These case summaries are not legal advice or legal interpretations. They are linked to the case decisions, statutes, ordinances.

***Hanson v. Public Integrity Commission*, C.A. 11A-06-001(Del. Super., August 30, 2012).** **PIC found that a local official violated three provisions of the Code of Conduct. Commission Op. No. 10-31. The official appealed arguing that: (1) PIC had no jurisdiction over local officials; (2) PIC lacked substantial evidence to support its findings of any conflict; (3) PIC exceeded its authority when it found the official's conduct created an appearance of impropriety. The Superior Court held (1) PIC has jurisdiction over local officials under 29 Del. C. § 5802(4); (2) PIC lacked substantial evidence to find any conflict; and (3) as the appearance of impropriety found under 29 Del. C. § 5806(a) was based on the alleged conflicts that lacked substantial evidence, that finding was also reversed.**	**Superior Ct. Judge Bradley**	**Order. Superior Ct. Decision Affirmed.**
***Post v. Public Integrity Commission*, C.A. 07A-09-08 Del. Super. April 30, 2008).** **An official asked if the Town's Mayor had a conflict if the Mayor appointed his own brother to the Zoning Board, when no position existed to add anyone. The Commission advised that a conflict existed. The Mayor asked it to reconsider. It again found a conflict. Advisory Ops. No. 07-05. The Mayor appealed the advice to the Superior Court.** **(1) Can an official seek advice on another official's conduct? Yes. 29 Del. C. § 5807(c) and PIC Rules VI. (2) Can advisory opinions be appealed? No. It is not a "final" decision. Court lacks jurisdiction.**	**Superior Ct. Judge Witham**	**Order. Appellee's Motion to Dismiss—GRANTED.**
***City of Wilmington v. AFSCME,* C.A. No. 19561-NC (Del. Ch. March 21, 2003).** **While a City employee, a Code Enforcement Officer impersonated a police officer, made discriminatory comments and engaged in other improper conduct. He was terminated and sought to be reinstated under a collective bargaining agreement.** **One City argument was that under its Ethics Ordinance, his violated the public trust. Wilmington Code § 2-341 & 2-339(b) (same as State law – 29 Del. C. § 5802(1) & 5806(a)).** **(1) Can Ethics ordinances on violating "the public trust," vacate an Arbitration Award reinstating an employee if a collective bargaining contract exists?** **No. Public policy must be "explicit," "well-defined," "dominant," "ascertainable" in laws & legal precedents; not general considerations of supposed public interests.**	**Chancery Court Vice Chancellor Noble**	**Order. City's Motion to Vacate granted in part; denied in part on basis of Ethics issue.**

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	Superior	Order. Superior
***Harvey v. Zoning Board of Adjustment of Odessa*, C.A. No. 00-04-007CG (Del. Super. November 27, 2000) *aff'd* 781 A.2d 697 (Del., 2001).** **Appellant sought a writ of certiorari under 22 Del. C. § 328 asking the Court to review an Odessa's Zoning Board decision based, in part, on an alleged conflict of interest by the 3 Board members because they were related to persons who might have a personal interest in the decision.** **(1) Does the State Code of Conduct apply to Local Officials? Court said no but statute says yes. 29 Del. C. § 5802(4). It applies to local governments that do not have a Commission approved Code that is at least as stringent as the State Code. See Letter to Court.** **(2) Financial Interest – none. 29 Del. C. § 5805(a)(2).** **(3) Recusal – Would be "Prudent," even without a technical violation of the law.** **(4) If all recused, no one could make the decision. Rule of Necessity. 29 Del. C. §§ 5805(a)(3).**	**Court Judge Goldstein**	**Order. Superior Court reversed Board's Decision Reversed based on Standing; Not alleged conflict. Supreme Court affirmed. Justices Walsh, Holland, and Berger**
***Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff'd* No. 304 (Del. January 29, 1996).** **A Board Appointee's private employer had business dealings with an applicant before him. His comments were "neutral" and "unbiased." He then recused before the vote. A non-selected applicant appealed the Board's decision, and among other things, argued that the provision on reviewing or disposing of matters if a personal or private interest existed was violated. 29 Del. C. § 5805(a)(1).** **(1) When should recusal occur? From "the outset. Even "neutral" and "unbiased" remarks should occur.** **(2) Did the conduct rise to the level of a Constitutional due process violation? No.** **Board appointee went before his former Board. The law bars representing a private entity before the State for 2 years if the official was directly and materially responsible for the matter. 29 Del. C. § 5805(d).** **Was the former official "directly and materially" responsible? No. He had not worked on those particular applications while on the Board.**	**Superior Court Judge Terry. Delaware Supreme Court, *aff'd.*, No. 304 01/29/96**	**Superior Court Order. Board's decision affirmed. Supreme Court Order. Superior Court decision affirmed. Chief Justice Veasey, Justices Holland and Berger**
***Prison Health Services, Inc. v. State*, C.A. No. 13,010 (Del. Ch. July 2, 1993).** **29 Del. C. ch. 58. Note: The Court did not identify a specific provision in this Chapter.**	**Del. Chancery Vice Chancellor Hartnett III**	**Order. Prelim injunction denied.**

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Prison Health, a non-selected contractor sought an injunction on a contract between the Corrections' Department and ARA to give health services. Prison Health alleged a conflict because a State employee, not on the selection committee, discussed the contract with the committee before making its decision, when his spouse was an ARA employee. **Is it a conflict for a State employee to discuss a contract with a selection committee if his spouse works for a bidder?** **Yes. Although he was not on the Committee; did not vote; no facts showed undue influence; and his wife was a low-level ARA employee, the Court said even "indirect" and "unsubstantial" participation is "undoubtedly improper."**		
***Howell v. State,* 421 A.2d 892 (Del. 1980).** **Official used State employees to work on his private home during State hours. After it was discovered, he did not repay the funds in a timely manner.** **He was charged under the criminal law with using his office "to obtain a personal benefit," and the Attorney General's office argued that complying with the ethics law was a "clearly inherent" official duty. 11 Del. C. § 1211. Defendant said his conduct may be unethical, but not criminal. The Court distinguished the *Green* case below.** **The Code of Conduct has a similar provision against using public office for personal benefits. 29 Del. C. § 5806(e). Administrative penalties can be imposed. *See Green below.* Codified at 29 Del. C. § 5810(f).**	**Superior Court Defendant entered a "Robinson" plea of guilty to 2 counts of official misconduct. Judge imposed sentence greater than that recommended by prosecutor. Defendant appealed.**	**Delaware Supreme Court Order. Judgment and Sentences affirmed. Chief Justice Herrmann; Justices Duffy and Horsey.**
***State v. Green*, 376 A.2d 424 (Del. Super. 1977).** **A State Banking official, who did not disclose he accepted loans from a bank under his regulatory authority, was charged under the criminal law with, among other things, using his office with intent "to obtain a personal benefit" by knowingly refraining from performing a duty which "is clearly inherent in the nature of his office." 11 Del. C. § 1211. The basis of the charge was that public servants must avoid conflicts.** **Is avoiding conflicts under the Ethics law a "clearly inherent duty" of an official under the Criminal Code?** **No. The Ethics law says officials must have the benefit of specific standards to guide their conduct and some**	**Superior Court Judge Balick**	**Order. Indictment Dismissed**

standards are so vital to government that violation thereof should subject the violator to criminal penalties. 29 Del. C. § 5851(2), now 29 Del. C. § 5802(2). **If avoiding unspecified conflicts of interest or other ethical standards were an "inherent duty," it would defeat the purpose of having "specific standards."** **Also, the ethics duty to disclose unsecured loans exceeding $5000 from entities subject to the regulatory jurisdiction of a State agency, is not legislatively deemed as so "vital" it carries a criminal penalty. 29 Del. C. § 5855(f)(3).[1] Rather, the person is subject to administrative penalties: removal, suspension, demotion, or other disciplinary action. 29 Del. C. § 5858(c)(4), now 29 Del. C. § 5810(d).**		
[1] Current law: State Executive Branch and local employees and officials, must file full disclosures of "financial interests" in a private entity that does business with, or is regulated by, their government's agencies. 29 Del. C. § 5806(d). The threshold is $5,000. "Financial interest" does not specifically refer to unsecured loans. 29 Del. C. § 5804(5). Also, apart from the Ethics law, the Financial Disclosure law for Elected officials, judges, and senior level Executive Branch officials, requires disclosing just the creditor if the officer owed more than $1,000 for more than 90 days. 29 Del. C. § 5813(5).		
***W. Paynter Sharp & Son v. Heller*, 280 A.2d 748 (Del. Ch. 1971).** **A Board appointee bid on a contract issued by the agency when his Board was under that same agency.** **Can an official be barred from a contract with his own agency, based on a Cabinet Secretary's policy to avoid allegations or suggestions of undue influence?** **Yes. Court noted no conflict statute existed at the time, but said the award of public work contracts has been suspect, often, because of alleged favoritism, undue influence, conflicts and the like. It said: the record did not show undue influence; the contract was publicly noticed and bid; his bid was $9,000 less than other bidders, etc. It said, despite the saving of taxpayer funds, it was vital that a public agency have the people's confidence and, for this reason, it must avoid not only evil but the appearance of evil as well.** **Since the decision, a conflict statute was passed. The bar on employees and Board appointees representing or assisting a private entity before their agency is now codified. For senior officials, it is more stringent. They are barred from private dealings with any State agency. 29 Del. C. § 5805(b)(1) & (b)(2).** **Also, the Legislative findings cite the need for public confidence and some standards so vital as to require a criminal penalty. 29 Del. C. § 5802(1) & (2).**	**Chancery Court Chancellor Duffy.**	**Order. Plaintiff's motion for injunctive relief denied.**

