. Also, the occasion was not a purely social activity, but was an annual meeting with an afternoon of speakers and panel discussions, followed by a reception and dinner with speakers. While he could not attend the afternoon business sessions, he would attend the reception and dinner at the Hotel du Pont. No facts indicated the value or lavishness of the event. Obviously, the du Pont Hotel is known for its fine dining, etc.³ We assume the event would include fairly typical fare for such events, rather than a lavish dinner and evening of entertainment. Although his State agency was paying for two other persons from his office to attend and could pay the cost of his attendance, his agency’s funding comes from the Association’s members, not the public’s tax funds. No facts indicate that accepting payment from the Association for this particular event under these circumstances would raise the specter that he was using public office for unwarranted privileges, private advancement or gain. Based on all those facts, it would not raise an appearance of impropriety for him to accept payment of his expenses to attend the Association’s annual meeting. (**Commission Op. No. 00-15**).

Soliciting from Private Companies

A State agency asked if its employees may solicit private companies, which contract with it, to pay for a conference to be hosted by agency. The Commission concluded that such conduct would violate the Code of Conduct based on the following law and facts.

I. Applicable Law

State employees are restricted from accepting anything of monetary value if acceptance may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official

³We bring to your attention as guidance Commission Op. No. 97-11, where we concluded that it would appear improper for State officials to accept payment of expenses from an entity they regulated to attend a purely social and rather lavish evening at the Hotel du Pont, when they routinely had regulatory matters before them concerning the entity, the matters were frequently adversarial, and at the time of the event, there was a matter pending on their docket.

channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5805(b).

II. Facts Applied to Law

The agency was asked to host a conference that would be open to the public. Approximately 300 people were expected to attend. The agency wanted to finance the conference by soliciting private companies as sponsors. Their sponsorship category, and the amount of recognition the companies will receive, would be based on the amount contributed. At the highest level, certain sponsors would be solicited for \$10,000. They would be recognized as major sponsors in all promotional material; the company logo would be on the program brochure, registration brochure, and T-shirts. Additionally, those sponsors would have a free exhibit table; company name recognition at the beginning of the program; 30 scholarships for employees; and recognition as a lunch sponsor. At the lowest level, sponsors would be solicited for \$1,500. Their company logo would be on the program and registration brochures and a T-shirt.

The agency identified a number of private companies to solicit. It contracts with most of them. It had gone through the list of companies with which it contracts, selecting a number of them to solicit. Other agency contractors were not selected. The solicitation calls would be made by such persons as the key assistants, policy advisors, Division Directors, and heads of sections. The money would be used to reduce registration costs, pay for food, beverages, guest speakers, use of facilities, etc. The beneficiaries of these contributions will primarily be the general public. However, as it is open to all women, some State employees may attend and receive the benefit. For example, State employees who comprised the agency's planning committee would be expected to attend and would receive the benefits. The estimated cost was \$100,000 for a one day event. The agency apparently did not want to incur the costs out of its budget.

While the Commission agreed that this particular conference was a worthy cause, the manner in which the agency planned to finance the event raised a number of concerns.

First, the Delaware Code does not authorize this particular agency to solicit funds. A review of the entire Delaware Code reflects that where the General Assembly wanted an agency or one of its sections to have authority to solicit private sources, it has clearly and specifically done so. *See, e.g.,* 14 Del. C. § 132(d) (*Department of Education's Education Science in Motion Fund*); 14 Del. C. § 3453 (*DOE's Engineering and Applied Science Recruitment Fund*); 29 Del. C. § 53 (*State Archives Museum*); 29 Del. C. § 3203 (*Delaware Heritage Commission*); 31 Del. C. § 303 (*Division of Child Protective Services*); 31 Del. C. § 405 (*Delaware Children's Trust Fund*); 31 Del. C. § 3203 (*Delaware Heritage Commission*).

Thus, it appears clear that the General Assembly intended to limited solicitation authority to only those seven (7) entities. This agency was not one of them.

Second, the agency planned to use fairly high-level employees to solicit. Even if we could graft solicitation authority onto the Code of Conduct statute, the limits on acceptance embedded in the gift provision raise further concerns. Specifically, it restricts acceptance if it may result in impaired judgment in performing official duties; preferential treatment; official decisions outside official channels; or any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b) (*emphasis added*).

The agency said it will not have these employees solicit a company which contracts with their specific Division or Section. That reduces the possibility of, or the appearance that, their judgment may be impaired in performing official duties (e.g., contract renewals with those companies, etc.). However, this would not dispel at least the appearance that persons in key positions--principal assistant, policy advisor, division director, and heads of various sections--"carry great weight" within the agency, and because of their status would be in a position to insure preferential treatment or official decisions outside official channels. Aside from raising suspicion among the public that acceptance may result in preferential treatment or official decisions outside official channels, this could put the companies in the awkward position of feeling coerced into contributing, or fearing penalization if they do not (e.g., no contract renewal or future business with the State).

Third, the agency planned to target only a selected group of its contractors. Delaware Courts have held that the award of State contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." W. Paynter Sharp & Son v. Heller, *Del. Ch.*, 280 A.2d 748, 752 (1971). Those contractors who contribute would receive widespread publicity and recognition at a conference open to the public. Some contractors who are not selected, but have the resources to contribute, may view the decision to provide such publicity to select contractors as an unfair advantage or favoritism to those companies. Other companies who are not selected and would not have the resources to contribute could also see this publicity as an unfair advantage to companies with resources while they, because of their lack of resources, lose the opportunity to obtain publicity for their company. Moreover, the amounts designated to be solicited could play a role in "weeding out" the publicity opportunity for small companies who consider themselves competitors for State business.

This is not to say that the State employees who decided which companies to target were showing preferential treatment or that they would in fact, if authorized to solicit, attempt to: (1) coerce businesses to give; (2) insure preferential treatment; or (3) make

official decisions outside official channels, favoring those who contribute. However, the statute does not envision an actual violation. *See, e.g., Commission Op. Nos. 99-34 and 92-11.* Rather, it speaks to whether it “may result” in those effects.

Last, but perhaps most important, is that the Code prohibits conduct which may raise suspicion among the public that State employees are violating the public trust and engaging in conduct that would not reflect favorably on the State; and it prohibits conduct that may result in any adverse effect on the public’s confidence in the integrity of its government. *29 Del. C. § 5805(a) and § 5806(b)(4).* We have held that these two provisions are basically a test of whether the conduct would “raise an appearance of impropriety.” *See, e.g., Commission Op. No. 96-78.* Accordingly, we must conclude that even if there were no actual violation, for the reasons stated herein the conduct could raise the appearance of: preferential treatment and official decisions outside official channels under the State Code of Conduct. Moreover, it could raise the appearance that the agency is trying to obtain, through this Commission, an authority to solicit which the General Assembly did not deem was needed by that agency. (***Commission Op. No. 00-37.***)

Donation from Licensee

A private company offered to donate a large check to a State agency which had significant input into whether the company’s license would be renewed. Also, agency employees served on a committee that monitored the company to insure compliance with requirements resulting from the resolution of a law suit. Based on the following law and facts, the Commission held that it would be improper for the agency to accept the donation. It based that conclusion on the following law and facts.

The Code of Conduct restricts acceptance of gifts or anything of value if acceptance 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 latter item is basically an appearance of impropriety test. *Commission Op. No. 96-78.* We weigh the totality of the circumstances to decide if there is an appearance of impropriety. *Id.*

First, the Commission noted that the agency’s staff had given considerable thought to this situation, in effect, making their own assessment of the impact if the contribution were accepted. The Commission was assured that acceptance would not actually impair the judgment of the employees or actually result in preferential treatment to the company. However, the agency was concerned about appearances that may be raised by

acceptance.

The Commission noted that public officers are entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). However, the restriction on accepting things of value does not require an actual violation, only that acceptance “may result in” an adverse effect on the public’s confidence. *Commission Op. No. 99-34*.

Here, another State issued permits to the company. However, the Division which was offered the check had significant input into the permit renewal process which could affect the company’s operation. Its comments on permit renewal included a data assessment and a conclusion on whether the data showed concerns that could impact on the renewal.

The problems identified when the permit was considered for renewal some years ago, resulted in the company paying a large settlement to both Delaware and another State. The settlement agreement required that the company’s conduct be monitored by an advisory committee for compliance. Two Division employees are on that committee.

During the past five years, while Division employees were on the monitoring committee, the company asked about the Division’s programs. It was explained that the Division could obtain federal dollars for some programs, but there were never enough funds for all the programs in which the Division would like to become involved. The company asked for the Division’s costs for the programs. The costs were provided. Subsequently, the company forwarded a large check to the Division, stating that its contribution was to fund certain programs which the agency administered. The contribution, if accepted, would result in a three-for-one dollar match from the federal government. The effect of the federal match would result in the contribution becoming almost 1/4 of a million dollars for the agency.

This offer was made as the company’s license was up for renewal. In fact, in the company’s letter with the check, it said it had recently provided some updated data for consideration of its renewal. The Division was in the process of reviewing volumes of information to aid it in putting together comments on the company’s operation based on the data the Division collects. It had hired outside consultants to review the materials, but it did not have to accept the consultants’ view when providing its comments on the license renewal.

Based on those facts, accepting a significant contribution from a company which has

matters being monitored by the Division, especially when the Division is preparing to comment on the permit renewal, may result in the appearance that the company is attempting to curry favor with the Division. It also could raise the appearance that acceptance may result in: impaired judgment in performing official duties; preferential treatment to the company because the contribution would triple the money available for the Division's programs; and/or it may appear that the Division could use its influence with the other State to affect preferential treatment for the company. Accordingly, it would be improper for the Division to accept the contribution. (**Commission Op. No. 00-38**).

Fruit Basket from Law Firm

As the manager of a State program, a State employee had routine and direct contact with both the lawyers and their clients who applied for the program. To receive the program benefits, the lawyers and their clients completed and submitted an application. The employee reviewed the applications and advised applicants and/or their attorney if more information was needed. Upon receipt of the information, the State employee went before a panel and advised it of the details of the application. Neither the individual who was applying nor their attorney appeared before the panel. The panel then recommended to the appropriate Division Director whether the application should be approved. The Division Director made the final decision.

Shortly before the December holidays, an out-of-State law firm, which was representing a client who submitted an application, sent a gift basket, valued at approximately \$30, to the State employee. This was the first time this out-of-State law firm had represented a client on such matters before the State. Thus, there was no past experience with them. Delaware law firms with which the State employee normally dealt had never sent such gifts. Before the gift was received, the State employee had already advised the panel of the details of the application and it had recommended to the Division Director that the application be approved. That recommendation was made three days before the gift was received. To the State employee's knowledge, the law firm was not aware that a favorable recommendation had been made at the time it sent the gift.

As the State employee was concerned about accepting the gift, she contacted her supervisors, who contacted this Commission's legal counsel. It was explained that the decision of whether it would be proper to accept the gift must be made by the Commission, based on the particular facts. However, in reviewing the statute and prior Commission decisions, it appeared that acceptance might, at a minimum, raise concerns. As the gift was perishable, rather than being returned to the out-of-State gift giver, it was donated to a local shelter, pending the Commission's final decision.

Under the Code of Conduct, State employees are restricted from accepting gifts if it may result in: (1) impaired 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, at the time she provided the panel with information on the application, the gift had not been received, nor was she aware that it was being sent. Thus, at the time she was performing her official duties, her judgment would not have been affected by the gift. Further, no facts indicated that acceptance resulted in any official decisions outside official channels; or that any preferential treatment was given.

However, the admonition against accepting gifts which may result in any adverse effect on the public's confidence in its government, is basically "an appearance of impropriety" test. *Commission Op. No. 98-31*. It does not require that the law actually be violated, only that it raise the appearance of improper conduct. *Commission Op. No. 99-34*.

Although she did not make the final decision on the application, she routinely dealt with persons who applied; reviewed the applications; decided if the application complied with the filing requirements; and presented her conclusion to the panel. In performing these tasks, she dealt directly with the applicants and/or their attorneys and made the presentation to the panel. The applicants/attorneys do not appear before the panel to plea their own case, so her input on whether the applications complied with the rules is significant. Thus, as the program manager, she had significant decision making authority over whether the applications complied with her agency's rules and regulations. Therefore, it may appear to the public that her judgment could be impaired by receiving such gifts; that she could engage in conduct that would result in preferential treatment, etc. No facts indicated that these events occurred, but in light of her significant role as the program manager, we concluded that accepting such gifts, at a minimum, may result in an adverse effect on the public's confidence in its government. Here, while the gift may have a relatively small value, it was given to the program manager, by a law firm which had a matter pending when it sent the gift. The public may suspect it was offered to curry favor or preferential treatment. Moreover, accepting a gift from this applicant's law firm may raise suspicion among other applicants that if they want favorable treatment they should be giving gifts. In this case, the gift basket was sent to a local shelter as it was perishable so returning it to the out-of-State law firm may not have been feasible. Neither she, nor any State employee, personally gained from the gift.

Because of the issues such gifts raise, and to avoid the possibility of such gifts in the future, it is our advice that the law firm be notified that no such gifts should be given in the future, and if they are received, should be returned. (***Commission Op. No. 00-01***).

Trip to a Foreign Country

A public officer's expenses for a trip overseas were paid by an Institute. The Institute, in cooperation with the Council of State Governments Eastern Regional Conference (CSG-ERC) put the seminar together for government officials from a number of States. The State of Delaware is a dues paying member of CSG-ERC, which is a multi-state organization that assists states with multi-state and regional solutions on legislative, economic, and other matters. As part of CSG's activities, it puts together international programs which consist of seminars, technical assistance programs and citizens' exchanges. The international programs are coordinated through the standing international committee, which supports the expanding role of states in international trade, economic development and other global activities.

The schedule reflected that most of the officer's time during the days and some evenings entailed participating in various events, e.g., briefings, tours of various locations, home hospitality with foreign counterparts, etc. There was some free time, but much of it was in the early evening before other scheduled events, such as when the officer had free time from 5 p.m. to 7 p.m., followed by a scheduled dinner and discussion for the participants and the foreign hosts, starting at 7 p.m.; and on another day when the officer had free time from 5 p.m. to 8 p.m., followed by a scheduled dinner meeting with senior officials from the foreign country at 8 p.m. In addition to the official schedule, the officer was asked by another Delaware official to add a specific activity, if time permitted, such as visiting a hospital in the foreign country. The officer added that to her schedule.