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***In re Ridgely*, 106 A.2d 527 (Del. 1954).** **A State prosecutor also had a private law firm. A complainant asked that the seller of a car with rolled back mileage be prosecuted. The prosecutor did not file criminal charges but took the case for his private practice.** **He also appeared in his private capacity before a State Board which he also represented in his State capacity.** **His representation of private clients expanded to appearances before other State agencies.** **(1) Should a State prosecutor refer a criminal complaint to his private firm as a civil matter and ignore his State duties on that matter?** **No. A prosecutor cannot perform his public duties if his personal interests are involved and his private representation gave him a personal interest. Restriction on "personal or private interests now codified. 29 Del. C. § 5805(a).** **(2) Should a State Attorney represent or assist a private client before a State Board when he is normally the Board's advisor?** **No. It was improper for him to represent a private client before the Board because it created the "unseemly appearance" of one State officer trying to uphold the State's case, and the other to overthrow it. The Court said it would have reached the same result even if Ridgely had not appeared in Court. Restriction on representing or otherwise assisting a private enterprise before one's own agency now codified. 29 Del. C. § 5805 (b)(1).** **(3) Should a State attorney represent or assist a private client before State Boards when he is the Board's legal counsel?** **No.** **May create appearance of impropriety, but the General Assembly should create that bar, not the Court. Code now has an appearance of impropriety provision. 29 Del. C. § 5806 (a).** **(4) Can another attorney, who is associated with the officer/private attorney, handle the case?** **Not in this case. However Delaware Lawyers' Rules of Professional Responsibility, Rule 1.11 now provides that current and former government employees may be**	**Del. Supreme Court. Chief Justice Southland, and Justices Wolcott and Tunnell**	**Order. Disciplinary action: severe reprimand, if certain conditions are met—return fees improperly collected' fees should not be collected or retained, since it represents payment for work done in opposing the State's interests. If he does not comply, the matter will be further considered.**

subject to the government conflict laws. It does not give authority to regulate attorneys but establishes the extent to which the government may consent. Purpose is to insure no undue influence, etc. Rule 1.11 cmt 1. It also is to encourage people to accept public jobs. *cmt*. Same reason is now in the Code of Conduct. 29 Del. C. § 5802(3). [2] **(5) Does the Court only consider the Lawyers' Rules of Conduct when the lawyer is a public officer?** **No. It said: "We think it unnecessary to decide if the case falls within the language of the canons cited by the Censor Committee, as a prosecutor's public duties must command precedence.** **(6) Appearance concerns: The Court said it is cast upon the official to decide for himself the limits circumscribing his private practice. It is easy to say that in a doubtful case he should decide against himself. That is true. "But lawyers, of course, are subject to human weakness, and the inevitable result is that in some cases -- relatively few, we like to think -- considerations of self-interest will entice the holder of the office away from the performance of his duty. Now the Public Integrity Commission makes the conflict decision so persons in its jurisdiction do not have to decide for themselves.** **The law now says Justice Department attorneys may not be a private attorney where the State or local governments have an interest. Full-time attorneys cannot engage in any private practice. 29 Del. C. § 2509 & § 2511(b). Some Public Defenders also are barred from private practice. 29 Del. C. § 4603(d).**		

[2] The Commission does not interpret the Lawyers' rules. It is the Delaware Supreme Court's area. The Commission's role is to decide to what extent, if any, a State agency client, may waive the conflict. Rule 1.11, *cmt. 1.*

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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RE: Diane Hanson v. Delaware State Public Integrity Commission
C.A. No: 11A-06-001 (ESB)

Dear Counsel:

This is my decision on Diane Hanson's appeal of the Delaware State Public Integrity Commission's ("PIC") finding that she violated the State Employees,' Officers' and Officials' Code of Conduct (the "Code of Conduct") when, as a town commissioner for Dewey Beach, she voted in favor of an ordinance purportedly clarifying the height limit applicable to structures in the Resort Business-1 ("RB-1") zoning district in Dewey Beach. This case arises out of the efforts by Dewey Beach Enterprises ("DBE") to re-develop a commercial development known as Ruddertowne in Dewey Beach, litigation filed by DBE against Dewey Beach, Hanson and other Dewey Beach officials when its development efforts were unsuccessful, and Dewey Beach's efforts to deal with that litigation. Hanson was at all times relevant hereto a Dewey Beach town commissioner, a resident of Dewey Beach, and an owner of two oceanside rental properties in Dewey Beach. DBE submitted to the Dewey Beach town commissioners a Concept Plan to re-develop Ruddertowne,

which is located in the RB-1 zoning district. The Concept Plan proposed, among other things, a 120 room five-star hotel and condominium in a structure that was to be 68 feet tall. Hanson and all of the other town commissioners voted against the Concept Plan. DBE then filed a lawsuit against Dewey Beach, Hanson and other Dewey Beach officials in the United States District Court for the District of Delaware, alleging a host of constitutional and other violations (the "Federal Case"). DBE sued Hanson in both her official and individual capacities. An issue in the lawsuit was whether Dewey Beach's longstanding 35 foot height limit had been relaxed for the RB-1 zoning district when Dewey Beach enacted its 2007 Comprehensive Land Use Plan. While the Federal Case was pending, Hanson and other town commissioners passed an ordinance purportedly clarifying the height limit, stating that it was 35 feet and making it retroactive to the adoption of the 2007 Comprehensive Land Use Plan (the "Clarifying Ordinance"). A Dewey Beach property owner then filed a complaint with PIC, alleging that Hanson voted in favor of the Clarifying Ordinance to protect her rental properties from having to compete with DBE's proposed hotel and condominium and to enhance her legal defenses in the Federal Case. PIC investigated the matter, held a "hearing," and concluded that Hanson did have several conflicts of interest and never should have voted in favor of the Clarifying Ordinance. Hanson then filed an appeal of PIC's decision with this Court. I have reversed PIC's decision, concluding that it is not supported by substantial evidence in the record and violates PIC's own rules of procedure.

I. Ruddertowne

DBE released its Concept Plan for Ruddertowne to the public on June 15, 2007. Ruddertowne consists of 2.36 acres of land and existing improvements located near Rehoboth Bay on the western side of Coastal Highway in Dewey Beach. The Concept Plan proposed a welcome

center, a bayside boardwalk, public restrooms, a 120 room five-star hotel and condominium, public parking, a convention center, and a funland for children in a structure that was to be 68 feet tall. The Ruddertowne Architectural Review Committee, which was created specifically to review the Concept Plan, voted to approve the Concept Plan after seven public meetings. The town commissioners then held a public hearing to introduce an ordinance allowing the Concept Plan to proceed and sent the ordinance to the Planing & Zoning Commission for review. The Planning & Zoning Commission voted to reject the ordinance on October 19, 2007. The town commissioners voted unanimously to reject the ordinance on November 10, 2007.

DBE then submitted an application for a building permit and a site plan for a three-story, mixed-use structure for an expansion of Ruddertowne in early November, 2007. The site plan would expand Ruddertowne by removing portions of the existing commercial building and adding a parking garage and 62 residential units in a structure that would only be 35 feet tall. Dewey Beach told DBE that its alternative plan did not comply with a provision of Dewey Beach's zoning code requiring a 3,600 square-foot lot for each residential unit. DBE appealed this decision to the Board of Adjustment on January 23, 2008. The Board of Adjustment denied DBE's appeal, reasoning that DBE's site plan did not meet the minimum lot requirement. DBE filed an appeal of this decision with the Superior Court, which affirmed the Board of Adjustment's decision.[1] DBE then filed an appeal of the Superior Court's decision with the Supreme Court, which reversed the Superior Court's decision and ruled in favor of DBE, concluding that the minimum lot requirement was ambiguous.[2]

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[1] *Dewey Beach Enterprises, Inc., v. Board of Adjustment of the Town of Dewey Beach*, 2009 WL 2365676 (Del. Super. July 30, 2009).

[2] *Dewey Beach Enterprises, Inc., v. Board of Adjustment of the Town of Dewey Beach*, 1 A.3d 305 (Del. 2010).

While DBE's site plan was working its way through the zoning and appeal process, DBE submitted building permit applications to Dewey Beach for Phases II and III of its Concept Plan on April 4, 2008. DBE also repeatedly asked Dewey Beach to either process its building permit applications, or place them before the Board of Adjustment. Dewey Beach did not comply with DBE's requests.

II. The Federal Case

Frustrated with how its development plans were being treated, DBE and Ruddertowne Redevelopment, Inc. ("RRI") filed a complaint against Dewey Beach, Dell Tush ("Mayor Tush"), David King ("King"), Hanson and Richard Hanewinckel ("Hanewinckel") in the United States District Court for the District of Delaware on July 10, 2009. The complaint alleged: (1) violations of substantive due process under 42 U.S.C. §1983 (Count I); (2) §1983 violations of procedural due process (Count II); (3) §1983 violations of the Equal Protection Clause (Count III); (4) regulatory taking (Count IV); (5) 42 U.S.C. §1985 civil conspiracy (Count V); (6) 42 U.S.C. §1986 failure to prevent actionable harm (Count VI); (7) First Amendment free speech and petition violations (Count VII); (8) equitable and promissory estoppel (Count VIII, DBE against all defendants; Count IX, RRI against all defendants); and (9) abuse of official power and violation of substantive due process against the individual defendants (Counts X-XIII). In connection with these allegations, DBE sought compensatory and punitive damages, attorneys' fees, costs, pre-and post-judgment interest, and injunctive relief. DBE further alleged that Hanson, Wilson, and Mayor Tush should have recused themselves from the Ruddertowne matters because each owned rental properties in Dewey Beach that would be adversely affected "should the Concept Plan be approved and built." DBE also alleged that these individuals wrongfully worked to defeat and/or against its proposed ordinance

because of these personal interests. Dewey Beach filed a motion to dismiss the plaintiffs' complaint with respect to all counts. Mayor Tush, King, Hanson, and Hanewinckel (collectively, the "Individual Defendants") also filed a motion to dismiss.

Dewey Beach's motion to dismiss set forth nine grounds for dismissal of the plaintiffs' complaint. Specifically, Dewey Beach argued that: (1) DBE's claims challenging Dewey Beach's denial of the RB-1 68 foot ordinance were unripe because DBE failed to seek a variance or other available remedy; (2) because a municipality cannot be held liable for a §1983 claim under the respondent superior doctrine articulated in *Monell v. N.Y. City Dep't of Social Services*,[3] DBE did not identify or attribute a wrongful custom or policy to Dewey Beach; (3) DBE's due process rights were not violated because the legislative and executive actions at issue were rationally based and did not shock the conscience; (4) DBE's equal protection claims failed because it did not identify a similarly situated party and Dewey Beach's actions were rationally based; (5) DBE's procedural due process claim failed both because DBE did not have a constitutionally protected property right and because there was no viable procedural due process claim for legislative acts; (6) no regulatory taking occurred because DBE had not sought a state remedy and viable uses of the property remained; (7) there were no actionable First Amendment claims because Dewey Beach did not engage in retaliation and would have reached the same determination irrespective of the party involved; (8) the state law estoppel claim failed because the alleged damages were not recoverable in an estoppel claim under Delaware law; and (9) DBE's §1985 and §1986 claims failed because the complaint did not allege a conspiracy and no underlying constitutional violation existed. The District Court granted Dewey Beach's motion to dismiss with respect to Count III (Equal Protection)

[3] 436 U.S. 658 (1978).

and Counts VIII and IX (Equitable Estoppel), and denied its motion to dismiss in all other respects.[4]

The Individual Defendants' motion to dismiss set forth three grounds for dismissal of DBE's complaint. Specifically, they argued that the District Court should grant their motion because the Individual Defendants were: (1) immune from suit under the *Noerr-Pennington* doctrine[5]; (2) entitled to legislative immunity for all actions involving zoning ordinances; and (3) entitled to qualified immunity for all non-legislative actions. The District Court rejected the Individual Defendants' *Noerr-Pennington* doctrine argument and concluded that, given the state of the facts that at the time, the doctrines of legislative immunity and qualified immunity could not be applied.

III. The Clarifying Ordinance

Although it was hardly mentioned in the District Court's decision, an important issue in the consideration of DBE's Concept Plan and the Federal Case was whether the maximum building height for structures in the RB-1 zoning district was 35 feet. Dewey Beach had adopted its most recent land use plan on June 29, 2007. The 2007 Comprehensive Land Use Plan provided that in the RB-1 zoning district "Relaxed bulk standards" were available for contiguous tracts of land consisting of at least 80,000 square feet. Ruddertowne was in the RB-1 zoning district. DBE believed that the maximum building height for the proposed structure in its Concept Plan was also relaxed. However, not everyone shared DBE's view. In order to resolve the issue, Dewey Beach introduced the Clarifying Ordinance, which stated, among other things, that:

. The 2007 Comprehensive Plan provides that in the Resort Business-1 (RB-1)

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[4] *Dewey Beach Enterprises, Inc., v. Town of Dewey Beach,* 2010 WL 3023395 (D. Del. July 30, 2010).

[5] See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965).

> zoning district "Relaxed bulk standards" (setbacks, lot coverage, etc.) are available for contiguous tracts consisting of at least 80,000 square feet with a detailed commercial, mixed- and multi-family land-use development-plan review as an overlay district or alternate method of development, provided that there is public access to all common areas of the development and any waterfront area shall be public use.
>
> Section 2. The Commissioners of the Town of Dewey Beach further clarify their intent that "Relaxed bulk standards" for contiguous tracts consisting of at least 80,000 square feet, as that phrase is used in the 2007 Comprehensive Plan's description of the RB-1 zoning district, does not permit any height increase beyond 35 feet, which is (and has been) the maximum height in all zoning classifications in Dewey Beach.
>
> Section 4. This Ordinance, upon adoption by a majority vote of all Commissioners of the Town of Dewey Beach, shall be effective immediately and shall apply retroactively to June 29, 2007, the date of adoption of Ordinance No. 597. It is the express intent that this clarification ordinance apply retroactively.

Hanson and two other town commissioners voted in favor of the Clarifying Ordinance on September 11, 2010, causing it to pass.

IV. Joseph Nelson's Complaint

Joseph W. Nelson, a Dewey Beach property owner and resident of Milton, Delaware, filed a five-page complaint against Hanson with PIC on October 1, 2010. His complaint focused on DBE's efforts to re-develop Ruddertowne and the Clarifying Ordinance. Nelson alleged that Hanson violated the Code of Conduct when she voted in favor of the Clarifying Ordinance by (1) intentionally withholding information so that she could mislead the public regarding passage of the Clarifying Ordinance, (2) failing to reveal obvious conflicts of interest, and (3) taking actions in violation of the public trust that reflected unfavorably upon the State and its government. Attached to Nelson's complaint were a copy of the Clarifying Ordinance and a series of e-mails between a State Representative and the State Director of Planning about the Clarifying Ordinance.

V. The Rules for PIC Proceedings

PIC has adopted rules governing its proceedings.[6] The Code of Conduct also sets forth rules governing how PIC is to proceed.[7] The process generally starts with the filing of a sworn complaint with PIC by a person alleging a violation of the Code of Conduct.[8] PIC then meets to review the complaint to determine if it is frivolous or states a violation.[9] If PIC determines that the complaint sets forth a violation, then PIC sets the matter down for a hearing.[10] PIC's legal counsel is the prosecutor at the hearing.[11] The complaint must be served on the person charged with violating the Code of Conduct.[12] The complaint must specifically identify each portion of the Code of Conduct that the person is alleged to have violated and the facts upon which each alleged violation is based.[13] The burden of proving violations of the Code of Conduct is on the prosecutor and such violations must be proven by clear and convincing evidence.[14] The clear and convincing evidentiary standard is an intermediate evidentiary standard, higher than mere preponderance, but lower than proof

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[6] Rules of the Delaware State Public Integrity Commission ("PIC Rule").

[7] 29 *Del. C.* §5810

[8] *Id.*; PIC Rule III.

[9] PIC Rule III(A).

[10] PIC Rule III(A)(1).

[11] 29 *Del. C.* §5810(a); PIC Rule IV(A).

[12] PIC Rule IV(c)(1).

[13] PIC Rule IV(c)(2).

[14] PIC Rule IV(k).

beyond a reasonable doubt.[15] The hearing is to proceed as follows:

> (1) The Chairperson or the Chairperson's designee shall open and preside at the hearing.
> (2) An opening statement by the Prosecutor.
> (3) An opening statement by the Respondent.
> (4) Witnesses and other evidence by the Prosecutor.
> (5) Witnesses and other evidence by the Respondent.
> (6) Rebuttal witnesses and other evidence by the Prosecutor, if appropriate.
> (7) Witnesses may be cross-examined by the opposing party. Redirect examination and recross-examination may be permitted in the Commission's discretion. Commission members may also question witnesses.
> (8) Closing argument by the Prosecutor.
> (9) Closing argument by Respondent.
> (10) Rebuttal closing argument by the Prosecutor, if appropriate.[16]

Four members of PIC constitute a quorum and sanctions may be imposed only by the affirmative action of at least four members.[17] PIC's decisions must set forth (a) findings of fact based on the evidence, (b) conclusions of law as to whether the Respondent has violated the Code of Conduct, and (c) what sanctions PIC is imposing if violations of the Code of Conduct are found.[18] PIC members, if any, who disagree with PIC's decision may file dissenting opinions.[19]

VI. PIC's Proceedings Against Hanson

Nelson's complaint against Hanson was filed with PIC on October 1, 2010. The Code of Conduct and PIC's rules of procedures require complaints to be sworn. Nelson's complaint was not properly sworn. Nelson signed his complaint twice. Below his second signature, Wendy L.