To decide if any ethical issues are raised by accepting things of value, the standard applied is whether acceptance 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).

No facts indicated that the officer had any decision making authority over the Institute or could give it preferential treatment or make official decisions outside official channels. Thus, the question was whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b)(4). This is basically an appearance of impropriety test. *Commission Op. No. 97-42.*

The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties

with integrity, impartiality and competence is impaired. *In re Williams, Del. Supr., 701 A.2d 825 (1997)*. While *Williams* interpreted the Code of Judicial Conduct, such interpretations may be used as guidance to interpret the State Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. *See, Commission Op. No. 95-5 (citing Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992) (decision on statutory construction has relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other))*.

In deciding the appearance of impropriety issue, the Commission looks at the totality of the circumstances, such as the reason for attending, the activities engaged in while attending, etc. *See, e.g., Commission Op. No. 97-23 and 97-42*. Because the officer had no decision making authority over the Institute; the purpose of the trip was educational in nature which served to benefit, not the gift giver, but the State; and the agenda reflects a trip primarily focused on official activities, with little free time, we concluded that no ethical issue was raised by acceptance. **(Commission Op. No. 00-03)**.

Gift to Stay at Hotel

A Senior Level Executive Branch official received a gift certificate for services at a hotel. The certificate was signed as being from the hotel staff, but the officer said the manager gave it to him as a holiday gift. The manager was on an Advisory Board that worked with this public officer's office on certain matters. The officer, who headed the agency, had concerns about a possible appearance of impropriety. If acceptance appeared improper, the officer intended to return the certificate. Based on the following law and facts, the Commission concluded that acceptance may, at a minimum, raise an appearance of impropriety, and the officer returned the gift.

State officers may not accept gifts if acceptance may result in: (1) impaired 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 also prohibits State officers from using public office to obtain unwarranted privileges, private advancement or gain. *29 Del. C. § 5806(e)*.

As head of the agency, the officer's statutory duties included responsibility for, among other things, matters that had a significant impact on the hotel. *(Citation Omitted)*. Also, by statute, appointees to the Advisory Board to which the manager was appointed, serve in an advisory capacity to this Director and their responsibility is to "consider matters relating to..." the responsibilities of the Director. *(Citation Omitted)* The hotel had a vested interest in those matters. Also, the agency puts together seminars and uses hotel

facilities for those seminars. The hotel could have an interest in being selected as the site for such seminars.

When private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “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, the employee’s acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. Id.

Here, the hotel has an interest in insuring that its interests are advanced. In fact, the officer noted that this hotel was a “significant player.” Because of his statutory duties, his decisions could directly impact on the hotel’s interests. Since the hotel’s manager was on the Advisory Board, it may appear to the public that the hotel wanted to curry favor in decisions made by him. Also, as his office selects hotels as the location for some of its seminars, other hotels or the public may believe his acceptance of a gift certificate worth more than \$250 from the hotel is an endorsement of that hotel, or believe it would receive preferential treatment in decisions by him and his staff.

Even if the hotel were not trying to curry favor, we have noted that the more lavish the gift, the more it may raise the appearance that State employees are using public office for unwarranted privileges, private advancement or gain. Here, he was offered the opportunity for services at what may be one of the best hotels not only in Delaware, but in the region.

Whether acceptance may result in any adverse effect on the public’s confidence in the integrity of its government, turns on the totality of the circumstances. *Commission Op. No. 96-78*. Moreover, the Code does not require an actual violation, only that the conduct “may raise suspicion” that the public trust is being violated or “may result in” impaired judgment, preferential treatment, etc. *Commission Op. No. 99-34*. Thus, even where the gift giver has no intent of currying favor, we must balance that fact against the other facts, which are that his position gives him the authority to make decisions that could significantly impact on the hotel’s concerns. Here, acceptance “may raise

suspicion” that: his judgment could be impaired; he could give preferential treatment; or make official decisions outside official channels to benefit the hotel. Also, because of the nature of the gift, it may raise suspicion that he is using public office for unwarranted privileges, private advantage or gain. Because acceptance may raise such suspicions, he was advised to return the gift. (*Commission Op. No. 00-07*).

Payment of Family’s Expenses

A private enterprise paid the expenses for an Executive Branch official to attend and speak at its annual meeting. Based on the following law and facts, we concluded that: (1) the value of the payment for lodging for his family should be reported as a “gift;” and (2) accepting the payment does not raise an ethical issue under the Code of Conduct.

No Consideration for Expenses of Family Members

Public officers must report gifts valued at more than \$250 under the financial disclosure law. *29 Del. C. § 5813(a)(4)(e)*. Executive Branch Officers must also report gifts of more than \$100 from a single source. *E. O. No. 5 ¶ 1*. “Gift” includes payment or anything of monetary value, unless consideration of equal or greater value was given. *29 Del. C. § 5812(o)* and *E. O. No. 5 ¶ 3*.

The public officer agreed to speak at the annual meeting to emphasize to the industry the attributes of doing business in Delaware. He also brought his family. He paid for all meals and expenses of the trip, except for two nights lodging, which was paid for by the private organization and valued at \$897.92. It was assumed that the cost of lodging would have been less if he alone had attended.

His agreement to attend and speak in return for payment of his own expenses constitutes “consideration,” which we find to be equal to or greater than the value paid for his trip. *Commission Op. No. 99-17*. However, if the private source also pays expenses for a spouse or friend who is not performing an official function, then the value of that part of the payment is a “gift.” *Commission Op. No. 97-33*. Thus, under *29 Del. C. § 5813(a)(4)(e)*, the value of lodging for his family members would be reported in the financial disclosure report if it exceeds \$250; and, under *E.O. No. 5*, reported in an addendum if it exceeds \$100.

His request cited a prior opinion where payment of his expenses of \$2,424.46 for air travel in return for going to and speaking at a meeting were found to be adequate consideration, and therefore not treated as a gift. The Commission must base its

opinions on the particular facts of each case. *29 Del. C. § 5807(c)*. It is not enough to compare other trips based solely on the dollar amount, because the issue of “consideration” is whether something of adequate value is given in return under the specific facts of each case. In the prior opinion and this opinion, we concluded that he gave consideration for his expenses. The difference here is the payment of expenses for his family, not for him, for which we found no consideration.

Were any Ethical Issues Raised?

The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in:

- (1) impaired independence of judgment in performing official duties;
- (2) preferential treatment of any persons;
- (3) official decisions outside official channels; or
- (4) any adverse effect in the public’s confidence in the integrity of its government.

29 Del. C. § 5806(b).

The correspondence indicated that he had no direct or immediate decision making authority over the private organization, and no facts were given to indicate the possibility of preferential treatment or official decisions outside official channels. Thus, the issue is whether acceptance may result in any adverse effect in the public’s confidence in the integrity of its government. To decide if acceptance adversely effects the public’s confidence in the integrity of the government, we look at the totality of the circumstances. *Commission Op. No. 96-78*. This is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In several past opinions, we noted that when private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns regarding 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 “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, the employee’s acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

In this instance, any appearance of impropriety is negated by the following facts: he had no direct or immediate decision making authority over the private organization; it does not appear that the private organization was attempting to curry favor with him as he had no decision making authority over it; he paid for all expenses associated with his family's trip except for lodging; while the conference ran from June 3 to June 6, he and his family were only there on June 5 and 6; part of that time he was fulfilling his speaking agreement; no facts indicate that the two days were spent in purely social activities provided by the private organization; and he will report the value of his family's lodging. Placing those facts within the total circumstances, we find no appearance of impropriety. (*Commission Op. No. 00-13*).

Concurrent Employment

Local Official Has Contracts with his Local Government

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

Absent other conflicts, local officials may contract with their government. However, if the contract is: (1) less than \$2,000, it requires arms' length negotiations; and (2) if greater than \$2,000, it requires public notice and bidding. *29 Del. C. § 5805(c)*. Here, the official contracted with the town in two emergency situations when other contractors were not available or the cost was too high because of the distance they would have to travel to do the work. The contracts were for less than \$2,000, so public notice and bidding was not required, but arms' length negotiations were required.

"Arms' length negotiations" means that unrelated parties negotiate the contracts, each acting in his or her own self-interest, which forms the basis for a fair market value determination. *Commission Op. Nos. 98-11, 98-23 & 97-17*. Delaware Courts, in ruling on arms' length negotiations, have noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id.* (citing *Oberly v. Kirby, Del. Super., 92 A.2d 445 (1991)*).

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

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

Aside from contracting at a lower price, the official did **not**: (a) violate *29 Del. C. § 5805(a)(1)* which restricts officials from reviewing or disposing of matters where there is a personal or private interest, because in his official capacity he was not involved in the town's decision of which firm to use; (b) violate *Del. C. § 5805(b)(1)* which restricts officials from representing or assisting a private enterprise before their own agency because the contract was not with the agency by which he was employed, but with another town agency; (c) violate *29 Del. C. § 5806(e)* which prohibits officials from using public office for unwarranted privileges, private advantage or gain because he charged only the costs of repair which was not only less than another firm would have charged, but resulted in no profit for his firm. Based on those facts, we find no violation. (*Commission Op. No. 00-05*).

Concurrent Employment as a Licensed Professional

I. Facts

A State employee is a licensed professional in his capacity as a State employee. He also has a private professional practice. As a result of his private practice, he has, on occasion, been hired to conduct certain evaluations on persons who are prosecuted by

the State, and been asked to serve as the defendant's expert witness. In a case where he was to serve as the defendant's expert witness, the State represented a Division of his Department in bringing the prosecution. The question was raised about whether his private representation created a conflict of interest. As a result, he did not see the client or testify in that case. In his private practice, he also evaluates minors who may be involved in criminal matters who may concurrently be active with other Divisions in his Department. Although he also evaluates minors in his State practice, the private clients are not State clients in his Division. In those cases, he is hired by the minors' public defender or private attorney to conduct certain evaluations. He gives his written evaluations to the attorneys. He may testify concerning the evaluations in criminal litigation prosecuted by the State, but not by or for his Division.

The request indicates that he also may be hired as a defense expert when the State represents agencies other than his own. No further facts were given regarding those cases.

II. Background to Decision

The State employee and his agency sought as much guidance as possible, not only for him, but for other licensed professionals in the agency. This Commission must base its opinions on the particular facts of each case. *29 Del. C. § 5807(c)*. However, the purpose of issuing synopses of advisory opinions is to be used as guidance. *29 Del. C. § 5809(9)*. For example, the Commission has issued decisions on a State employee seeking outside employment as an expert witness and to a State employee who might be called as a fact witness. *Commission Op. Nos. 91-19 and 99-53*. Also, this opinion may assist in guiding other licensed professionals in the agency.

III. Applicable Law

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

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

As a licensed professional, this individual's private practice is regulated by the State. (*Citation omitted*). Thus, a full written disclosure is required. "Full disclosure" means

sufficient information for the Commission to decide if there is compliance with the Code of Conduct. *See, e.g., Commission Op. No. 98-23.* As noted above, some details of his outside employment have not been fully disclosed. Further, nothing indicated if his private practice is limited only to being an expert witness against the State and/or its agencies, or if his practice is broader, e.g., fact witness, representation before State entities other than the Court, etc., such that the Commission would need to consider those factors. Thus, no attempt is made to decide if those situations create a conflict of interest.

(B) Restrictions on Holding Other Employment

There is case law interpreting government restrictions on its employees who have outside employment. *See, Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers, 62 ALR 5th 671.* However, there are few cases interpreting outside employment restrictions based on the particular fact situation of a government employee who, in his outside employment, testifies against the government as an expert witness for a private party. *See, Hoover v. Morales, 5th Cir., 164 F.3d 221 (1998); FDIC v. Jefferson Bank and Trust, D. Colo., 46 F. Supp. 2d 1109 (1999); Young v. United States, W. D. Texas, 181 F.R.D. 344 (1997); and Dean v. Veteran's Administration, N. D. Ohio, 151 F.R.D. 83 (1993); Conrad v. United Instruments, Inc., W.D. Wisc., 988 F. Supp. 1223 (1997); and EEOC v. Exxon Corp. v. United States Department of Justice, 5th Cir., 202 F. 3d 755 (2000).*⁴

As guidance to the agency, we note that in *Morales*, a State statute and policy imposing a complete ban on outside employment as an expert witness, without applying any criteria other than the fact that the expert witness would take a position contrary to the State, were found unconstitutional because they were based solely on speech content (State employees would testify opposite to the State). However, the Court said restrictions based on factual justifications such as ethics laws on outside employment dealing with conflicts of interest did not pose the same problem. *Id.* That statement is confirmed by cases in which various States and the United States Supreme Court have upheld

⁴Not only are there few cases dealing with such facts, but even those cited are of little help in interpreting Delaware's outside employment restriction. In *FDIC, Young, and Dean*, the Courts decided such issues as whether the federal ethics policy which precludes a federal employee from being an expert against the government without first obtaining government approval could: (1) supercede the Court's authority to appoint an expert (*FDIC*); (2) preclude plaintiffs from designating a government treating physician as both a fact witness and expert witness (*Young*); and (3) be used to prevent discovery (*Dean*). *Conrad* and *EEOC* interpreted the federal post-employment law. None of these issues are before this Commission.

restrictions on outside employment by government employees which deal with conflicts of interest. *See, 62 ALR 5th 671; See, Sector Enterprises Inc. v. DiPalermo, N.D. NY, 779 F. Supp. 236 (1991) (dealing with 1st Amendment issue and citing a line of Supreme Court cases).*

Unlike the statute in *Morales*, Delaware's Code of Conduct does not ban outside employment based solely on speech content. Rather, it prohibits a State employee from having any interest in any private enterprise or incurring any obligation which is in substantial conflict with the proper performance of his duties in the public interests. *29 Del. C. § 5806(b)*. It specifically restricts accepting other employment if it **may result in:**

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

29 Del. C. § 5806(b) (emphasis added).

In a New York case, the Court addressed the concerns raised when State employees have a private business which offers the same type of services privately as they do on their State job. *Sector Enterprises, Inc. v DiPalermo, N.D. NY, 779 F. Supp. 236 (1991)*.

The Court said that "multiple conflicts of interests are inherent when a State employee purports to act on behalf of an outside venture." First, it noted that:

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

The Court added that there is an "inevitable conflict created by the limited time and resources for the employee to perform two jobs." *Id. at 246*. Likewise, this Commission considers the time involved to hold a second job and considers when the employee will perform the private activities in deciding if the other employment creates an interest which is in "substantial conflict" with performing official duties, which is prohibited by *29 Del. C. § 5806(b)*. *See, e.g., Commission Op. No. 98-14*.

Here, no facts were given to indicate that this employee was operating his private enterprise during the hours when he should be performing his official public duties.

However, because his private practice involves litigation, the Commission notes that the inherent nature of preparing for litigation may result in the attorneys/clients who hire him from his private practice seeking him out during State duty hours. While this raises some concern, by law, public officials are entitled to a presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). Thus, we assume that he is not conducting his private business during State duty hours. However, even assuming that as true, it does not cure the other concerns raised below.

One concern is that his professional expertise is in an area where there are few other licensed professionals. Thus, if his own agency needed access to his expertise, and he already has a client/case in his private practice in that matter, he would not be available to his own agency. That could result in his having an obligation that could preclude him from performing his public duties.

The other concerns arise in the context of the specific restrictions on outside employment if “**it may result in**”: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b) (*emphasis added*).

First, we emphasize that 29 *Del. C.* § 5806(b) only requires a showing that a course of conduct “may result in” a violation of the Code provisions. *Commission Op. Nos. 92-11; 99-34*. Second, the restriction prohibiting conduct that may result in “any adverse effect on the public’s confidence in the integrity of its government,” is basically an “appearance of impropriety” test, as is the restriction, found in 29 *Del. C.* § 5806(a), against engaging in any conduct that may “raise suspicion” that the public trust is being violated. *Commission Op. Nos. 98-11; 98-23; 98-31*. Thus, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14*. It only requires that it “may result in an adverse effect on the public’s confidence” or that it may “raise suspicion” that the dual employment holder is acting in violation of the public trust. *Id*; *See also*, 29 *Del. C.* § 5811(2) (*public officers and employees should avoid even the appearance of impropriety where they have a financial interest*); *See also*, *Commission Op. No. 99-35* (*citing 63C Am. Jur. 2d Public Officers and Employees § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict)*).

To decide if there is an appearance of impropriety, the Commission weighs the totality of the circumstances--facts diminishing an appearance of a conflict and facts lending themselves to an appearance of a conflict. *Commission Op. No. 96-78*. We weighed the following facts and law to conclude that the totality of the circumstances creates, at a

minimum, the appearance of a conflict if this State employee serves as an expert witness for a private client against another Division in his own Department.

(1) Impaired judgment in performing official duties. In his State capacity, no facts indicate that he reviewed or disposed of any matters related to the adult client who was prosecuted. That is because his official responsibilities within his Division entail evaluating minor children, not adults.

It also does not appear that in his State capacity his judgment involved making decisions about the private adult client's minor child because the request for the advisory opinion states that he had no contact with the client or the client's family previously. Rather, it appears that the official decisions on this particular case were made by a separate Division within his Department, which is statutorily tasked with bringing these types of cases. (*Citation Omitted*).⁵ Additionally, since the matter was to be prosecuted by the Attorney General's office, that agency also would be responsible for State decisions regarding the case. No facts indicate that he was involved in those State decisions. These facts diminish the possibility that his judgment would tend to be impaired, which is prohibited by 29 *Del. C.* § 5805(a)(1) and 29 *Del. C.* § 5806(b)(1).⁶

(2) Preferential treatment to any person: As noted, he had no official decision making authority over the adult private client, or the private client's minor child in this particular case. Those facts diminish the possibility that he could have given preferential treatment to his private client, (e.g., used information from or about the minor child obtained in his official capacity to aid the private client). Further, in this case, he decided not to testify after a question of a conflict was raised. Thus, any interest in insuring preferential treatment for his private client apparently became moot.

However, had he proceeded to serve as the expert in this action brought by another Division within his Department and prosecuted by the Attorney General, it would raise

⁵Other agencies also have certain statutory authority regarding these particular types of cases. No attempt is made to decide if it would be a conflict if he were called as an expert witness against such other agencies.

⁶By way of guidance, had he made official decisions about the matter, such conduct may have violated this restriction on holding other employment if it may result in "impaired judgment," and the prohibition on State employees reviewing or disposing of matters involving the State in their official capacity if they have a personal or private interest which tends to impair judgment. 29 *Del. C.* § 5805(a). For example, if the private adult client's minor child was one of his state clients, then his judgment in decisions over the minor child may have been impaired by his personal or private interest in his private client.

a number of possibilities that may result in preferential treatment for the private client, and raise the appearance of, or actual possibility of, violations of other Code provisions.

Specifically, had he proceeded as the defense's expert in this case, it may have resulted in his representing or otherwise assisting his private enterprise before his own agency, which is prohibited by 29 *Del. C.* § 5805(b)(1). That is because the agency and the Attorney General's office, in deciding whether to proceed with a prosecution may wish to consider such things as information from the defense's expert witness. This could mean that he would have to represent his expert opinions to his own agency in order for it to evaluate his expertise in making their decision on whether to proceed with a prosecution.

The purpose for prohibiting State employees from representing or otherwise assisting a private enterprise before one's own agency, is to insure that one's connection to the agency does not result in the use of undue influence, preferential treatment, and the like. *Commission Op. No. 98-23*. Because his own colleagues would evaluate his private expertise as an aid to deciding if they would proceed, it could raise the specter that he had used undue influence on his colleagues or that their judgment was impaired in their decision making, raising the appearance that his client would receive preferential treatment because of his status within his agency.

Similarly, if he testified at trial, his own agency's expert would have to evaluate his testimony, expertise, etc., for such purposes as cross-examination, etc. Again, raising an appearance concerning the validity and fairness of such evaluations by a representative for his own agency.

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

(4) Other Adverse Effects on the Public's Confidence in its Government: Additionally, serving as an outside expert in cases against his own agency may result in an adverse effect on the public's confidence in its government, because it may appear that he is acting in violation of other provisions of the State Code of Conduct.

As noted by the agency, it has an electronic database with confidential information on agency clients. The Code of Conduct prohibits the improper use or improper disclosure

of confidential information gained as a result of one's public position. *29 Del. C. § 5806(f) and (g)*. This is not to say that he has, or would, use confidential information from his agency's database to assist him in preparing as an expert, or deciding to undertake representation. Moreover, the agency said that there are restrictive measures used to limit access to the information. However, because of the possibility of accessibility to data from another Division within his agency that could assist him in preparing as an expert in his private cases, it may result in at least an appearance of improper use of confidential information which would benefit his private client, and his private practice. While he stated that any expert hired by the defense would have been able to obtain that information through discovery, we note that the rules of discovery do not necessarily require that all information held by one party be given to the other party. Thus, he might have the benefit of information that would not be discoverable. Further, other experts would not have personal access to the database in advance of discovery, while the State employee would be in a position to have access to the data which might aid him in deciding if he even wants to consider taking a case.

In *Sector*, the Court noted that where State employees hold outside employment in the same field as their State work, it "creates an appearance of impropriety" because of the perception that the State employees have an unfair advantage. The Court specifically noted that the State employees in *Sector* had access to the State's computer system, which could be an aid to them in their private business.

Here, the agency also raises the issue of loyalty to his agency if he testifies against his own agency. The Delaware Supreme Court has specifically addressed some issues that arise when a licensed professional, as a result of outside employment, represents an opposing interest in a matter involving the State. *In Re Ridgely, Del. Supr., 106 A. 2d 527 (1954)*. While *Ridgely*, was a common law decision, this Commission has held that pursuant to the rules of statutory construction, since the General Assembly did not specifically overrule common law, such decisions have precedent in interpreting the statutory provisions. *Commission Op. Nos. 97-24 and 97-30*.

In *Ridgely*, the Court held that where the licensed professional (a lawyer) held outside employment that "his private interest (outside employment) must yield to the public one." *Id. at 4 and 7*. The Court said because the private employment must yield to the public one, it need not decide if his dual employment resulted in a violation of the professional code of ethics for lawyers. The Court held that it was "manifestly improper" for him to accept private employment in State matters and "engage in litigation or the prosecution of claims against a fellow member" of his agency's (Attorney General) staff. *Id. at 7*. The Court also said that when Ridgely represented the opposing side against an administrative board which he represented in his State position, "the result was the

unseemly appearance in the court of two State's attorneys, one endeavoring to uphold the State's case and the other to overthrow it." *Id.*

Since that common law decision, the General Assembly enacted a provision that requires that: "Each state employee, state officer and honorary state official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government." 29 *Del. C.* § 5805(a).

Here, the State employee, like the attorney in *Ridgely*, is a licensed professional. Similarly, if he were to serve as an expert witness in a case against his own Department, it may result in "the unseemly appearance in Court" of him contesting his own Department's case, while an official representative of his agency attempts to uphold the Department's decision to prosecute. Moreover, had he and his agency's representative both testified in this matter, it would place him in the position of evaluating the testimony and expertise of colleagues of his own agency.

IV. Conclusion

Based on the foregoing facts and law, we conclude that his outside employment as an expert witness in cases being prosecuted by or brought on behalf of another Division within his own agency, may result in, at least an appearance of a conflict, if not an actual conflict. (***Commission Op. No. 00-19***).

Dual Compensation from State Agencies

A State employee asked if she could be paid for attending meetings of a State Council to which she was appointed, if she takes leave from her full-time State job to attend the meetings. Based on the following law and facts, held that she could be paid for attending the Council meetings when she was on leave from her full-time State job.

The "double dipping" law was passed in 1986 because, in some instances, it was believed that State officers were being paid from one fund for discharging their appointed or elected duties, and simultaneously, were paid from other public funds for regular State employment. *Att'y Gen. Op. No. 87-1016*. The General Assembly expressly provided that the State should not pay an individual more than once for **coincident** hours of the workday. 29 *Del. C.* § 5821 (*emphasis added*).

To insure that persons holding dual State positions are not paid from two sets of public funds for coinciding hours, the law sets procedures to follow when holding dual positions,

such as: requiring additional time records; audits of those records; and referral by the State Auditor to this Commission or the Attorney General if false records or discrepancies are revealed in the audits. 29 Del. C. § 5822 and §5823.

Regarding payment, the statute states:

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

Thus, the statute does not prohibit her from being paid by the Council; rather, her full-time State salary **could** be prorated (*emphasis added*). However, the statute then expressly excludes vacation time from being prorated. It says: “Any hours or days during which an employee uses vacation or personal days to which he or she is entitled **shall not** constitute hours or days which fall within the scope of this subchapter.” 29 Del. C. § 5822(e) (*emphasis added*).

Accordingly, the language is clear--if she is on vacation or personal days when she attends the Council meetings, then her State salary is not prorated for the time she is absent from her full-time State position.

Copies of the Merit Rules, which also have provisions on dual employment by State agencies, were included in the information sent to us. *See, e.g., Merit Rules 5.0400; 5.0500; and 18.0200.* We cannot interpret the Merit Rules as our jurisdiction is limited to Title 29, Chapter 58. *Commission Op. No. 96-17.*

We also are not ruling on whether her second position with the State creates a conflict of interest; only interpreting the law on “double dipping.” The employee was advised that the Code of Conduct has a specific provision on accepting “other employment”. 29 Del. C. § 5806(b). We have held that “other employment” includes a second position with the State. *Commission Op. No. 99-35.* Further, she was advised that as an appointee she is considered an “honorary State official.” Thus, her conduct in her full-time State position is governed by the Code of Conduct provisions as they apply to “State employees,” and her conduct as an appointee is governed by the provisions as they apply to “honorary State officials.” (**Commission Op. No. 00-08**).

For other cases dealing with concurrent employment issues, see case reported under heading of “Representing Private Enterprise Before Own Agency,” and Carter and cases reported below under “Disclosure of Business Dealings with the Government.”

Disclosure of Business Dealings with the Government

Contracting with the State - Violations Found

A School District employee was provided with the District’s policy on conflicts of interest, which included specific reference to the State Code of Conduct. He signed a statement verifying that he read the policy and that he had a financial interest in a private enterprise. Subsequently, an audit revealed that his private business had contracts with his own District and other State agencies. The District sought an advisory opinion on the possible conflict, providing information from the audit and its own investigation. The request did not have details on all of the contracts, and the District’s policy, in some instances, appeared to conflict with the Code of Conduct. The District was notified that the Commission needed more details before it could act, and that some of the information might not be within the District’s knowledge, but rather within the employee’s. The District then directed the employee to seek an advisory opinion. The details of the employee’s private business contracting with his own District and other State agencies are discussed below in applying the law to the facts.

I. ISSUES, FACTS AND APPLICABLE LAW

(A) Issue 1: FULL DISCLOSURE REQUIREMENT

LAW: Any State employee who has a financial interest in any private enterprise which does business with any State agency shall file with the Commission a written statement fully disclosing the same. *29 Del. C. § 5806(d)*. The requirement for such disclosure is a condition of commencing and continuing employment. *Id.*

FACTS: The State employee had a financial interest in a private corporation which contracted with a number of State agencies from 1997 through 1999. No written statement of these dealings was filed with the Commission. Thus, the Commission found that the employee’s conduct did not comport with *29 Del. C. § 5806(d)*.

(B) Issue 2: REPRESENTING/ASSISTING A PRIVATE ENTERPRISE BEFORE HIS OWN AGENCY

LAW: No State employee may “represent or otherwise assist” a private enterprise with respect to any matter before the State agency by which he is employed. 29 Del. C. § 5805(b)(1).

Based on the following law and facts, the Commission found that this provision was violated.

FACTS: The District where the employee worked bought some products from the employee’s private company. The transcript of the interview notes from the District’s investigation stated that the employee did not think his conduct was improper because he did not “solicit”⁷ his agency. He confirmed that belief with the Commission. He said that to him, “solicit” meant someone would approach him and ask if he could get them certain items and a price from his company, and they then would try to use that communication more or less to try to get the best price. The remaining circumstances of that transaction are detailed in the analysis below.