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[15] *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2012 WL 1869416, (Del. Ch. May 16, 2012).

[16] PIC Rule IV(L).

[17] PIC Rule IV(N); 29 *Del. C.* §5808(d).

[18] PIC Rule IV(O).

[19] *Id.*

Compton, a notary public for the State of Delaware, signed her name and placed her notary seal below her signature. The requirements for a properly sworn and notarized statement are set forth in 29 *Del. C.* §4327. Essentially, Nelson had to swear or affirm that the statements that he was making were true and correct. He did not do that. Nevertheless, PIC accepted his complaint and the allegations in it as true and correct.

PIC met and voted to proceed against Hanson on October 15, 2010. PIC preliminarily found (the "Preliminary Decision") that when Hanson voted in favor of the Clarifying Ordinance she violated (1) 29 *Del. C.* §5805(a)(2)(a) and (b) because the Clarifying Ordinance would make it more difficult for DBE's bayside hotel and condominium to compete with her oceanside rental properties; (2) 29 *Del. C.* §5805(b) because the Clarifying Ordinance would aid her defenses in the Federal Case; and (3) 29 *Del. C.* §5806(a) because the public might suspect that she was using her public office to benefit her own interests. The Preliminary Decision was issued on November 22, 2010. Hanson filed a Motion to Stay on February 7, 2011. PIC denied it on February 28, 2011. Hanson filed a Motion to Dismiss and a Response to the Preliminary Complaint on March 8, 2011.

PIC held a hearing on Hanson's Motion to Dismiss on March 15, 2011. Hanson's attorney called Hanson, Glenn C. Mandalas, Esq., and Max B. Walton, Esq., to testify. Mandalas represented Dewey Beach in the Federal Case. Walton represented Hanson and the other individual defendants in the Federal Case. Hanson testified about her longstanding support of the 35 foot height limit, the Clarifying Ordinance, her rental properties, and quality of life issues. Mandalas and Walton testified about the Clarifying Ordinance, the Dewey Beach zoning code and the Federal Case. Hanson's attorney offered the testimony of Hanson, Walton and Mandalas in an effort to show that Hanson had no conflicts of interest when she voted in favor of the Clarifying Ordinance. Even though PIC's

counsel had the burden of proof, she called no witnesses and introduced no exhibits. PIC's counsel did cross-examine Hanson and the two lawyers.

PIC denied Hanson's Motion to Dismiss and issued a Final Disposition Opinion on May 13, 2011. Its Final Disposition Opinion was based on Nelson's complaint, an article in the *Cape Gazette*, advertisements for Hanson's oceanside rental properties, a map of Dewey Beach, the District Court's decision, an open letter from the Dewey Beach town manager about the settlement of the Federal Case, the settlement agreement for the Federal Case, Sussex County tax records for Hanson's properties, and the Dewey Beach zoning map.

PIC found that when Hanson voted in favor of the Clarifying Ordinance she violated (1) 29 *Del. C.* § 5805 (a)(1) because the Clarifying Ordinance would help her rental properties compete with DBE's hotel and condominium, (2) 29 *Del. C.* § 5805 (a)(1) because the Clarifying Ordinance would improve her quality of life, (3) 29 *Del. C.* § 5805 (a)(1) because the Clarifying Ordinance would help her qualified immunity defense in the Federal Case, and (4) 29 *Del. C.* §5806 (a) because the public might suspect that she was using her public office to benefit her own interests. In reaching its conclusions, PIC found that Hanson had conflicts of interest involving her rental properties, qualified immunity defense in the Federal Case, and quality of life. I have summarized PIC's reasoning as follows:

(a) Hanson's Rental Properties

Hanson has two oceanside rental properties. DBE wanted to build a 120 room five-star hotel and condominium in a 68 foot tall structure on the bay. Hanson's rental properties and DBE's hotel would compete with each other for the same tenants. The Clarifying Ordinance would limit DBE's structure to 35 feet, making the hotel smaller or non-existent and a less fearsome competitor to

Hanson. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(b) Hanson's Quality of Life

Hanson was concerned about her quality of life. She believed that DBE's large structure would bring in more traffic and people and diminish her quality of life. The Clarifying Ordinance would reduce the size of DBE's structure, which would reduce the traffic and congestion associated with it, which would minimize the impact on Hanson's quality of life. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(c) Hanson's Qualified Immunity Defense

Hanson was sued personally in the Federal Case, putting her at risk of having to pay both a judgment and attorney's fees. The Clarifying Ordinance would help her qualified immunity defense in the Federal Case. Hanson's attorney told her that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case. Thus, Hanson had an impermissible conflict of interest when she voted in favor of the Clarifying Ordinance.

(d) Hanson's Appearance of Impropriety

Lastly, according to PIC, if the public was aware of all of Hanson's conflicts of interests it would conclude that she was using her public office to advance her own interests.

VII. The Standard of Review

The standard of review on appeal is whether PIC's decision is supported by substantial evidence on the record.[20] Substantial evidence is that which "a reasonable mind might accept as

[20] 29 *Del.C.* §5810A.

adequate to support a conclusion."[21] It is more than a scintilla, but less than a preponderance of the evidence.[22] It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency.[23]

VIII. Hanson's Arguments

Hanson argues that (1) PIC does not have jurisdiction to hear and decide conflict of interest matters involving municipal officials, (2) there is not substantial evidence in the record to support PIC's finding that the Clarifying Ordinance would help her rental properties compete with DBE's hotel, (3) PIC exceeded its statutory grant of authority when it found that the Clarifying Ordinance would improve her quality of life, (4) there is not substantial evidence in the record to support PIC's finding that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case, and (5) PIC exceeded its statutory grant of authority when it found that she had an appearance of impropriety.

(a) PIC's Jurisdiction

Hanson argues that the Code of Conduct does not apply to her because she is a town officer, not a State officer. Her argument is based on a conflict between the scope and definitional sections of the original Code of Conduct and an amendment to the Code of Conduct enacted by the legislature

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[21] *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)).

[22] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F.Supp. 110 (D.Del. 1983)).

[23] *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976).

to make the Code of Conduct applicable to counties, municipalities and towns. The Code of Conduct, as originally enacted, did not apply to town officers. It only applied to certain State employees, officers and honorary officials. The Code of Conduct generally prohibits State employees, officers and honorary officials from participating on behalf of the State in the review or disposition of any matter pending before the State in which the State employee, officer or honorary official has a personal or private interest.[24] It also generally requires State employees, officers and honorary officials to behave in such a manner that will not cause the public to suspect that the State employee, officer or honorary official is engaging in acts which are in violation of the public trust and which will reflect unfavorably upon the State.[25] The definition of State employee covers anyone who receives compensation as an employee of a State agency, anyone who serves as an appointed member, trustee, director or the like of any State agency and who receives more than $5,000 per year, and elected or appointed school board members.[26] The definition of State agency excludes political subdivisions of the State and their agencies.[27] However, the legislature changed the scope and application of the Code of Conduct when it added 29 *Del. C.* § 5802(4), which states:

> It is the desire of the General Assembly that all counties, municipalities and towns adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials. This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993. No code of conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of this subchapter unless the code of conduct

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[24] 29 *Del. C.* §5805(a).

[25] 29 *Del. C.* §5806(a).

[26] 29 *Del. C.* §5804(12).

[27] 29 *Del. C.* §5804(11).

> has been submitted to the State Ethics Commission and determined by a majority vote thereof to be at least as stringent as this subchapter. Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter.

When the legislature added §5802(4) it did not amend the rest of the Code of Conduct, leaving conflicting language in the scope and definitional sections. Even though the legislature never amended the rest of the Code of Conduct to make it consistent with §5802(4), both the plain language of §5802(4) and intent of the legislature are clear.[28] §5802(4) states that "[t]his subchapter (which is the subchapter setting forth the scope of the Code of Conduct) shall apply to any County, Municipality or Town and the employees and elected officials thereof which has not enacted such legislation by July 23, 1993" that has been approved by the State Ethics Commission. This language and the legislature's intent could not be more clear. Thus, the Code of Conduct applies to Dewey Beach and Hanson. Dewey Beach does not have a code of conduct approved by PIC. Hanson is an elected official of Dewey Beach. Therefore, I have concluded that PIC has jurisdiction over Hanson as a Dewey Beach town commissioner.

(b) Hanson's Rental Properties

Hanson argues that PIC's finding that her two oceanside rental properties would compete with DBE's bayside hotel and condominium is not supported by substantial evidence in the record.

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[28] *Alexander v. Town of Cheswold*, 2007 WL1849089, at *2 (Del. Super. June 27, 2002) ("Interpreting a statute is a question of law. When interpreting a statute, "the predominant goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.' "Thus, if looking at the plain meaning of the statute it is clear what the intent of the legislature is, then the statute is unambiguous and the plain meaning of the statute controls. If the statute is ambiguous, meaning if it is "reasonably susceptible of different conclusions or interpretations," then the Court must attempt to ascertain the intent of the legislature. In doing so, if a literal interpretation causes a result inconsistent with the general intent of the statute, "such interpretation must give way to the general intent" to allow the court to promote the purpose of the statute and the legislature's intent.")(Citations omitted).