ANALYSIS: The Code of Conduct does not use the term “solicit.” Rather, it uses the terms “represent or otherwise assist.” Those terms are not defined in the Code. The Delaware rules of statutory construction require that terms be read in their context and given their common and ordinary meaning consistent with the manifest intent of the General Assembly. *See, e.g., Commission Op. No. 96-87 (citing, 1 Del. C. §§ 301 and 303).*

Ordinary meaning: “Represent”--“to act in the place of or for, usually by legal right.” *Merriam Webster’s Collegiate Dictionary, p. 993 (10th ed. 1993);* “Assist”--“to give supplementary support or aid to or be present,” *Id. at 70;* and “Solicit” -- “to make petition to; to try to obtain, usually by urgent requests or pleas.” *Id. at 1118.*

Intent of the General Assembly: In its findings of fact in passing the Code of Conduct, the General Assembly said the purpose was to insure the public’s confidence in its government employees and officials by setting specific standards. 29 Del. C. § 5802. The specific standard at issue here is that State employees shall not “represent or otherwise assist” a private enterprise before their own agency. Delaware Courts have noted that when a State official seeks to contract with their own agency, the award of such contracts “has been suspect, often because of alleged favoritism, undue influence,

⁷The policy restricts District employees from using their position to “solicit” for business favors. To the extent that policy is less stringent than the State Code of Conduct, which prohibits State employees from “representing or otherwise assisting,” we note that the Delaware Supreme Court has held that an agency cannot write a policy that is less stringent than State law. *See, Nardini v. Willin, Del. Supr., 245 A.2d 164 (1968).*

conflict and the like.” *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). Thus, the restriction is meant to insure that the public does not suspect that a contract was awarded out of favoritism, undue influence, or the like.

Having established the ordinary meaning and the public purpose of the Code, the conduct is placed within that framework.

In interpreting a similar provision in the federal ethics law, Courts have noted that when the purpose is to instill public confidence in the government, “otherwise assist” is broadly defined to include even what may be considered “passive action.” *United States v. Schaltebrand*, 11th Cir., 922 F.2d 1565 (1991). In fact, Courts have expressly rejected the argument that mere presence as a passive observer does not constitute acting as an agent, attorney or “otherwise representing.” *Schaltebrand* (citing *United States v. Coleman*, 3rd Cir., 805 F.2d 474 (1986)). In *Coleman*, the court said that nothing in the legislative history of the federal ethics law supported the argument that “otherwise represents” is limited to “professional advocacy.” *Id.* at 480. The *Schaltebrand* and *Coleman* Courts said that mere presence can possibly influence government colleagues. It was noted that a major goal of the Ethics in Government Act was to avoid the appearance of impropriety. In speaking of appearance of impropriety, *Schaltebrand* noted that where a government employee’s private enterprise will benefit by a decision by employees in his agency, that kind of conduct can make citizens “suspicious” of their public officials. *Id.* Similarly, the Delaware Code prohibits conduct that may “raise suspicion” that the public trust is being violated. 29 *Del. C.* § 5806(a).

Here, there was more than mere presence. The State employee is the corporate secretary of the private business. Thus, he legally stands in the place of the corporation. He spoke directly with another State employee at his agency about the order. He said she later approached him and asked how it was going. He shipped the goods to his agency without a purchase order, although he was aware of the requirement. After a number of weeks, he called her and another State employee pursuing payment for the order.

He said he shipped without the purchase order because he did not think it would be a State check. However, it appears that no effort was made to ascertain the real purchaser at the time of the order. The contract was awarded to him without the agency obtaining other bids as required by its own policy.⁸ The employee expressed knowledge of that

⁸We note that there is a “mandatory use” State contract with the Division for the Visually Impaired, Industries from the Blind, to provide promotional items, such as the ones sold by his private company. As no other prices were obtained, it appears that no State contract was considered. However, as this Commission has no jurisdiction or enforcement powers of procurement laws or the

policy, but asked how he would know if bids were obtained since the agency is to obtain the bids. The District has not paid the company because it believed the business dealing violated the State law on after the fact purchase orders and the District's policy requiring three bids when dealing with a State employee.

The employee said: "we found out that it was going to be a State check because communications in the office went awry..... Well, when the whole thing washed out, then we realized we needed to have the purchase order and that's when we submitted it." Whatever the rationale for not knowing who was paying for the goods, the Code of Conduct, through its phrasing--"No State employee... may represent or otherwise assist any private enterprise..."--places the responsibility on the State employee not to represent or assist a private enterprise before their own agency. That responsibility would entail ascertaining if one is dealing with one's own agency, especially when the goods were shipped to the employee's agency and he was communicating about the order with other agency employees.

To the extent the State employee was asserting that he did not know the statutory requirements, the record showed that he read and signed the policy which specifically referred to the State Code of Conduct. Even assuming he was unaware of the law, in Delaware, ignorance of the law is not generally an excuse. *Kipp v. State, Del. Supr., 704 A.2d 839 (1998)*.

Thus, based on the meaning of representing and otherwise assisting, the State employee's personal dealings with his own agency constitute a literal violation of that restriction. Moreover, the public could well suspect that he was acting in violation of the spirit or purpose of the law which is to insure contracts are not awarded out of favoritism, undue influence, etc., because he represented and assisted his private enterprise before his own colleagues, contrary to the Code of Conduct, and neither side complied with the procurement procedures (requirement for three bids and purchase order) which they knew to exist.

**(C) Issue 3: CONTRACTS WITH OTHER AGENCIES--ARMS'
LENGTH DEALINGS/PUBLIC NOTICE & BIDDING**

Aside from contracting with his own District, the audit showed that his company contracted with the other State agencies. Between 1997 and 1999, he contracted with seven other agencies. Some contracts were for less than \$2,000, others were for more than \$2,000.

use of State contracts, we do not rule on whether the agency should have used the State contract.

LAW: The Code of Conduct provides that if a State employee or their private enterprise contracts with the State, if the contract is for less than \$2,000 there must be arms' length negotiations and if the contract is for more than \$2,000 there must be public notice and bidding. 29 Del. C. § 5805(c).

(1) Contracts of Less than \$2,000: Were there arms' length negotiations?

FACTS: The State employee's private enterprise contracted with a number of School Districts, other than his own, and with other State agencies from 1997 through 1999. By statute, each School District is considered a separate entity. Thus, while the State employee may not represent or assist his private enterprise before the school district by which he is employed, he may do so with other districts,⁹ as long his conduct comports with other Code provisions.¹⁰ He also contracted with State agencies other than the School Districts. Many of the contracts were for less than \$2,000. Thus, the issue is whether those contracts met the requirement for arms' length negotiations, pursuant to 29 Del. C. § 5805(c).

ANALYSIS: 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*. This Commission has noted that one indicia of whether there were arms' length negotiations is to compare the price paid with the price likely to be available in alternative transactions. *Id.* (citing, e.g., Oberly v. Kirby, *Del. Supr.*, 592 A.2d 445 (1991)).

The computer printouts of the contracts do not indicate any information about such matters. The State employee was asked to give the Commission any information on competitive prices. The information submitted consisted of such things as his own price list, his own pricing philosophy, etc. He said that he did not know how competitive his prices were with others in the same business because "we don't make a habit of calling up the competition and finding what prices are out there." He stated that: "We have a catalog price that is suggested by the ad specialty institute and we delete 10%, 15% from that. That's usually consistent; we don't go any lower than that because of all the

⁹We understand that sometimes School Districts may consolidate contracts; however, no facts indicate that the contracts with other school districts were consolidated with the State employee's district. Thus, we do not address what conduct would be appropriate if the contracts were consolidated.

¹⁰We have already held that he failed to comply with the requirement to fully disclose these dealings.

overhead involved.” But for some of his company’s products, he said that the prices are based on quantity and “the higher amount that a person orders, obviously the price changes.”

Because the contracts covered a period from 1997-1999, we are unable to ascertain in late 2000 what the market rate would have been in those years to know what price would have been available in alternative transactions. In the context of an advisory opinion, the burden of showing competitive market prices is on the State employee as his obligation is to file a “full disclosure” with the Commission, pursuant to 29 *Del. C.* § 5806(d). “Full disclosure” means sufficient information for the Commission to decide if the individual complied with the Code restrictions on conduct where a financial interest is involved. *Commission Op. No. 98-23.*

The State employee said his company’s price for catalogue items are usually 10% to 15% off of the catalogue price, while the State contract with the Division for the Visually Impaired lists a 30% discount on items in its catalogue.¹¹ This may be some indicia that his product prices are not competitive with the mandatory State contract. However, as he did not “fully disclose” the business dealings at the time of the contracts (1997-1999), the Commission cannot ascertain the fair market price to use as an aid to decide if there were arms’ length negotiations, as required by 29 *Del. C.* § 5805(c). Thus, as to these contracts, the only violation for which there is substantial evidence is the provision requiring State employees with a financial interest in a private enterprise which does business with the State to fully disclose such dealings. 29 *Del. C.* § 5806(d). We have already held that his conduct violated that provision.

(2) Contracts for more than \$2,000: Was there public notice and bidding?

FACTS: Over a period of years, there were several contracts for more than \$2,000 with two agencies. The State employee was asked to provide additional details on whether the contracts for more than \$2,000 were publicly noticed and bid. He questioned how he was supposed to know if an agency publicly noticed and bid a contract. He was informed that if it were publicly noticed and bid, his company would have submitted a response to a request for proposals (RFP).

Again, the statute imposes on the State employee the responsibility for complying with the Code--in this instance, not seeking State contracts of more than \$2,000 unless there is public notice and bidding.

¹¹Again, we make no ruling as to whether these agencies should have or could have obtained the items under the State contract for promotional items.

Apparently, no response to an RFP was completed, as the only information he provided was the price quote, an invoice, a purchase order, etc. He said that an employee from one of the agencies came by his company and asked for a quote. The employee seeking the quote was previously assigned to the same School District as this employee. The audit confirmed that the contracts were for more than \$2,000 and not publicly noticed and bid.

ANALYSIS: Like the requirement for arms' length negotiations for contracts of less than \$2,000, the purpose of requiring public notice and bidding if a State employee seeks a State contract for more than \$2,000, is to insure that State employees are not awarded contracts out of favoritism, undue influence and the like. The public could well suspect that since the contract dealings were through an employee who previously worked at the same School District, and the Code of Conduct requirements for public notice and bidding were not met, that the contract was awarded out of favoritism.

Accordingly, we find a violation of the restriction against a State employee seeking a contract with a State agency of more than \$2,000 when the contracts were not publicly noticed and bid.

(3) Contracts with State Agencies Since the Audit

Before the Commission meeting, the State employee was asked to provide any additional information on contracts his company has obtained with the State since 1997-1999. No additional information was provided by him. However, the Commission obtained a more recent printout of his company's contracts with the State. It showed that in 2000, his private enterprise had five contracts with four State agencies for less than \$2,000.

As these are not with his own agency, there was no violation of the provision against representing or assisting before one's own agency. As they were less than \$2,000, public notice and bidding was not required. However, arms' length negotiations were required, but, again, insufficient facts are available on what the going market rate would be. Again, we find that while there is insufficient evidence to decide if there were arms' length negotiations, there is sufficient evidence to hold that the State employee failed to comply with the requirement to file a full disclosure with the Commission.¹²

II. CONCLUSION

¹²Again, whether the mandatory State contract for promotional items should have been used by these State agencies is a procurement law issue and we have no jurisdiction over those rules and procedures.

Based on the above facts and law, we find that the State employee's conduct violated the following Code of Conduct provisions:

(1) the restriction on State employees "representing or otherwise assisting" a private enterprise before his own agency, *29 Del. C. § 5805(b)(1)*;

(2) the restriction on State employees seeking a State contract of more than \$2,000 when there was no public notice and bidding, *29 Del. C. § 5805(c)*;

(3) the requirement for State employees to file a full disclosure with the Commission when they have a financial interest in a private enterprise, *29 Del. C. § 5806(d)*.

Violations of (1) and (2) above can result in up to one year in prison and/or up to \$10,000 in fines. *29 Del. C. § 5805(f)(1)*. However, having considered all the facts, we concluded that based on the law and the facts we will not refer this matter to the Attorney General as is authorized by *29 Del. C. § 5807(d)(3) and § 5809(4)*.

Rather, based on the particular facts, we find that the violations are sufficient to warrant that we recommendation a written reprimand by his District.

Based on past activities, it appears that his business may in the future do business with the State. He needs to remain aware of the State Code of Conduct provisions discussed herein, and fully comply with the statutory restrictions on his conduct. Moreover, he must meet the requirement to fully disclose future business dealings with the State, as "the filing of such disclosure statement is a condition of commencing and continuing employment or appointed status with the State." *29 Del. C. § 5806(d) (emphasis added)*.

Pursuant to the Commission's authority to provide assistance to State agencies under *29 Del. C. § 5809(10)*, it also is recommended that the agency review its policy to insure that it is not in contravention of the State Code of Conduct. (*Commission Op. Nos. 00-06 & 00-40*).

Contracting with Local Government

The Code requires that employees and officers with a financial interest in a private enterprise file a full disclosure with the Commission if the private enterprise which they own or are employed by does business with, or is regulated by the State. *29 Del. C. § 5806(d)*. The Commission reviewed disclosures on the private business dealings of two local government officials, which were submitted to comply with a prior ruling that they file an annual disclosure, pursuant to *29 Del. C. § 5806(d)*. *Commission Op. No. 98-23*. "Full disclosure" is meant to insure that no conflict of interest arises from such dealings. *Id.* Based on the following law and facts, we find no conflict.

The contracts with the officials were for less than \$2,000. Such contracts must reflect arms' length negotiations. 29 Del. C. § 5805(c). Arms' length negotiations require sufficient distance between the parties to insure fairness in the transaction, e.g., no self-dealing, no undue influence, fair market price, etc. *Commission Op. No. 98-23*.

Here, arms' length distance is established in part by the restriction against government officials reviewing or disposing of matters where they have a personal or private interest. 29 Del. C. § 5805(a)(1). This provision prohibits self-dealing. *Commission Op. No. 98-23*. The local officials submitted documentation that they did not review or dispose of the decision.

Arms' length distance is further established by the restriction on representing or otherwise assisting a private enterprise before one's own agency. 29 Del. C. § 5805(b)(1). This restriction insures that officials do not use their influence with their colleagues and co-workers in their own agency to obtain preferential treatment. *Commission Op. No. 98-23*. The officials said that they did not deal with their own agency. Also, a letter from the local government's finance officer expressly identified the agencies that they contracted with and they did not contract with their own agency.

A further aid to test for "arms' length" negotiation, is to ascertain 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")). The financial officer said that as in the past, prices were checked by several sources within the local government. Specifically, the head of the Department seeking to contract; the Finance Office's purchasing agency; the Accounting Department, and by the Finance Director, reviewed the prices.

Finally, the officials said they did not use confidential information in obtaining the contracts and/or use public office to secure the business dealings. 29 Del. C. § 5806(e), (f) and (g). They are entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-01-004, *Terry, J.* (June 30, 1995), *aff'd*, *Del. Supr.*, No. 304, *Veasey, C. J.* (January 29, 1996).

Accordingly, we find that they have submitted a "full disclosure" of their business dealings as required by 29 Del. C. § 5806(d), and that they have comported with the Code of Conduct requirements in those dealings. (***Commission Op. No. 00-51***).

For other cases dealing with "full disclosure" requirements, see, "Local Official

Contracts with his Local Government,” p. 45; and “Concurrent Employment as a Licensed Professional,” p. 46.

Post-Employment

From State Nurse to Private Nurse Practitioner

A State nurse left State employment to be a Nurse Practitioner at a Day Care Center. During her State employment, one of the Divisions she worked for contracted with the Center. She left that Division and worked for another Division before leaving the State. While at the first Division, she did not prepare the contract or select the Center as the contractor. However, she performed health assessments of the Division’s clients who might qualify for care at the Center. Her State job entailed: functional assessments (e.g., could clients bathe themselves); portions of medical evaluations (e.g., blood pressure); and obtaining the clients’ recollection of their medical history. That was part of the data used to decide if clients qualified for the State program. The medical assessment of the level of nursing home care needed by clients must be decided by a physician. The physician’s level of care decision might not always agree with the level assessed by a State nurse. If there were differences, the State might discuss the issue with the physician. She was not responsible for such discussions or any decisions arising from them. She asked if her private employment would violate the post-employment law.

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

In applying the facts to the law, the Commission found that she did not give an opinion and was not otherwise directly and materially responsible for the State’s contract with the Center. However, her post-employment activities may require her to represent or otherwise assist that private enterprise on matters related to the contract in the following ways:

- (1) providing day-to-day nursing duties for the Center’s clients, some of whom may be State clients. She would give clients medical care and develop a medical care plan. For a State client, the State may periodically come to or contact the Center regarding a client and she might be asked about a client’s care; how they

are responding, etc.; and

(2) providing primary care in collaboration with a physician for the Center's clients and clients from surrounding communities. Again, some clients may be State clients. Her former Division may need the physician's medical assessment for certain programs. The physician might instruct her to perform physicals, etc., to aid in assessing the level of care. If there were a difference in the physician's assessment and the State's, the State may ask how the level of care was reached, which could include requesting information she obtained from the physical exam.

Obviously, in her State and private positions, she was a nurse. However, while the broad subject "matter" may be the same, the facts must overlap substantially in order for it to be the same "matter" on which a former employee gave an opinion, etc. *Commission Op. No. 96-75*. At her former Division, she did not provide day-to-day care to State clients. Regarding her State job to perform functional assessments, she would not perform functional assessments in her private capacity. Rather, she might be asked by the physician to perform physicals and the information she obtained may be used, with other information, by the physician to make an assessment. Thus, while the subject "matter" is nursing, the type of nursing responsibility at the State and the responsibility in her new job did not overlap sufficiently for her conduct to violate the Code. (***Commission Op. No. 00-12***).

Pension Offset Law Cannot be Waived by Commission

A State agency wanted to privately contract with a former State employee to perform the same job he had while employed by the State. Such conduct would violate the post-employment law. *See, 29 Del. C. § 5805(d)*. The agency asked for a waiver so that the former employee would not suffer the "hardship" of the pension offset which is imposed when a retiree is re-hired by a State agency. *See, 29 Del. C. § 5502*.

The Commission may waive the Code of Conduct provisions if there is an "undue hardship" on the agency or the employee. *29 Del. C. § 5807(a)*.

The Commission held that it would not grant a waiver so that the former employee could violate the post-employment law. It reached that conclusion because there is an existing law which permits retirees to be re-hired by their former agency and work on matters for which they were responsible without violating the post-employment provision. *See, 29 Del. C. § 5502*. However, that law stipulates that if they are re-hired they will have a pension offset. *Id.*

The Commission cannot waive any laws except the ones in Title 29, Chapter 58. *See, 29 Del. C. § 5807(a)*. Moreover, the Commission can grant a waiver only if an “undue hardship” is established. *Id.* “Undue hardship” means “excessive or more than is required.” *Commission Op. No. 97-18*. The mere fact that the former employee will suffer a pension offset if re-hired under the existing law and personnel rules for retirees is the very hardship that any former employee would experience. As the agency could hire him without violating the post-employment law, and as no “undue hardship” was established, we have no basis on which to grant a waiver. (***Commission Op. No. 00-17***).

Working for Private Company on State Contracts

A Division Director who planned to leave State employment asked if she could accept a position with a private company and worked on either of two State contracts the company had with a separate Division. As to one contract, the private employer was bidding on it, but it had not been awarded. The other contract was awarded while she was employed by the State. However, based on the following law and facts, the Commission concluded that: (1) as to the contract on which the company was bidding, she had absolutely no involvement in the matter; and (2) as to the existing contract, her only involvement was to coordinate events to insure that representatives of the private company were at State events to discuss the contractual services they offered with potential State clients. Thus, she was not directly and materially responsible for those contracts while employed by the State.

(I) Applicable Law:

For two years after leaving State employment, former State employees may not represent or otherwise assist a private enterprise on matters involving the State 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 as a result of their State position. *Id.*

(II) Application of Law to Facts

In her State position, she had no decision making authority nor was she in any manner involved in putting together either contract or selecting contractors. Thus, she did not give an opinion, etc., as to the substance or awarding of the contracts. With the private company, she might be involved with the contracts as follows:

(A) The contract on which the company is bidding on: If awarded this

contract, the company wants her to be the contract manager. While employed by the State, besides not being involved with the contract, she had no dealings with the company on the contract in any way. Thus, it was not a matter on which she gave an opinion, conducted an investigation, or was otherwise directly and materially responsible for while employed by the State.

(B) The existing contract: If the company is not awarded the above contract, it wants her to manage the existing contract which was issued by a Division other than hers. That Division manages the contract and, under the contract, the private company manages a federally funded program. She was not responsible for the contract or the program while employed by the State. However, her office had a grant for a different program which was responsible for outreach and enrollment of children in certain programs, including the one managed by the private enterprise. Because of overlapping program goals in her Division's program and the contract program, her office coordinated with the private company to be at events, such as certain fairs, where people could learn of the programs. The private company then assisted in enrolling those who were eligible. If she managed the private company's State contract with another Division, her former Division would coordinate with her to insure that the company's representatives would be available for such events. As her only involvement with the contract while employed by the State was to coordinate to insure that the company's representatives were available at such things as fairs, and another Division was responsible putting together the contract; awarding the contract; and managing the substance of the contract with the private company, she was not directly and materially responsible for the matter. *(Commission Op. No. 00-20)*.

Pension Offset is Not Enough to Waive Post-Employment Law

The Commission, based on the following law and facts, could not grant a waiver allowing a former State officer to violate the post-employment law when there was a legal means for the State to access his expertise without violating that law. The Commission found no "undue hardship" which would permit a waiver, and concluded that the literal application of the law was necessary to serve the public purpose.

(I) Applicable Law

The post-employment law prohibits former State employees from representing or assisting a private enterprise on matters involving the State, for two years after leaving State 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)*.

Waivers to such prohibitions may be granted if: (1) the literal application of the law is not necessary to achieve the public purpose or (2) an undue hardship would result on any employee, officer, official or State agency. 29 Del. C. § 5807(a).

(II) Application of Law to Facts

A State officer retired after many years with the State. During the last six years, he held a high-level position. It was stated that his expertise was needed for a smoother transition for the State officer who would assume his position. The officer selected to replace him had more than a decade of experience with the agency. According to the written request, there was “full faith and confidence in him.” However, it was stated that the former employee’s experience “is unprecedented”; his advice is much valued; and his advice was needed on a fairly limited basis over the next couple of months.¹³ There were certain critical months when more of his assistance and advice would be needed. He would work on matters for which he was directly and materially responsible, so a waiver was sought to let him privately contract with the State to work on those matters because of his expertise.

(A) Is there an undue hardship on the State?

“Undue hardship” means “excessive or more than is required.” *Commission Op. No. 97-18*. We have noted that the very hardship imposed by the post-employment law is that the State loses the expertise of those who leave State employment. *Commission Op. Nos. 97-18, 99-15*. The individual had retired for health reasons, and had been re-hired in a temporary position. Thus, the State could access his expertise during those “critical times” without violating the post-employment law by keeping him in the temporary position as provided by State law. *See, Ethics Bulletin 007*.

We must be consistent in our opinions. 29 Del. C. § 5809(3). Recently, a State employee retired for health reasons and wished to privately contract with the State on matters for which he was responsible. The agency said it would be “dangerous” to not have his years of experience in overseeing a critical contract. As the agency could have his expertise without violating the post-employment law, no waiver was granted. *Commission Op. No. 00-17*. Here, too, the State’s need for this individual’s expertise can

¹³The written request said it was expected that he would work more than 4 hours a week but less than 37.5 hours a week, which would legally be considered full-time employment. It was indicated that there would be months in which he would work less than 16 hours. In the phone conference with the former employee, he said he expected to work 10 hours a week. For purposes of this opinion, we assume 10 hours a week.

be met without violating the law. Thus, we find no “undue hardship” for the agency.

(B) Is there an undue hardship on the former employee?

The former employee had agreed to work with the State on those matters “as a favor and due to his loyalty.” It was stated that this was not a case where the former employee necessarily needed a job. Also, while his doctors concluded that he could not work full-time, they had not said that his health precluded him from working the number of hours that are anticipated by him--40 hours a month. Moreover, this is not a situation where, as a result of being hired as a temporary, he would not receive health benefits because, as a retiree, he can still participate in the State’s health benefits program. Rather, he does not want a pension offset. He said: “I don’t feel I want to suffer and that means I can only work 4 hours a week or less to stay out from under the penalty.” He said that if the earnings limit in the first retirement year were based on a yearly rather than a monthly limit, he would not seek a waiver. Thus, the main “hardship” which limited his hours if he were re-hired as a temporary employee was the pension offset law, not his health.

First, while the General Assembly prohibited former employees from privately contracting to work on certain matters under the post-employment law, it gave such employees a means to work for the State on such matters in a temporary status. However, the General Assembly concluded that if a retiree returned, they must have a pension offset. 29 *Del. C. § 5502(a)(3)*. The only exception is if they return as a registration or election official or as a juror. 29 *Del. C. § 5502(b)*. There is no exemption based on the reason for retirement, such as health reasons. We must assume that if the General Assembly felt there should be other exceptions it would have added them to § 5502(b).

Second, we do not administer that law. *Commission Op. No. 00-17*. We cannot waive laws over which we have no jurisdiction, including the pension offset law. *Id.* The very hardship imposed by that law on any retiree, other than those exempted, is that they must “suffer” the pension offset. *Id.* Even if we could waive that law, we would have to be consistent with many prior opinions which have held that the very hardship which is imposed by law is not an “undue hardship.” *Commission Op. Nos. 97-18; 97-41; 99-15; 99-21; 00-02 and 00-17*. Thus, we could not waive the pension offset as an “undue hardship” even if we administered that law.

It was stated that he was not seeking a waiver of the pension offset law. However, granting a waiver of the post-employment law would have exactly that effect. That effect is what raises concerns in deciding if granting a waiver would serve the public purpose, which we now address.

(C) Is the literal application of the law necessary to achieve the public purpose?

Post-employment laws, like other conflict of interest laws, are meant to insure public confidence in the integrity of the government. “*Ethics in Government Act*,” *United States 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 the government. *Id.* at 33. Those concerns are addressed by a “cooling off period” in post-employment laws. *Id.*

Similarly, the Delaware Legislature said the Code of Conduct is to insure public confidence in the integrity of State government. 29 *Del. C.* § 5802. To instill that confidence, it set a two-year “cooling off period.” 29 *Del. C.* § 5805(d). That prohibition limits the actual or perceived unfair advantage in subsequent dealings with the State. *Commission Op. No. 97-18*.

We noted those public concerns in *Ethics Bulletin 007*, when we informed agencies that there was a legal means (temporary employment) established by the General Assembly to access those who left full-time State employment. In providing that access, the General Assembly set certain legal limits on: (1) the individual’s ability to financially capitalize; or (2) exercising undue influence for an improper and unfair advantage in later dealings with their government. *Ethics Bulletin 007*, p. 2 & 3. One legal limit cited, which helped insure those purposes, was the pension offset law. *Id.* The effect of that limit is that temporary employment does not hold the same financial enticements as a private contract. *Id.*

Assuming the former employee works 40 hours a month for \$50 per hour, he would earn \$845 in hourly wages for the first 16.8 hours. Beyond those wages, he would receive his full pension (unknown amount). For the remaining 23.2 hours, he would earn \$1160, subject to recoupment of \$580 at the end of the calendar year as the offset. This results in \$1,425 in hourly wages, plus whatever he receives as his State pension. If a waiver were granted, he would earn \$2,005 per month plus his entire pension. It is because of that financial difference that he does not want to “suffer” the pension offset. Avoiding that pension offset would certainly be seen as financially capitalizing.

Moreover, he wants a waiver from the Code of Conduct so that he can circumvent

another law. We have held that where the proposed conduct would appear to contravene other laws, such conduct does not instill the public's confidence in its government. *Commission Op. No. 98-31*. As that is the very purpose of the Code, the literal application of the law is necessary to achieve the public purpose.

The written request for a waiver stated that for the Commission to "dictate an arrangement that would penalize him financially would not serve the public purpose." We have stated above why granting a waiver would not serve the public purpose. Moreover, we have not "dictated" that arrangement. The pension offset was dictated by the General Assembly, and as the Commission cannot use its waiver authority to undo the arrangement that the General Assembly believed was appropriate for State retirees who return to work for the State, it would be up to the General Assembly to amend § 5502 if it decided it was necessary. (*Commission Op. No. 00-26*).