PIC relied on the following evidence in the record to support its finding:

(1) The following statement in Nelson's complaint to PIC:

> The situation is exacerbated by the facts [*sic*] that Commissioner Hanson owns rental income property in Dewey Beach and I am informed she has previously said that the redevelopment of Ruddertowne would jeopardize her rental income, thereby creating a conflict of interest. (Emphasis added.)

(2) Hanson's statement in a *Cape Gazette* interview dated September 12, 2007:

> What height and type of construction (a 68-foot hotel/condo hybrid or 48 townhouses) do you feel is best for Ruddertowne?

Hanson: A 120-unit 5-star condo/hotel complex is not a town center. I would like to see a third option of a mixed-use complex that follows our current zoning laws at a height of 35 feet – one that is truly a town center. However, because Harvey, Hanna and Associates have refused to negotiate, we have only a choice between a massive hotel and townhouses at this time. If the hotel is allowed to breach our current height limit, buildings of 68 feet will quickly spread along the business zone from Van Dyke to Rodney avenues. The hotel will also compete with property owners who rent their homes or for those selling their properties. (Emphasis added.)

(3) Hanson's testimony at the hearing. Hanson acknowledged during the hearing that both she and DBE would be offering rentals in Dewey Beach, that renters could stay in her rentals or DBE's rentals, that people who had rented from her had also rented on the bay.

(4) DBE's proposed hotel and condominium is close to Hanson's rental properties, being two blocks past Hanson's Sea Mist Villa and one block past Hanson's Sea Dune Villa.

PIC reasoned that since both Hanson and DBE would both be renting rooms in Dewey Beach that they were in the same market and thus in competition with each other, stating "It is this proximity and competition for essentially the same ocean space, and for the same market, that puts her in a different class than others." PIC supported its reasoning, stating "[t]he very meaning of competition is the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms."

I have concluded that PIC's analysis of the rental market in Dewey Beach is overly simplistic and that its ultimate conclusion is not supported by substantial evidence in the record. Quite simply, while PIC defined what competition is, it never addressed the factors that a Court looks at to determine if people are competitors.

The statements in Nelson's letter and the *Cape Gazette* article are unpersuasive. Nelson did not testify at the hearing and his five-page complaint is not properly sworn. Nelson did not state that he heard Hanson admit that DBE's hotel would compete with her rental properties. He instead stated that someone told him that they heard Hanson say this. This is double hearsay. As such it is inherently unreliable because no one knows who made the statement and the person making the statement was not subject to cross-examination. An unsworn statement that is double hearsay is proof of nothing. Hanson only stated in the *Cape Gazette* interview that DBE's proposed hotel and condominium would hurt rental properties in general. She did not say that they would compete with her rental properties. Indeed, Hanson was adamant during her testimony at the hearing that DBE's bayside hotel offered no competition for her oceanside houses.

Hanson's statements at the hearing are similarly unpersuasive. The mere fact that both she and DBE offer rentals in Dewey Beach and that people could stay at either one does not mean that they would and it does not mean that she and DBE would be competitors. Hanson's statement that a person who had rented on the bay had also rented from her was taken out of context by PIC. What Hanson actually said was that she had a tenant who rented her oceanfront house who had rented property on the bay the previous year and decided it was worth $1,500 more per week to rent on the ocean to avoid having to cross Coastal Highway with her belongings and children in order to get to the ocean. This does not support PIC's finding. It does support the finding that Hanson's rentals

are very different from bayside rentals and cost substantially more to rent.

Competition is usually defined more narrowly than PIC defined it. It has been stated that competition "entails more than mutual existence in the marketplace; rather, it requires an endeavor among business entities to seek out similar commercial transactions with a similar clientele."[29] Put another way, competitors are those "who vie for the same dollars from the same consumer group."[30] In order to determine if people are actually competing with each other for the same consumers you have to "compare all relevant aspects of the products, including price, style, intended uses, target clientele, and channels of distribution."[31] It is this critical step that PIC never took in its analysis of the Dewey Beach rental market.

PIC never examined or compared the price and nature of Hanson's oceanside rentals to the price and nature of DBE's hotel. Merely because Hanson and DBE would be renting rooms in the same town hardly means that they would be competing with each other, particularly given what is known about each property suggests just the opposite and what is unknown about each property is substantial and important.

PIC assumed that Hanson's rental properties and DBE's hotel are similar enough in nature, location and price to appeal to the same group of potential renters. That assumption is not supported by the evidence. Hanson has two rental properties in a residential area. Sea Mist Villa is a three-story, four-bedroom, two bath, oceanfront house. Three of the bedrooms have adjoining decks with

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[29] *McKinnon v. CV Industries, Inc.*, 2012 WL 2107119 (N.C. Super. June 11, 2012).

[30] *West v. Gold, Inc.*, 2012 WL 2913207 (N.D. Cal. July 16, 2012).

[31] *Toni & Guy* (USA) Ltd. v. Nature's Therapy, Inc., 2006 WL 1153354 (S.D.N.Y. May 1, 2006).

two of the decks overlooking the ocean. The living area has a large deck that overlooks the ocean. Sea Dune Villa is a six-bedroom, four and one-half bath second story condominium one house back from the ocean. It has a screened-in porch, several decks, a two-car garage and ocean views from nearly all of the rooms.

DBE has proposed building a 120 room hotel in a commercial area on the bay. Virtually nothing is known about the rooms it plans to offer. What is known is that Hanson's rental properties are very large with multiple bedrooms and are oceanfront and one house back from the ocean. DBE's hotel will be on the bay. Hanson's rental properties and DBE's hotel are separated by Coastal Highway, a four-lane highway with two lanes in each direction separated by a median. Hanson's tenants do not have to cross this very busy highway to get to the ocean. DBE's tenants will have to cross it to get to the ocean and cross it again to get back to their rooms. PIC minimized this inconvenience, stating that "The other side of Route 1 is not the dark side of the moon" and that Hanson's and DBE's rentals are "across the street" from each other. Well, the street is a major highway that people do not like to cross and will pay a lot of money to avoid. Obviously, those who want to pay less will do so and rent on the bayside. Those who want to pay more will do so and rent on the oceanside. Hanson's rental properties are located in the most desirable area of Dewey Beach and DBE's proposed hotel is not.

Moreover, what is not known about Hanson's and DBE's rental properties is substantial and important. There is no evidence in the record about how much Hanson charged for her oceanside properties or what DBE planned to charge for its bayside hotel rooms. Price is always an important consideration and there is no evidence in the record about it.

PIC concluded that a four bedroom ocean front house and a six bedroom condominium one

house back from the ocean in a residential area on the other side of a major highway will compete with hotel rooms of an unknown size on the bay in a commercial area. There simply is not substantial evidence in the record to support this finding.

(c) Hanson's Quality of Life

Hanson argues that PIC exceeded its statutory grant of authority when it found that her vote in favor of the Clarifying Ordinance was motivated by her desire to maintain her quality of life. PIC concluded in its Final Disposition Opinion that Hanson voted for the Clarifying Ordinance because it would help her maintain her quality of life. I have reversed PIC's decision because it did not follow its own rules when it made this finding. PIC has adopted rules governing its proceedings. Rule IV(c)(2) requires PIC to, when it takes action against someone, to "specifically identify each portion of the Code of Conduct Respondent is alleged to have violated and facts upon which each alleged violation is based." PIC, while it alleged that Hanson violated 29 *Del. C.* §5805 and §5806 in its Preliminary Decision by voting on the Clarifying Ordinance because she had conflicts of interest involving her rental properties and qualified immunity defense, never preliminarily found or told Hanson that she violated these sections because she had a conflict of interest because of her quality of life concerns. It is well-settled law that once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid.[32] Nelson did not raise the quality of life conflict in his complaint. PIC did not make a preliminary finding about it. PIC did not tell Hanson about it. The issue did not even come up until Hanson testified at the hearing on her Motion to Dismiss. PIC heard this quality of

[32] *Dugan v. Delaware Harness Racing Commission*, 752 A.2d 529 (Del. 2000).

life testimony and concluded that Hanson had yet another conflict of interest and found yet another violation of the Code of Conduct. However, PIC never followed its own rules by first making a preliminary finding that Hanson had such a conflict, informing her of the conflict, and giving her an opportunity to rebut the finding before finally determining that she did have such a conflict of interest.