Case Manager Seeks Post-Employment with State Contractor

A State employee asked if she could accept employment with a company which contracts with the State. She was not involved with the contract program while employed by with the State. Based on the following law and facts, the Commission concluded that such employment would not violate the post-employment law.

(I) Applicable Law

Former State employees are restricted for two years from representing or assisting 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 while employed by the State. 29 *Del. C. § 5805(d)*. They also may not improperly use or disclose confidential information gained from public employment. *Id.*

(II) Application of Law to Facts

As a State employee, she was not involved in preparing the contract or selecting the contractor. Thus, she did not give an opinion and was not directly and materially responsible for the preparation or award of the contract.

Regarding the substance of her responsibilities as a State employee as it relates to the contracted program, she performed client evaluations; determined their eligibility; and was a case manager for clients in the program. As case manager, she obtained therapy services for the clients by working with their insurance companies and their primary care

physicians. Under the State contract, the company she seeks to work for is one of a number of contractors which provides therapy, but the decision on which contractor will be used is based on insurance coverage programs. Some clients could be eligible for Medicaid, and she would refer families to the Medicaid program for a decision on eligibility.

In her job with the private company, she would not: perform development evaluations; manage cases of clients; or provide therapy services as she was not a therapist. Rather, she would be an in-house nurse educator, giving training to nurses and developing educational and orientation programs for nursing staff. Those activities are not part of the State contract with the company, nor was she responsible for such matters in her State job. The only connection to the clients in the program is that some nurses she may train for the company may provide nursing care to some State clients. Based on the above facts and law, her employment would not violate the post-employment law. **(Commission Op. No. 00-27).**

Former Board Member to Represent Clients Before Board

An appointee to a State Board, which the Code of Conduct defines as an “honorary State official,” wanted to represent persons who opposed a private company’s application for a certain license from the Board on which he previously served. Based on the following law and facts, the Commission concluded that his representation would not violate the post-employment law.

(I) Applicable Law

For two years after leaving a State appointed position, honorary officials may not represent or otherwise assist private enterprises on matters involving the State if they are matters on which the official: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for while in their appointed position. *29 Del. C. § 5805(d)*. They also may not improperly use or disclose confidential information gained from their public appointment. *Id.*

(II) Application of Law to Facts

The honorary State official had resigned his appointment to a Board which, by statute, was responsible for such matters as granting, refusing, and canceling certain licenses. *(Citation omitted)*. A private company was applying for a license and the clients he sought to represent opposed the company’s application. While serving on the Board, he was in no manner involved in reviewing or otherwise considering this particular

application.

Delaware Courts have held that where an appointee left a State Board and later represented an applicant before his former Board, he was not representing or assisting his client on a “matter” for which he was “directly and materially responsible” while on the Board as he had no part in reviewing the particular applications pending before his former Board. *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). Consistent with *Beebe*, we hold that as he was not involved in the private company’s application while on the Board, his representation would not violate the post-employment law based on those facts.

He did say that a principal of the company had applied for a number of licenses from the Board, but not as that particular company. He was on the Board when the principal of the company applied for at least one license. He also said the Board took disciplinary action against the principal regarding one of his licenses. The former appointee did not recall participating in either action. Also, he asked the principal’s attorney if his client recalled his participation in any disciplinary proceeding. The principal had no recollection of his participation. The former official said that if he were involved in such matter, it might raise a different issue.

Delaware cases have held that past violations of certain license holders are obviously relevant when they seek another license. (*Citation omitted*). Thus, if he were involved in a violation decision on the license holder, it might raise a different issue. The former appointee had asked the Board’s staff to search its data bank to see if he was involved in matters related to the applicant company or its principals, but had not obtained the results by the time of the Commission meeting. For purposes of this advisory opinion, we presumed that his recollection and that of the principal is correct--that he was not involved in matters related to the applicant company or its principals. We do not speculate on what the result might be if the search reveals other information. Rather, once he obtained the information, he was advised to reassess his situation. He was referred to *Beebe* and Commission decisions on other post-employment issues. Specifically, he might wish to review *Commission Op. No. 96-75*, which discusses the meaning of “matter” in the post-employment law and cites several federal cases interpreting “matter” as used in a similar federal post-employment law. *See, Opinion Synopses - 1996*, “What’s a ‘Matter’ Under the Post-Employment Provision?”

At the Commission’s meeting, he also said he would like to represent other clients before the Board. We must base our opinions on a “particular fact situation.” 29 *Del. C. § 5807(c)*. Without the facts, we can make no ruling. For guidance, he was referred to this

opinion, the *Beebe* case, and our synopses on post-employment issues. Should he need specific guidance when a particular fact situation arises, he could return to the Commission for a decision. (**Commission Op. No. 00-29**).

Insufficient Facts to Make A Decision

A State employee asked if it would violate the post-employment law if he privately contracted to give training to a number of State agencies after he retired. A number of agencies discussed possibly contracting with him, but at this time there were no known details about those possible contracts. We must base our opinion on the particular facts. *29 Del. C. § 5807(c)*. As to those “possible contracts,” there were no facts on which to base an opinion. (**Commission Op. No. 00-25**).

Post-employment Applies to Matters “Involving the State”

A State employee had worked for two different agencies during his State career. While employed by those agencies, he developed and gave training programs to a number of other State agencies. He did not intend to contract with the two agencies which had employed him. Thus, he would not represent or assist his private enterprise before his own State agencies. However, he asked if he could privately contract to give training to another State agency. Based on the following law and facts, we found that such contract would violate the post-employment law.

(I) Applicable Law

Former State employees are restricted for two years from representing or assisting 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 while employed by the State. *29 Del. C. § 5805(d)(emphasis added)*. They also are prohibited from improperly using or disclosing confidential information gained from public employment. *Id.*

(II) Application of Law to Facts

The post-employment law does not restrict the representation of former employees only to matters “involving the State agency by which they were employed.” Rather, it restricts the conduct on matters “involving the State.” Had the General Assembly intended to limit the post-employment conduct only to dealing with the State agency which employed the individual, it could have done so because it clearly restricted the representation of current employees “before the State agency by which they are

employed.” *See, 29 Del. C. § 5805(b).*

To give meaning to the phrase “involving the State” we must recognize that State employees can be responsible for matters which involve more than their employing agency. That was true in his particular situation. He developed training programs as an employee of the two agencies where he worked. But his responsibilities, at least while employed by one agency, were broader than just to the employing agency because he was tasked with developing training programs that applied to persons in any State agency. Thus, on the broad scale, the training programs are matters “involving the State.” Next, that broad application must be placed within the other terms of the statute. *Commission Op. No. 96-75.*

Whether a “matter” he was responsible for while employed by the State is the same “matter” on which he would represent or assist his private enterprise, depends on whether the “matter” fits within the three discrete areas of the post-employment law-- “matters” on which he gave an opinion; conducted an investigation; or was otherwise directly and materially responsible. *Id.* For them to be the same “matter,” there must be a “substantial overlap” of the facts. *Id.*

Here, while employed by the State, he developed the concept of a particular program; he turned it into an 8-hour course; he presented the course; and it was offered to State employees from all agencies.

To decide if that program was the same “matter” on which he wished to contract, we looked at what he would present to the contracting agency to see if there was a “substantial overlap.” For the contract program, he was taking a 2-hour segment of the 8-hour program which he conceived and developed for his former State agency. He would focus on the “core principles” in that 2-hour segment. Courts have held that even where there have been a few adjustments to the “matter” of the contract, it can be the same matter if the facts substantially overlap. *Commission Op. No. 96-75 (citing United States v. Medico, 7th Cir., 784 F.2d 840 (1986)).* While he intended to tailor the 2-hours to the particular agency, the program concept was the same concept he developed while employed by the State; the 2-hour course is a direct abstract of the 8-hour course; and he would use the exact same “core principles.” Moreover, the description of the purpose of the course was the same in the course he developed while employed by the State, as it was for the contract course he wanted to present. Accordingly, there was a “substantial overlap” between the courses, making the contract course the same “matter” for which he had been directly and materially responsible for while employed by the State. ***(Commission Op. No. 00-25).***

Post-Employment as a Lobbyist

A former General Assembly employee asked if he could lobby on behalf of his private employer on matters before the General Assembly in certain areas. Based on the following law and facts, a majority of the Commission's quorum concluded that his post-employment activities would not violate the post-employment law.

The post-employment law restricts former State employees from representing or otherwise assisting 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 may not improperly use or disclose confidential information gained from their public position. *Id.*

We are required to be consistent in our opinions. 29 *Del. C.* § 5809(5). The post-employment law does not prohibit representation before an individual's former agency, unless the representation is in one of the three areas that trigger the provision--matters where the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for matter while employed by the State. *Commission Op. No. 96-75*. Thus, the issue is whether his representation as a lobbyist on matters affecting his private employer would constitute representing it on "matters" in those three areas.

In deciding if the representation is on the same "matter," Courts look to whether there is a substantial overlap in the facts regarding the matters worked on for the government and the matters on which the individual will represent the private enterprise. *Id.* (citing *United States v. Medico*, 7th Cir., 784 F.2d 840 (1986); *CACI, Inc. v. United States*, Fed. Circ. 719 F.2d 1567 (1983)).¹⁴ Like the federal Courts, Delaware's Courts look to the particular matter on which the State official worked to see if there is an overlap with his private representation. *Beebe 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).

In *Beebe*, a former member of the Health Resources Management Council represented a company before the Council on a certificate of need (CON) request. *Id.* at 17. He had served on the Council for five years. *Id.* It was argued that his representation violated the post-employment law. *Id.* The Court found that while he was a Council member, he did review CONs; however, the record showed that he did not review the two

¹⁴These cases interpreted the term "matter" under the federal post-employment law which is similar to Delaware's post-employment law. *Commission Op. No. 96-75*.

applications before the Council. The Court held that “since he appeared before the Council in a matter for which he had no direct and material responsibility while on the Council, he did not violate the statute.” *Id.* (*emphasis added*).

Here, as in *Beebe*, the former employee wished to represent a private enterprise before his former State entity. The “matters” on which he would represent the private employer related to agriculture, manufacturing, and taxes. As a State employee, he was an Administrative Assistant. He supported the General Assembly members on such things as constituent relations, liaison with other government offices, issue research, and other administrative needs, as directed by the legislators. He had “little if anything” to do with agricultural issues and did not recall working on manufacturing issues while employed by the State. Under Delaware law, he was entitled to a “strong, legal presumption of honesty and integrity.” *Beebe, supra*. Thus, based on his statements, he did not give an opinion, conduct an investigation, nor was he directly and materially responsible for matters relating to agriculture and manufacturing.

Regarding tax issues, while working in the General Assembly, he might, for example, be asked by a member for the effect on a family of four if certain tax changes were passed. He would contact the Controller General’s office and ask it to develop a formula for determining the impact. If research were needed, he contacted the Legislative Council’s Research Division. He gave the information from those entities to General Assembly members to use in speeches and/or he might write a press release about the proposed bill and its impact. In his private job, he would reach out to businesses or people in the community on tax issues. His private employer might develop a policy on the impact on those persons and have him contact the General Assembly to advocate the company’s policy. No facts indicated that as a State employee he was responsible for reaching out to businesses or people in the community on tax issues, nor did he research tax issues or develop formulas for determining tax impacts on businesses or citizens. Thus, based on the facts provided, it did not appear that he was directly and materially responsible for those matters.

The Commission also advised him that he must register with this Commission within five days of qualifying as a lobbyist. *29 Del. C. § 5832*. His employer must complete an employer’s authorization at the time of his registration or not later than 15 business days after his registration. *29 Del. C. § 5833. (Commission Op. No. 00-34)*.

Private Contract to Perform Former State Job - Waiver Denied

A State employee sought to privately contract with her former Division to perform the same job she had while employed by the State. Such conduct would violate the post-

employment law, so she sought a waiver. Based on the following law and facts, a waiver was denied.

The post-employment law tries to strike a balance so as not to discourage public service. Thus, post-employment contracts are prohibited for two years only if the post-employment work with the State agency deals with matters on which the former State 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)*.

In a 1996 opinion to this individual, the Commission held that her proposed post-employment contract with her Division came within the prohibitions *§ 5805(d)*, but we granted a waiver. For the reasons in this opinion, that waiver is no longer effective, and we cannot grant a new one.

Waivers may only be granted if the literal application of the law is not necessary to serve the public purpose of the statute or there is an undue hardship on the agency or the employee. We are required to be consistent in our interpretations of the law. *29 Del. C. § 5809(5)*. Applying the waiver provision, we have denied a waiver where an agency had a program in operation for a number of years and wanted to contract with a former employee to work on the same matter, but the agency had not fully addressed options that could result in no violation of the Code. *Commission Op. No. 99-15*. In that case, the agency project began a number of years before the employee left State service. When she was ready to retire, it had not fully explored rehiring her under such options as part-time, temporary, or casual/seasonal as permitted under the personnel laws. *Id.* Moreover, it had had years to train a replacement, but had not worked to insure that the replacement was trained. *Id.* It sought a waiver on the basis that it needed to have her work on the program because of her knowledge and expertise and it needed her to train her replacement. *Id.*

Here, the former State employee and her former Division said that her expertise is needed because of her knowledge of a particular program, and the agency needed her to train others. However, as in the above referenced opinion, the program has existed for years, at least since 1996, when we issued our initial opinion. We granted a waiver in 1996 on the representation that: she planned to leave because of medical reasons in January 1997; the agency might not be able to reduce the number of hours she worked; and if it could not reduce the hours, it wanted the option to contract with her. We granted it on that limited basis. *Commission Op. No. 96-60*.

In this most recent request, she said she received the 1996 waiver “with the

understanding that the waiver would only be exercised if [the Division] was not able to change my status to part-time.” She did not leave in January 1997, but continued to work for the Division until June 1999. During that time the Division did, in fact, reduce her hours to 30 per week. In June 1999, she then exercised her waiver, and entered a one year contract with the agency to work for 20 hours a week.¹⁵ During that time, an employee was hired to replace her. The former employee said she worked with her replacement for a year. Also, a person was assigned to another facility to handle the program at that location.

The former employee said: “it was just not possible to pass all of the information on to key staff within [the agency] within one year.” However, it has not been just one year. The former employee and the agency have known since at least 1996 that she was considering leaving because of her alleged medical condition. The agency got her work hours reduced to accommodate her medical condition even as the program continued to grow. In February 1999, she submitted notice that she planned to leave in June 1999. In June, she accepted a private contract to perform the program work on a 20-hour per week basis. Thus, she and the agency have had years for her to pass on information. Yet, she specifically stated that there is some information that she still has not passed on to the agency, even after all those years.