(d) Hanson's Qualified Immunity Defense

Hanson argues that PIC's finding that the Clarifying Ordinance would help her qualified immunity defense in the Federal Case is not supported by substantial evidence in the record. PIC's finding is based largely on the testimony of Mandalas and Walton and its own legal analysis of qualified immunity. PIC's findings of facts are reflected in the following statements:

> This undisclosed purpose – not on the face of the ordinance – is at the heart of the allegation that she had a personal or private interest because she was personally sued by DBE.
>
> She argues her judgment was not impaired by her personal interest because: "I've been consistently in favor of keeping the height limit at 35'." The law does not require that it actually be impaired – only that it may "tend" to be impaired. It also does not say she can participate in the face of a conflict as long as she is consistent in how she votes. It is not how she voted, but that she voted when she had a personal or private interest and knew specifically she could personally benefit from her own decision. (Emphasis added.)
>
> It has been established that Respondent was clearly aware of the ordinance's undisclosed purpose – creating a legal defense to the law suit in which she was personally sued – and was advised by her Attorney that it could affect her qualified immunity argument. Thus, she not only knew the purpose was not on the face, but was advised of the personal benefit to her if it passed. (Emphasis added.)

I have summarized PIC's reasoning as follows:

The Relaxed bulk standards in Dewey Beach's 2007 Comprehensive Land Use Plan and the 68 foot height limit were at the heart of the Federal Case. The Clarifying Ordinance would set the

height limit at 35 feet and make it retroactive. This would allow Hanson to argue that the Clarifying Ordinance made her acts going back to 2007 official acts for which she is entitled to qualified immunity. The Clarifying Ordinance, if accepted, could also be a defense to DBE's claims that it could build a structure taller than 35 feet. This would allow Hanson to argue that her vote against the Concept Plan was merely a "ministerial" act, releasing her of personal liability. Hanson knew all of this because her lawyer told her so and that is why she had a conflict of interest when she voted for the Clarifying Ordinance.

The critical elements of PIC's findings of fact and its legal reasoning are: (1) Hanson was personally at risk for damages and attorney's fees because DBE had sued her individually, (2) the real purpose of the Clarifying Ordinance was to help Dewey Beach and Hanson and the other individual defendants in the Federal Case and this real purpose was not disclosed to the public, (3) Hanson's lawyer told her that the Clarifying Ordinance would help her qualified immunity defense, (4) the Clarifying Ordinance could be accepted, and (5) the Clarifying Ordinance would help Hanson's qualified immunity defense.

PIC's findings are not supported by substantial evidence in the record in several important respects.

1. Personal Risk

There is scant evidence in the record to support PIC's finding that Hanson was at risk personally in the Federal Case. PIC concluded that Hanson was at risk for damages and attorney's fees simply because DBE sued her individually. However, Dewey Beach had an obligation to indemnify Hanson, from the general funds of the town's treasury, to the extent not otherwise covered by appropriate insurance, for any matter arising out of an action taken by her in connection with the

performance of her official duties, against expenses (including attorney's fees), judgments, fines, amounts paid in settlement incurred by her in connection with such action.[33] The Federal Case had been settled at the time of the hearing on Hanson's Motion to Dismiss. However, PIC, which had the burden of proof, never determined whether Hanson was paying her own attorneys' fees or whether they were being covered by Dewey Beach or its insurance carrier when she voted in favor of the Clarifying Ordinance.

2. Disclosure

The evidence in the record shows that the purpose of the Clarifying Ordinance was, in part, to help Dewey Beach, but not necessarily Hanson and the other individual defendants, in the Federal Case, and that this purpose was disclosed to the public by Mandalas. I assume that PIC concluded that the real purpose of the Clarifying Ordinance was undisclosed because the text of the Clarifying Ordinance only discussed clarifying the maximum height limit in the RB-1 zoning district. However, the fact that the purpose of the Clarifying Ordinance was, in part, to help Dewey Beach in the Federal Case was discussed publicly by Mandalas before Hanson and the other Dewey Beach commissioners voted on it. Mandalas was Dewey Beach's attorney. He prepared the initial draft of the Clarifying Ordinance. He testified at the hearing that the Clarifying Ordinance had "served a couple purposes." One purpose was to clarify the meaning of the bulk standards to show that they did not relax the maximum 35 foot height limitation. The other purpose was to help Dewey Beach in the Federal Case. Mandalas believed that by clarifying the meaning of bulk standards it would remove an issue in dispute in the Federal Case. Mandalas told PIC this at the hearing in response

[33] Dewey Beach C. §22-1.

to PIC's legal counsel's question on the matter. The following is an excerpt of their exchange:

Q. And did you, as counsel to the Town, recommend to Mayor Hanson and the other commissioners that a clarifying ordinance be adopted?

A. I recommend that. And I've discussed this in open session, so this isn't violating any client confidences. I did, in fact, recommend that for litigation purposes, I thought this ordinance was an ordinance that should be adopted. (Emphasis added.)

Now that's separate from a policy decision. Whether, as a member of the commission, somebody as a matter of policy thought it was good to go above 35 feet or not good to go about 35 feet, my view was that since we're in litigation, if we want to put on the best defense possible with that litigation, I did recommend adoption of this ordinance.

Thus, it is clear that Mandalas told the public that the purpose of the Clarifying Ordinance was to help Dewey Beach in the Federal Case. There is no evidence in the record suggesting that he told Hanson and the other individual defendants that the purpose of it was to help them personally.

3. Walton's Advice

There is not substantial evidence in the record to support PIC's finding that Walton told Hanson that the Clarifying Ordinance would help her qualified immunity defense. PIC did not find that it was a conflict of interest for Hanson to vote in favor of the Clarifying Ordinance in order to help Dewey Beach in the Federal Case. It was only a conflict of interest if she did so to help her own defense in the Federal Case. However, Walton, who was the attorney for Hanson and the other individual defendants, did not testify that he told Hanson that the Clarifying Ordinance would help her. He only testified that he discussed the impact of the Clarifying Ordinance on her qualified immunity defense. This is a meaningful distinction. The following is his testimony:

Ms. Wright: After that was passed – well, after the Federal Court ruled that those claims could still exist against the Town and Ms. Hanson, did you advise her – and I'm not asking you what you advised her. Did you advise her of the potential impact that the clarifying ordinance could have in her defense regarding qualified immunity?

The Witness: I'm sure we spoke of it, yes.

Ms. Wright: Thank you.

Based on this, PIC concluded that Hanson "not only knew the purpose was not on the face, but was advised of the personal benefit to her if it passed." Walton's testimony simply does not support PIC's finding. Walton's advice could have ranged anywhere from "the Clarifying Ordinance is a complete defense to all of DBE's claims against you" to "the Clarifying Ordinance is no defense at all to DBE's claims against you because it cannot be given retroactive effect because to do so would violated DBE's constitutional and vested rights." Notwithstanding this, PIC concluded, as a finding of fact, that Walton told Hanson that the Clarifying Ordinance would help her qualified immunity defense.

PIC's findings in this regard are critical to its ultimate finding that Hanson had a conflict of interest. Mandalas openly advised the Dewey Beach Mayor, Hanson and the other Dewey Beach commissioners to pass the Clarifying Ordinance to help Dewey Beach in the Federal Case. Hanson, as a non-lawyer, certainly would not know the legal consequences of the Clarifying Ordinance on her qualified immunity defense unless her attorney told her what those consequences were. Thus, it was critical for PIC to determine if Walton had told Hanson that the Clarifying Order would help her qualified immunity defense. This is why PIC's counsel asked Walton whether he had discussed the effect of the Clarifying Ordinance on Hanson's qualified immunity defense. Walton testified that he did talk to Hanson about it, but he never told PIC what his advice was. Thus, there is no evidence in the record that he told Hanson that the Clarifying Ordinance would help her qualified immunity defense. Therefore, PIC's finding that he did is not supported by substantial evidence in the record. Even though the record does not support PIC's finding about what Walton told Hanson, which I view as fatal to its conflict of interest finding, I will briefly address the rest of PIC's findings in this

regard.

4. The Clarifying Ordinance

There is not substantial evidence in the record or legal analysis supporting PIC's finding that the Clarifying Ordinance would ever be accepted. The fact is that such ordinances are usually not given retroactive effect. There is no doubt that, in the absence of constitutional provisions to the contrary, the legislative branch of Government can adopt legislation having a retroactive or retrospective affect.[34] Legislation is either introductory of new rules or declaratory of existing rules.[35] A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute and declares what it is and ever has been.[36] Such a statute therefore is always, in a certain sense, retrospective because it assumes to determine what the law was before it was passed.[37] It is always permissible to change an existing law by a declaratory statute where the statute is only to operate upon future cases.[38] But the legislative action cannot be made retroactive upon past controversies and to reverse decisions which the courts in the exercise of their undoubted authority have made.[39] The United States Supreme Court has said that the legislature has the power to declare by subsequent statute the construction of previous statutes so as to bind the courts in reference to transactions occurring after the passage of the law and may at times

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[34] 2 *Sutherland Stat.Constr.,* 2nd Ed.Sec. 2201 et seq.

[35] 1 Cooley's Const. Lim., 188 (8th Ed.).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

enunciate the rule to govern courts in transactions that are past provided no constitutional rights are prejudiced.[40] However, the legislative branch of government has no power by subsequent act to declare the construction of a previous act prejudicially affecting constitutional and vested rights which have attached under the prior act and before the passage of the declaratory law.[41]

There is no doubt that DBE, after having spent a considerable sum of money to prepare the Concept Plan, would have argued that its right to build a 68 foot tall structure under the Relaxed bulk standards applicable in the RB-1 zoning district had "vested" and could not be impaired by the Clarifying Ordinance.[42] Thus, it seems highly unlikely that the Clarifying Ordinance would have ever of been of any help to Hanson in any event.

5. The Qualified Immunity Defense

There is not substantial evidence in the record or legal analysis to support PIC's finding that the Clarifying Ordinance would have helped Hanson's qualified immunity defense. PIC never reviewed DBE's complaint against Dewey Beach, Hanson and the individual defendants or their respective motions to dismiss. It instead relied on the District Court's decision on the motions to dismiss in order to analyze the legal issues in the Federal Case.

The common-law doctrines that determine the tort liability of municipal employees are well established.[43] Generally, a municipal employee is liable for the misperformance of ministerial acts,

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[40] *Stockdale v. Atlantic Insurance Companies,* 87 U.S. 323 (1873); *Town of Koshkonong v. Burton,* 104 U.S. 668 (1881).

[41] *Id.*

[42] *In re: 244.5 Acres of Land,* 808 A.2d 753 (Del. 2002).

[43] *Bridgeport Harbor Place I, LLC v. Ganim,* 2006 WL 493352, at *3 (Conn. Super. Feb. 16, 2006).

but has a qualified immunity in the performance of governmental acts. [44] Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature.[45] The hallmark of a discretionary act is that it requires the exercise of judgment.[46] In contrast, ministerial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion.[47]

Defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[48] Qualified immunity balances two important interests: the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.[49] The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official.[50] Whether a reasonable officer could have believed his or her conduct was proper is a question of law for the court and should be determined at the earliest possible point in the litigation.[51] In analyzing

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

[49] *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

[50] *Id*. at 819.

[51] *ACT UP!/Portland v. Bagley*, 988 F.2d, 868, 872-73 (9th Cir. 1993).

a qualified immunity defense, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case.[52] "The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[53]

PIC never conducted this analysis to determine if the Clarifying Ordinance would be of any help to Hanson's qualified immunity defense. Indeed, such an analysis would have been difficult to undertake because PIC never reviewed DBE's complaint against Hanson and thus was not aware of the underlying factual allegations against her. PIC also never determined if Hanson's qualified immunity defense would overcome her conflicts of interest.[54] PIC did conclude that Hanson could argue that her vote against the Concept Plan was merely a ministerial act. However, PIC never discussed the land use process for evaluating and voting on a "Concept Plan." Thus, it cannot be determined whether Hanson's vote was a ministerial act or not.

(e) The Appearance of Impropriety

Hanson argues that PIC exceeded its statutory grant of authority when it found that she had acted in such a manner so as to create an appearance of impropriety. PIC found that when Hanson voted for the Clarifying Ordinance she engaged in a course of conduct that would raise suspicion

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[52] *Saucier v. Katz*, 533 U.S. 194 (2001).

[53] *Id.*

[54] *Wong v. Allison*, 208 F.3d 224, 2000 WL 206572, FN3 (9th Cir. 2000).

among the public that she was engaging in acts that were in violation of the public trust and which did not reflect favorably upon Dewey Beach. This finding is based in turn on PIC's finding that Hanson should not have voted on the Clarifying Ordinance because she had conflicts of interest arising out of her rental properties, the desire to strengthen her qualified immunity defense in the Federal Case, and the desire to maintain her quality of life. Given these conflicts of interest, PIC concluded that the public would suspect that Hanson "used her public office for personal gain or benefit." This is based on an appearance of impropriety test. The test is, according to PIC, if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official's ability to carry out her duties with integrity, impartiality and competence is impaired.

Having concluded that there was not substantial evidence in the record to support PIC's conflict of interest findings regarding Hanson's rental properties and her qualified immunity defense in the Federal Case, and that the conflict of interest issue regarding Hanson's quality of life was not properly before PIC, I have concluded that PIC's finding regarding the appearance of impropriety must be reversed because it is based upon these three unproven conflicts of interest.

I note that Hanson testified that she had, both before and after she became an elected official in Dewey Beach, maintained that she was steadfastly committed to a maximum height of 35 feet for structures and had always voted against DBE because its structure in the Concept Plan exceeded 35 feet. PIC concluded that she had not always felt this way, noting that Hanson had twice reviewed and voted in executive session in favor of the mutual release and agreement, which permitted a maximum height for DBE's structure of 45.67 feet. PIC went on to state, "Thus, her approval of the Mutual Agreement in Executive Session appears to contradict her statement that she always voted against DBE's height exceeding 35 feet." In reaching this conclusion, PIC took the evidence in the

record out of context. This matter was discussed by PIC's legal counsel and Mandalas. The following is an excerpt of their exchange:

Q. And are you familiar with or aware of how Mayor Hanson voted with regard to accepting or rejecting the proposed settlement?

A. Yes. Mayor Hanson was the one nay vote, voting - - voting not to settle the litigation.

Ms. Wright: Mr. Mandalas, prior to that, there were votes on the mutual agreement and release; is that correct?

The Witness: Yes.

Ms. Wright: And within that mutual agreement and release, it discusses having a height above 35 feet, and my understanding is that it was a unanimous vote to move that forward to the town manager. Correct?

The Witness: Not entirely correct. The way the mutual agreement and release worked is that it kind of had a two-step process, where the town manager worked with Dewey Beach Enterprises to develop this mutual agreement and release. Once the town manager was satisfied with it, she brought it to council in executive session. And after reviewing the mutual agreement and release in executive session, council came out of executive session.

And the decision then was whether to pursue the public hearing process and the public meeting process that was established in the mutual agreement, to pursue whether a settlement made sense.

The mutual agreement and release makes clear that the settlement would only be adopted, and the mutual agreement and release would only be adopted upon a vote of the entire council after these public hearings occurred.

So those votes I think that you're referring to were votes to move forward with the process that's laid out in the mutual agreement and release, but not to actually settle the litigation. Not to actually adopt the mutual agreement and release. That happened - - whatever the date that the meeting was.(Emphasis added.)

I note this only because it is another example of how PIC reached a conclusion that was not supported by substantial evidence in the record. Hanson did vote against approving the settlement with DBE.

IX. Conclusion

There are two views of the evidence in this case. One view is that Hanson voted for the Clarifying Ordinance in order to help her rental properties compete with DBE's hotel and to improve her legal defenses in the Federal Case. The other view is that Hanson voted for the Clarifying Ordinance because she was opposed to a project nearly twice as tall as virtually every other building in Dewey Beach. PIC chose the former instead of the latter. The issue is whether that choice is supported by substantial evidence in the record. I have concluded that it is not.

The decision of the Delaware State Public Integrity Commission is reversed.

IT IS SO ORDERED.

/e/ E. Scott Bradley
E. SCOTT BRADLEY

ESB/sal

Tab 6

STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION
MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

June 25, 2007

John F. Brady, Esquire
Brady, Richardson, Beauregard & Chasanov, LLC
10 E. Pine St.
P.O. Box 742
Georgetown, DE 19947

Advisory Op. No. 07-05 – Nepotism
Hearing and Decision by: *Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, Dennis Schrader and Wayne Stultz*

Dear Mr. Brady:

The Public Integrity Commission (PIC) reviewed nepotism allegations that Milton's Mayor when he nominated his brother as a Board of Adjustment alternate. *(Complaint, Attachment A, A-1).* Based on the following law and facts, we find reason to believe a violation occurred.

I. Jurisdiction:

The State Code of Conduct gives PIC jurisdiction over local governments unless they adopt a PIC approved Code. *29 Del. C. § 5802(4).* Milton has not.

II. Standard of Review

All facts are assumed as true at the preliminary stage. *29 Del. C. § 5808A(a)(4).* A Commission majority must find reason to believe[1] a violation occurred. *Id.* Officials have a "strong legal presumption of honesty and integrity," which the facts must overcome. *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). Town of Cheswold v. Vann, Del. Supr., C. A. No. 05C-08-07, No. 445, 2006, J. Ridgely (April 23, 2007)(facts did not overcome presumption)(Attachment B, Unreported Cases).*

[1]"Reason to believe" means "probable cause." *Coleman v. State, 562 A.2d 1171, 1177 (Del., 1989).* "Probable cause" means facts and circumstances are enough to warrant a person of reasonable caution to believe an offense occurred. *State v. Cochran, 372 A.2d 193, 195 (Del., 1977).*

III. Application of Law to Facts:

Officials cannot review or dispose of matters if a personal or private interest may tend to impair judgment in performing official duties. *29 Del. C. §§ 5805(a).*

(1) FINANCIAL INTEREST: A conflict is automatic if financial interests in the decision exist. *29 Del. C. § 5805(a)(2)(a).* No facts suggest any financial interests.

(2) OTHER PERSONAL OR PRIVATE INTERESTS. The Code covers more than pecuniary interests. Commission Op. No. 97-24. *(Attachment C).* Associative relations can be a "personal or private interest." Shellburne, Inc. v. Roberts, *238 A.2d 331 (Del. Super., 1967)(alleging "personal interest," " conflict of interest," using public office due to "personal interest," and the decision was not on the merits but: (1) a desire to help coreligionists; (2) a close attorney-client and business relationship with the attorney for the group seeking action; and (3) a colleague's wife's membership in the Church affected by rezoning).*[2] These facts, even absent a financial interest were enough to deny dismissal. Id. This relationship is even closer.