Post-employment laws were passed because the 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.* Here, the public could well suspect that if in all those years she did not “pass on” all the information that the agency needs, that she was using information acquired during government service to place her in a position to control the knowledge and the agency then must rely on her through a contract to provide it with the information needed by its employees.

Further, the agency has made little, if any, effort to obtain the services it needs in a manner that would not violate the Code. First, it could hire her in a part-time position. The agency states that it has not found an “appropriate” part-time position that relates to her career field. However, when the agency needed to convert her State position to a

¹⁵Our records reflect that we notified the agency that because she waited so long to exercise her waiver that, at a minimum, the agency should confirm that the facts had not changed. No information was received from the agency.

part-time permanent 30-hour position, it was able to do so. When she accepted the private contract and the agency then needed to convert her position back to a full-time position, it also did so. Now, it states that it would take a number of weeks to get a casual/seasonal position. However, it has been on notice since her contract expired at the end of June that one option it could exercise so that the Code would not be violated would be to hire her as a casual/seasonal, but no facts indicate that those weeks were used to obtain the temporary or casual/seasonal position.

The agency's representative said at the Commission's meeting that not only has the program existed for many years, but that the federal government has required States to implement the program. Logically, if the States must implement the program, and it has existed for many years, it seems there would be other persons qualified to do this work with whom the agency could contract. Yet no facts indicate that the agency ever made an effort to contract with anyone but her. Again, this could raise suspicion that as a former employee she was in a position to obtain a "leg up" on others who are equally qualified but are not given the chance to compete. This goes to the very heart of the reason for the post-employment law.

She stated that there will be an "undue hardship" if she cannot contract with her former Division because her private business would lose \$30,000 a year for the 20 hours she worked per week. Again, we must be consistent in our opinions. We have held that "undue hardship" means "more than required" or "excessive." *Commission Op. Nos. 97-18 and 99-15*. The very hardship imposed by the statute is that as the law precludes former employees from working on matters for which they were responsible, then they cannot expect after they leave State employment that the State will still be a source of substantial income to them to perform their former job. It is the hardship any former employee must experience. Moreover, she said she had already contracted with another State agency and planned to contract with another Division of her former agency.¹⁶ Thus, it does not appear that she was without income as a result of not being able to contract with her former Division.

While she pointed to the fact that she was in an automobile accident in 1994, and that is why she left State service, she did not claim that she cannot work as a result of those injuries. In fact, she anticipated seeking even more contracts. Rather, it is the financial loss she claimed as a hardship. Nothing in the Code of Conduct prohibits her from contracting with private sources or local or federal agencies. In fact, under appropriate

¹⁶We do not address whether her contracts with those entities raise any post-employment issue as we have no facts on which to render a decision. She was advised that should she need a decision on those matters, she could submit the facts.

circumstances, contracting with the State may be permissible as long as it is not on matters where she gave an opinion, conducted an investigation or was otherwise directly and materially responsible.

In conclusion, under these particular facts, we cannot grant a waiver for her to contract with her former Division to work on matters for which she was responsible because: (1) the literal application of the law is necessary to serve the public purpose; (2) no facts indicate an “undue” hardship on her; and (3) the facts do not substantiate an undue hardship on the agency because there are still legal means of achieving its needs without violating the law, either by: (a) finding a casual/seasonal position for her; or (b) finding another contractor. (**Commission Op. No. 00-36**).

Project Manager Position

A State employee asked if accepting employment with an engineering firm would violate the post-employment law, as the firm is a consultant to the Department where he worked. Based on the following facts and law, the Commission concluded that the proposed conduct would not violate the Code.

(I) Applicable Law

Former employees are restricted for two years from representing or otherwise assisting a private enterprise on matters involving the State if their representation/assistance will be on matters 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). They also may not improperly use or disclose confidential information gained as a result of public position. *Id.*

(II) Application of Law to Facts

The firm wanted to hire him as its project manager. Among other things, it wanted him to manage two agreements it has with his former agency. He did not participate in the interview or the selection of the firm for either agreement or manage the agreements after the firm was selected. Those matters were handled by a project manager in a separate section of his agency.

However, he had some involvement in the agreements as follows:

(A) Agreement 1: Under this agreement, the firm is the sole source provider of certain surveys. When surveys were needed, the section he worked for made

the request through the agency's project manager. Because he worked in the section, he had occasion to request surveys. He could not select the provider as that was predetermined by the agreement, in which he did not participate. He also did not decide how costs would be controlled or paid, etc. Rather, when his section requested the survey through the project manager, the manager contacted the firm for the work, reviewed the proposed fee, gave notice to proceed, and authorized payment. As part of the former employee's function, he reviewed the survey after its completion. However, he had no expertise in conducting such surveys, so he could not look for accuracy or in any way evaluate the firm's work. Rather, he checked for certain standard information, e.g., tax or project numbers, etc. Technical or quality reviews of the survey were the project manager's function.

(B) Agreement 2: Under this program, another State agency worked with him in buying an easement. He had no contact with the firm and the purchase had no material impact on the firm's agreement with his agency. Again, oversight of the agreement as it related to the firm (fiscal, administrative or managerial) was the project manager's responsibility.

Based on those facts, as to Agreements 1 and 2, he did not give an opinion, conduct an investigation, nor was he otherwise directly and materially responsible for those matters.

He also asked about two other responsibilities he expected to have in his job with the firm. In the first instance, he would not be representing the firm before the State. Rather, he would represent it before local governments. The Commission has held that where the representation/assistance of the private employer is before local governments, not the State, that there is no violation of the post-employment law. *Commission Op. No. 98-12*.

In the second instance, he was not sure which contracts, if any, the company would want him to respond to. Without facts, we cannot render a decision. *Commission Op. No. 96-74*. He was advised to seek additional guidance, if necessary, if such contracts arose. (***Commission Op. No. 00-41***).

No Assignments to Work With Former Agency

Based on the following law and facts, the Commission concluded that employment with a private firm which contracted with a former State employee's former Division, would not violate the post-employment provision as the private employer was not going to assign him to work on projects with his former Division.

No State employee may represent or otherwise assist a private enterprise on matters involving the State for two years after termination 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 while employed by the State. They also may not improperly use or disclose confidential information gained from their State position. *29 Del. C. § 5805(d)*.

His former agency contracted with a private enterprise as the provider of certain network matters. While employed by the Division, he participated in that contract by: (1) putting together the contract requirements; (2) selecting the contractor; and (3) monitoring the contract.

Based on those facts, he gave an opinion and was otherwise directly and materially responsible for the contract while employed by the State. However, at his job with the private enterprise, he would not be assigned to work on any projects with his former Division, and the proposed scope of his private employment responsibilities would not include those network related tasks in Delaware.

We have held that where an individual gave an opinion on a State contract but would not work on that “matter” after leaving State employment to work for the contractor, then there was no violation of the post-employment law. *Commission Op. No. 94-15. (Commission Op. No. 00-49)*.

NOTE: When a waiver is granted, as in the case below, the proceedings before the Commission become a matter of public record. *29 Del. C. § 5807(a)*.

One Month Waiver Granted

Dear Dr. Brandenberger:

The Cape Henlopen School District asked if it would violate the post-employment provision if Dr. Hubert Mock privately contracted to be the Assistant Principal at Lewes Middle School, when less than two years before he served as the Principal at Milton Middle School before retiring. If a violation is found, the School District asks for a waiver. Based on the following law and facts, the Commission concluded that the contract would violate the post-employment provision. However, it agreed to grant a limited waiver based on the School District’s statement regarding the hardships it has had in obtaining an Assistant Principal. The waiver is limited to the remaining time in the present semester. However, the School District is not precluded from seeking an

extension if it can show due diligence in trying to find someone else to hire as the Assistant Principal.

I. Applicable Law

Post-Employment Restriction: 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)*.

Waiver Provision: 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 this chapter or would result in an undue hardship on any employee, officer, official or state agency. *29 Del. C. § 5807(a)*.

II. Facts

In the last week of August, a week before the 2000-2001 school year started, three assistant principals in the Cape Henlopen School District resigned and took employment elsewhere in the State. After advertising and interviewing, the District was only able to replace one assistant principal at an elementary school, leaving the assistant principalships at the high school and Lewes Middle School open. The four candidates interviewed for the middle school did not possess the required qualifications, and the candidates for the high school position withdrew their applications. A district office administrator was transferred into the high school principalship to do “double duty” as an instructional supervisor and as principal. Other teachers holding the required certificates to be an assistant principal were teaching in “critical skills.” The School District said it did not intend to pull those teachers from its teaching staff because of the need for teachers in those areas and because of the impact on the students and parents if a teacher were pulled during the school year. Additionally, none of those teachers had applied for the position when it was announced. The School District said it did not want to bring in such person for a limited time while it sought a qualified candidate who would take the position for the long-term. The School District said it planned to re-announce the position in the Spring, as it believed the candidate market would be more plentiful at that time. It also said it was unlikely that qualified applicants would want to leave their positions at other

schools at this stage of the school year. It said that it had not considered the likelihood of going out and looking for contractors for the position. According to the correspondence, Leading & Learning, Inc. contracted with the School District and Dr. Mock to provide the services of Assistant Principal at Lewes. Leading & Learning, Inc., is the name placed on reserve by Hubert D. Mock, according to the Secretary of State's Division of Corporation's office, but it is not registered as a corporation. Dr. Mock was approached by the School District to serve as the Lewes Middle School assistant principal. Dr. Mock has come out of retirement at least twice in the past to accept such substitute jobs, and has been serving in this present position in a reported-time basis. He apparently does not want to come out of retirement again; nor does he want to continue in a reported-time basis because once he earns \$10,300, by law, he will experience a \$3 to \$1 pension offset.

III. Application of Law to Facts

A "private enterprise" means "any activity conducted by any person, whether conducted for profit or not for profit...." 29 *Del. C.* § 5804(8). Accordingly, this Commission has held that a private contract of employment with the State constitutes a private enterprise. *Commission Op. No. 94-10*. Consistent with that ruling, the Commission finds that Dr. Mock, who seeks to contract with the School District, through his own activity or through the auspices of the corporate name reserved by him, is acting on behalf of that private enterprise in seeking a contract and fulfilling that contract which deals with matters involving the State.

As he is acting as a private enterprise, the next issue is whether his representation is on matters for which he was directly and materially responsible while employed by the State. "Matters" are defined as "any application, petition, request, business dealing or transaction of any sort." 29 *Del. C.* § 5804(6). This Commission has held that where there is a substantial overlap between the matters worked on while employed by the State and the post-employment matters involving the State, then there is a violation of the post-employment provision. *Commission Op. No. 96-46*.

To ascertain if there is a substantial overlap, the Commission compares the duties and responsibilities during employment to the post-employment activities. Here, Dr. Mock, while employed by the State, was the principal of a middle school. He now seeks to contract to be an assistant principal in the same School District over students in the same school grades. The job description for an assistant principal states that the job goal is: "To assist the principal in providing schoolwide leadership and to learn the role of the principal." Additionally, the performance responsibilities are to: (1) "Assist the principal in the overall administration of the school;" and (2) "Serve as the principal in the absence

of the regular principal.” These facts indicate a clear overlap of responsibilities between a principal and an assistant principal. Further, in comparing the job description of the principal and assistant principal, the performance responsibilities for both jobs include overlapping responsibilities in such areas as scheduling, budget requests, inventories, safety inspections and drills, student attendance, maintaining discipline, supervising teachers and departments, and maintaining relationships with students, parents, and faculties, etc. (*Compare, e.g., Assistant Principal Job Description Items 1,2, 3,4,5,6,7,9,10,11 and 14, to Principal Job Description Items 5, 13, 14, 40, 41, 39, 37, 21, 17, and 11*). It is logical that there is an overlap since the goal of an assistant principal’s job is to “learn the role of the principal.” (*See, Assistant Principal Job Description*).

Based on those facts, a majority of the Commission concluded that there was a sufficient overlap to conclude that Dr. Mock would be working on matters under the private contract for which he was responsible while working for the School District.

IV. Should a Waiver Be Granted?

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

The purpose of the post-employment statute is to instill the public’s confidence in the integrity of its government. *Commission Op. No. 99-15*. In the context of the post-employment law, public confidence has been weakened by a widespread perception 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 the government. *Id.*

Here, the School District, faced with the need for an assistant principal just as the school semester started, sought out Dr. Mock to fill the position. He was hired on a reported-time basis. If he continued in a reported-time basis there would be no violation of the post-employment law, because he would not be considered a “former employee,” but a current employee. *Ethics Bulletin 007*. He does not want to remain in a reported-time basis because as a retiree, he must have a pension offset of \$1 for every \$3 he earns above \$10,300. *29 Del. C. § 5502(a)(3)*. Every State retiree is subject to that pension offset if they return to work for the State. A waiver, which would permit him to avoid the pension offset, would mean he receives the full salary of an assistant principal, plus his full pension. The public may see his request to avoid the pension offset as turning his knowledge of the job into a situation of personal gain that, by law, other State retirees do not have. Thus, the literal application of the law is necessary to serve the public purpose.

(2) Is there an undue hardship on the former employee?

“Undue hardship” means “more than is required” or is “excessive.” *Commission Op. No. 97-18*. The alleged hardship on the former employee is that he would suffer a pension offset if he cannot privately contract. We have held that the very hardship imposed on any State retiree who is re-hired by the State is that they must suffer the pension offset. *Commission Op. No. 00-26*. The statutorily imposed offset is no greater for Dr. Mock than any other State retiree. Moreover, such offsets are not unique to persons other than State retirees, as the State offset is based on the Social Security earnings limits for retirees under that system. *29 Del. C. § 5502(a)(3)*. Accordingly, we cannot conclude that the pension offset for Dr. Mock is “excessive.”

(3) Is there an undue hardship on the agency?

Based on the details referred to in the statement of facts, e.g., three assistant principals resigning right at the beginning of the semester, lack of qualified applicants, etc., we conclude that the School District established an “undue hardship,” and therefore grant a waiver on that basis. We note that Dr. Mock could be hired without violating the Code, e.g., coming out of retirement as he has in the past, or being paid on a reported-time basis. Apparently, he is not agreeable to those options. Thus, if the School District is to use his services until it can find someone qualified, it would be by private contract. With those facts in mind, we place a time limit on the waiver of the remaining time in this semester to allow the School District to seek certified candidates in-house, or through other hiring options available to the agency. In the event the District cannot find a qualified applicant in that time, it is not precluded from seeking an extension if it can show due diligence in trying to resolve the matter.

V. Conclusion

Based on the above facts and law, we conclude that contracting with Dr. Mock as the assistant principal in the same school district and at the same grade level where he was previously principal, and where there is a substantial overlap in the responsibilities of a principal and an assistant principal, would violate the post-employment provision. However, a limited waiver for the time-frame of this semester is granted without prejudice to seek an extension. (*Commission Op. No. 00-46*).

Waiver Denied; Two-Year Restriction Begins Upon Terminating State Employment

A former State officer who headed a division wanted to represent private

companies before that division. Based on the following facts and law, the Commission concluded that: (1) the conduct would violate the post-employment law; (2) it could not grant a waiver; and (3) the 2-year restriction took effect when the individual terminated employment with the State.

I. Facts

In a prior opinion to this State officer, the Commission held that he could operate a consulting business and engage in certain activities identified in that opinion, but was restricted from representing or assisting private clients in obtaining State contracts through his former division. The basis of that opinion was that as he was the Director of the Division, he was, among other things, directly and materially responsible for the laws and policies regarding contracting. *Commission Op. No. 99-43*.

As the post-employment law restricts former State employees from representing or assisting private enterprises, for 2 years, on matters involving the State for which they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible, to the extent his post-employment activities entailed representing or assisting private clients in obtaining State contracts, such action was prohibited. He was not precluded from consulting with clients on such matters as: obtaining private sector contracts; advising them on customer service, etc.

This request sought a waiver of the post-employment law on the basis that the Commission's prior ruling prohibited him from assisting small businesses in their attempts to obtain an equitable opportunity for doing business with the State. Further, he argued that because he projected obtaining the majority of his consulting clients from persons who seek assistance in obtaining State contracts, the ruling would have "shut down" his consulting business. Second, he detailed a change in his circumstances which has resulted in a full-time job. Now, in addition to the consulting work, he was contemplating representing his full-time employer on a State wide network contract. Third, in meeting with him on this request, he said he had certain other interests he would like to pursue relating to State contracts. Fourth, he wanted to know if the two-year restriction applies from the time he left his Division, or from the time he left State employment.

II. The Waiver Request

A waiver may be granted if the literal application of the statute 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)*. Although he initially asked for a waiver, he said during

the Commission meeting that he was no longer seeking a waiver. However, because he said that he wanted more “broad based strokes” to help him understand the law and because he said his position may continue to change in the future, and as he gave the Commission particular facts to deal with, the Commission addressed the waiver request based on those facts.

(A) Is the literal application necessary to serve the public purpose?

The public purpose of the post-employment restriction, as stated in our prior opinion is to insure the public’s confidence that former State employees do not use information, influence and access acquired during their State service for improper and unfair advantage in dealings with the State after they leave public office. *Commission Op. No. 99-43*. The 2-year “cooling off” period in Delaware’s post-employment law instills the public’s confidence by preventing former employees from exercising undue influence on their former colleagues; obtaining a “leg up” for their clients over other competitors; or financially capitalizing on their former employment. *Id.*

To the extent that he was saying that small businesses will not get equitable treatment in State contracts, if he did not represent them, the statute does not authorize a waiver based on the needs of a private enterprise. *29 Del. C. § 5807(a)*. Moreover, while he was the Division Director, he worked with another State office to publish a Procurement Guide “designed to assist the small business person in his/her effort to contract with State agencies.” Also, any business, small or large, can ask to be placed on the Division’s list of vendors that wish to receive notice of all contracts that the State puts out for bids. Thus, free assistance is available specifically for the small business person. He now sought to provide clients with the same assistance in obtaining State contracts that he provided in a free publication while he was a Division Director, which could be interpreted as financially capitalizing on his former employment.

Delaware Courts have specifically noted that where government officials seek contracts with their governmental entity, that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” *W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748, 752 (1971)*. The Code of Conduct was subsequently enacted with restrictions, such as the post-employment law, which aids in avoiding those very types of allegations and suspicions. Similarly, the new procurement law enacted while he was a Division Director and in which he was involved, states that its purpose is to create trust, fairness and equitable treatment for persons who deal with the State procurement process. *29 Del. C. § 6901*.

Thus, the procurement law and the Code of Conduct have a common purpose of

achieving trust, fairness and equitable treatment in the conduct of and decisions made by government officials.

If a waiver were granted so he could represent and otherwise assist those small businesses on contracting with the State, it is not likely the public purpose of either the procurement law or the Code of Conduct would be served because it would raise the very concerns which the post-employment law, and the procurement law, seek to prevent--undue influence, favoritism, etc. Accordingly, no waiver will be granted on that basis.

(B) Undue Hardship

The law does not permit us to grant a waiver on the basis of an undue hardship on a private enterprise, only if there is an undue hardship on a State employee or State agency. 29 *Del. C. § 5807(a)*. Thus, no hardship waiver could be granted on the basis that any small business would suffer a hardship if he could not represent them. Further, no facts suggest any hardship on a State agency. Accordingly, the issue is if there is an undue hardship on him.

The Code of Conduct requires that the hardship be “undue,” which means “more than required” or is “excessive.” *Commission Op. No. 97-18*.

He said that since he initially projected obtaining the majority of his private consulting business clients by offering them advice and assistance in obtaining State contracts when he initially started, that the Commission’s prior ruling would have shut down his consulting business. However, in his previous request, he said he also intended to offer consulting services for such things as customer service improvement, business opportunities in the private sector, etc. We held that as such services would not entail representing or assisting a private enterprise before the State, that he could engage in those consulting activities. His present request stated that he was now employed full-time by a company as its marketing director. Finally, while he stated that our prior opinion would shut down his consulting business, it appeared that he was still operating it as a side-line because in this request he asked for another ruling regarding a client who was seeking his consulting services.

Thus, our prior ruling did not preclude him from having a consulting business. It limited that consulting business so that he did not work on matters which the post-employment law prohibits. The mere fact that a former employee cannot work on the same matters for which they were responsible, is not, by itself, an “undue hardship.” *Commission Op. No. 97-18*. Rather, it is the very hardship imposed by the statute. *Id.*

In considering if an undue hardship waiver should be granted, the Commission, in the past, has considered the Code of Conduct provision which says “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). *Commission Op. No. 97-34*. Weighing this concern aids in insuring that citizens will accept public employment and also have the latitude to move to the private sector.

Here, he had authority to operate a consulting business, with certain restrictions. He also had full-time employment with a private company. Clearly, he did have the latitude to move to the private sector. Accordingly, we find no facts to substantiate an “undue hardship.”

III. Activities on Behalf of his Full-Time Employer for State Contracts

Regarding his full-time job, he said he would will develop new business for the company, which provides information technology services. Such services would entail “network services.” While employed by the State, his Division issued a Statewide contract for network services. In his prior request he asked if his consulting business could represent private clients on that contract. We held that he could not represent or assist a private enterprise on that contract as it was created while he was the Division Director, and, by law, he was responsible for all central contracting.

In this request, he said that he will not be involved with the State’s contract for network services for the next two years. However, he then went on to say that “if [...] is selected as a subcontractor” on the State’s contract, “I will have no involvement in the contracting process since the primary vendor will be the lead contact” with his former Division. He said that his full-time employer plans to seek to participate in the State’s contract as a subcontractor. Apparently, the subcontractors had not yet been selected. The mere fact that the primary vendor will “be the lead” with his former division, does not mean issues could not arise under the post-employment provision.

The plain language of the Code not only restricts former employees from “representing,” but also restricts them from “otherwise assisting” a private enterprise on matters “involving the State” if those matters are ones for which they were otherwise directly and materially responsible. 29 *Del. C.* § 5805(d). The Statewide network contract is a matter “involving the State.” In our prior opinion we held that he was responsible for the matter. The mere fact that the primary vendor would be the “lead contact” with his former Division, did not necessarily mean that he would not be “otherwise assisting” the private enterprise on that matter. For example, if he acted as the company’s

representative to assist it in getting a subcontract with the contractors, he would be assisting it in obtaining a subcontract on a matter “involving the State” that was put together while he was the Division Director. Moreover, the contract specifies that his former agency must agree to and approve the subcontractors. Because we held that it would be improper for him to represent or otherwise assist his private consulting clients on that network contract in our prior opinion, if he represented or assisted his full-time employer in getting the subcontract, which his former colleagues must approve, the only difference is that he changed who he would represent or otherwise assist. It raises the same issues of undue influence, obtaining a “leg up” for the private enterprise, and financially capitalizing on his prior position. In effect, the public perception would be that he was trying to do through the backdoor what we would not permit him to do through the front door. The public’s concern of undue influence or favoritism could be heightened by the fact that his full-time employer bid to be the primary vendor but was not selected. A few months later, it hired him and he now seeks to assist them in getting a portion of the very contract which they were denied. Clearly, that does not instill the public’s confidence in the integrity of its government, as it may raise the appearance that he will use the influence which resulted from his State employment to obtain a subcontract on a matter for which he was responsible. This does not mean that the company cannot seek to subcontract; only that he cannot represent or assist them in obtaining the subcontract.

He also asked if he could represent and assist his full-time employer in obtaining network contracts with State agencies for services which are independent of the State network contract. The example he gave was that if an agency had a need for “maybe a website,” and the contract was for less than \$50,000 then it would not have to be publicly noticed and bid. Rather, he said the agency could contract directly with a company. The problem, as we see, it is that the laws and policies on when and how a State agency can directly contract come into play when agencies are deciding if it is appropriate to deal directly with the contractor. In our prior opinion we held that, by statute, he was responsible for those laws and policies. Specifically, by law, he chaired the committee that set the standards for such “small purchases” for all State agencies. Moreover, he was involved in writing the Statewide law that established the committee and the issues it addressed. Additionally, while he was the Division Director a contract was issued for various computer services, which identifies a particular contractor who provides services for websites. Perhaps more significant is that all State agencies that participate in central contracts are required to have the appropriate agency staff participate in user groups, which were established, convened and chaired by him as the Division Director. The significance of this, is that those same agency persons are the persons he would work with to get a direct contract with their agency. This would place him in the position of dealing directly with the key people he dealt with as chair of the user group. The effect

is that he would “represent and assist” his full-time employer in matters “involving the State,” and it would require his expertise on matters on which he gave an opinion and was directly and materially responsible for while employed by the State. The effect on the public’s confidence in the integrity of its government would be that he would be able to obtain a “leg up” over his employer’s competitors because he basically wrote the rules for the “small purchase” procedures, and would be representing and assisting it before the various agencies key staffers who were part of his user group.

IV. Other Clients He Would like to Represent/Assist in Getting State Contracts

He had other interests that he would like to pursue and said it was not clear to him if under our prior ruling he would be able to engage in the activity. The example he gave was that a private client approached him in his consulting capacity to see if he could help it obtain State contracts for designing and printing brochures, etc. He asked if the Commission’s prior ruling would permit him to go before agencies other than his former division.

We first note that merely changing clients does not affect the application of the law. Since we have just ruled that he could not represent or assist his full-time employer to obtain contracts with other agencies, we must be consistent in our ruling. However, to aid him in understanding why the results are the same in this opinion and our prior opinion, we again note:

(1) The post-employment law does not limit the restriction to working on matters involving the former employee’s prior agency. Rather, it limits working on matters “involving the State,” if they are matters in which the former employee gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for while employed by the State.

(2) In his case, the statute is clear that as the Division Director, his responsibilities were beyond just his agency. Specifically, by law, his “powers, duties and functions include central contracting for material and services **throughout the State.**” (*Citation omitted*) (*emphasis added*). He made the appointments to and chaired the committee which had the responsibility to “advise as to the effectiveness of and make recommendations for changes to **the State’s** procurement laws, policies and practices.” (*Citation omitted*) (*emphasis added*). He also was responsible for the user group which consists of the key staffers from all State user agencies. (*Citation omitted*).

(3) It raises the specter that he could use his former position to get a “leg up” for

his client or exert undue influence on those making the contract decision because: (A) he wrote the rules of the small purchase procedures; (B) those rules apply to all State agencies; and (C) he worked directly with the key persons who would make the agency decision.

V. Does the 2-year Restriction Apply from the Time He Left His Division or from the Time He Left State Employment?

He worked for the Division for six years and approximately one year ago took a job with another State agency. He asked if the 2-year “cooling off” period started when he left the Division or whether it started when he left the other State agency.

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...” 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).¹⁷

However, as 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,” we have also considered whether the lapse of time changes the “matters” for which a State employee was responsible. *Commission Op. No. 99-16* (citing *CACI, Inc.-Federal v. The 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).

In *Opinion No. 99-16*, a former State employee asked to contract with the State on a computer payroll program. She worked on a computer payroll program approximately ten years prior. In that time period, the computer system, the data for the system, etc., had radically changed because of new technology and new criteria for the payroll program, etc.

Under those facts, we held that the lapse of time resulted in the program not being the same “matter” for which she had been responsible.

In our prior opinion to him, and in this opinion, we noted that the “matters” for which he was responsible were matters such as the laws, rules and regulations governing procurement. He was directly involved in the procurement laws that passed in 1996;

¹⁷This ruling is consistent with interpretations of a similar federal post-employment provision. *See, United States of America v. Coleman*, 3rd Cir., 805 F.2d 472 (1986) (federal statute restricts post-employment activities “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 had engaged in prohibited activity).

the rules and regulations implementing those laws; chaired the contracting and purchasing committee; co-authored the Procurement Guide for Small Businesses, etc. When asked what negative effect it would have on him if we concluded that the two-year period started when he terminated State employment, he said that the network services contract would be up for renewal in 2001 and he wanted to represent his full-time employer when the contract is renewed. We note again that the network services contract was a matter that was decided when he was the Division Director.

No facts indicate that the lapse of time between when he left the Division and moved to a different State agency resulted in any significant change to the procurement laws, rules and regulations, or the substance of the network contract. Thus, the 2-year period started when he terminated State employment. ***(Commission Op. No. 00-02).***