Town Charter and ordinances duties are that: "the Mayor shall appoint all committees." *(Attachment D)* His "personal interest" was a family member whom he appointed. [3] These are not conclusory allegations without support. Independent of the allegations, the official Town minutes show that it occurred. *(Attachment E).* Those facts meet the statutory elements. It is of no moment that he took no other action.[4] Even without facts to show "undue influence," "indirect" and "unsubstantial" participation is "undoubtedly improper" when a close relative is involved. Prison Health Services Inc. v. State, *C.A. No. 13,010, Ch. Ct., V.C. Harnett III (June 29, 1993) (Attachment B).* In interpreting this very restriction, the Court said an official's comments were "neutral" and "unbiased" and showed no "undue influence" but still said he should have recused himself. Beebe, supra.

(3) GENERAL PUBLIC PURPOSE: The Code's general purpose is to instill public confidence that officials do not actually violate the law, or create a justifiable impression of a violation. *29 Del. C. § 5802(1).*

(4) PUBLIC PURPOSE OF "PERSONAL INTEREST" RESTRICTION:

Barring action if a personal interest exists insures fair decisions. Apparently, the Mayor's brother has some experience with historic land use. That may show some merit in the act. However, the letter of the law has no exemptions if the official's act has merit or is unbiased. Again, Delaware law says "unbiased" participation is improper. Here, the brother would have a

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Shellburne was a common law case. However, conflict laws do not generally abrogate common law unless expressly stated. *63 Am. Jr. 2d* Public Officers and Employees *§253.* Abrogation not expressed. *29 Del. C. § 5805(a).*

3

He tabled the appointment when it was challenged as a conflict, saying he would seek a legal opinion. That opinion was not from PIC which has sole statutory authority to interpret this law, although he availed himself of PIC services previously. Subsequently, it was determined that he had no legal authority to appoint alternates, even absent a conflict.

[4]Had the appointment proceeded, his brother's work for the Board would be subject to the Mayor's review, as the Zoning Ordinance gives a right to appeal the Board's decision to the Mayor and Council.

public office which has significant community prestige because of land use issues. The benefit to the Mayor would be having a relative involved in historic preservation when his political platform includes "expanding and protecting the Town's historic district" and "preserving Milton's heritage." *Town of Milton, website (Attachment F).* While they may be good causes, the public may suspect the Mayor may be "stacking the deck," to advance his political programs, or may suspect the brother would act to benefit those platforms rather than decide on the merits.

A complete bar insures actual compliance with the letter of the law; it also insures compliance with the spirit of the law–instilling public confidence. Thus, with or without actual bias, recusal limits the public's "justifiable impression" of a violation.

IV. Conclusion:

Based on the above facts and law, we find that appointing his brother is sufficient reason to believe that both the letter and the spirit of the law were violated.

Sincerely,

Bernadette Winston, Vice Chair
Public Integrity Commission

Cc: George Dickerson, Town Manager
Don Post, Mayor
Marion Jones
Keith Brady, Assistant State Solicitor

STATE OF DELAWARE
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September 5, 2007

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Motion for Reconsideration - 07-05
Hearing and Decision by: *Terry Massie, Chairman and Vice Chair Barbara Green; Commissioners Dennis Schrader, William Daily and Wayne Stultz*

Dear Mr. Brady:

The Public Integrity Commission considered the Motion for Reconsideration of its prior decision that concluded Milton's Mayor, Donald Post, should not have appointed his brother as an alternate on Milton's Historic District Commission. *Tab A, Motion; Tab B, Op. No. 07-05.* Based on the following law and facts, we reach the same conclusion.

I. Standard for Reconsideration

Reconsideration is not addressed in the statute. *29 Del. C. §§ 5807(c) & 5810.* PIC's Rules specifically allow reconsideration in complaint proceedings; not advisory opinions. *Tab C, Rule IV (C)(P), p. 7.* PIC treated the filing as an advisory opinion. *(¶ (B)(3) below).* However, PIC has reconsidered advisory opinions. *Op. No. 96-21.*[1] We do so here.

We use Superior Court Rule 59 as the standard. Rule 59 motions are to correct errors; not add new arguments. *Beatty v. Smedley, C.A. No. 00C-06-060 JRS, J. Slights III (Del. Super., March 12, 2003).* It is denied unless controlling precedents or legal principles were overlooked,

[1]Public bodies exercising judicial functions inherently have powers, like Courts, to reconsider, vacate judgments, etc. *Henry v. Dep't of Labor, 239 A.2d 578 (Del. Super., 1972)(State Commission acting in a judicial capacity, like a court, needs an opportunity to correct errors, change of mind, etc. Id. at 581); Family Court v. Reeves, Del. Super., C.A. 97A-10-001 RCC, J. Cooch (Nov. 21, 1997)(State Board had no Procedure for Reconsideration but had inherent authority to hear the motion as it was like Superior Court motions).*

or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

II. Application of Legal Principles and Facts

Argument 1. Mayor Post did not receive written notice of the hearing as required in the Public Integrity Commission Rules, nor was he able to attend that meeting in person.

(A) Legal Principle: Mr. Post may be alleging denial of notice and opportunity to be heard.

(1) Constitutional Due Process. If he is alleging Constitutional due process denial, PIC has no jurisdiction. Generally, administrative agencies have only the jurisdiction conferred by statute. *2 Am. Jur. 2d Administrative Law § 275 (1994).* PIC's jurisdiction is only the Code of Conduct. *29 Del. C. §§ 5805(a), 5809(3) and 5810(a).* Courts have held that Constitutional issues are in the courts' expertise; not an administrative agency's. *Plano v. Baker, 2d Cir., 504 F.2d 595, 599 (1974); Matters v. City of Ames, Iowa Supr., 219 N.W.2d 718 (1974); Hayes v. Cape Henlopen School District, 341 F. Supp. 823, 833 (D. Del., 1972).*

(2) Complaint Process: If he is alleging due process denial under the statute or rules, those rights apply only to the complaint process. *29 Del. C. § 5810(a)(10); Tab C, Rule IV (C), (D) and (E), p. 5.* This filing was treated as an advisory opinion. *See, ¶ (B) (3) below.*

(3) Advisory Opinion Process: The statute does not require appearance. PIC may proceed on a "written request." *29 Del. C. § 5807(c); Tab C, Rule VI (A)(1) and (4), pp. 8-9.* The Rules address attendance. *Tab C, Rule VI (A)(5), p. 9.* It is the Commission's option. *Id.*

(B) Process in this Particular Case.

(1) Complaint Process: A sworn complaint, or PIC acting on its own, triggers this process. *29 Del. C. § 5810(a).* Either way, PIC can refer it for investigation and a report. *Tab C, Rule III (A) and (E).* Then its Counsel, the Attorney General, or Special Counsel may file a complaint. *Tab C, Rule III (C)(1).* If a complaint is filed, notice and hearing rights arise. *29 Del. C. § 5810(a); Tab C, Rules III (D) and IV (D) and (E).* This was not a sworn complaint. *Tab D, Jones Filing.* PIC did not pursue a complaint on its own.

(2) Advisory Process: Official's written filing. Marion Jones is a Commissioner, Board of Adjustment-Historic District Commission, and its Ordinance Review Committee. *Tab E, Minutes, pp. 2, 3.* She was present at the meeting. *Tab E, Minutes, pp. E-4.* She wrote the filing. *Tab D, Jones Filing.*

(3) Notice of the Advisory Process and Written Statement: Advisory requests do not require notice. However, the Solicitor was told by phone that PIC could treat the filing as an advisory request. A letter to him cites advisory opinion sections—29 Del. C. § 5807(c), not the complaint section-- *29 Del. C. § 5810.* It says "if an official obtains advice," and calls it a

"filing." Mr. Post was copied. *Tab F, PIC Counsel ltr., June 5, 2007, p.1 ¶(3).* [2] The Solicitor reviewed the filing; asked for dismissal; and copied Mr. Post. *Tab G, Brady Ltr, April 30, 2007.* Informing Mr. Post is consistent with Mr. Brady's duty of client communication, not PIC's Counsel. *Delaware Lawyer's Rules of Professional Conduct (DLRPC), Rules 1.2, 1.4 & 4.2.*

(4) Notice of PIC's meeting and Opportunity to Be Heard:

(A) The dismissal request was one opportunity to be heard. Like advisory opinions, they are decided on the pleadings–the "paperwork." *Super. Ct. Rule 12.* As a responsive filing, it is equal to a general appearance. *Canaday v. Super. Ct., 119 A.2d 347(Del., 1956).*

(B) A second opportunity was when PIC set a meeting date and time for Mr. Post and Counsel to appear. They did not, as they were at the County's budget hearings. *Tab A, Reargument Motion ¶ (3).* The Town Manager appeared. *Id.* He contacted the Solicitor on whether to proceed. He proceeded. *(Tab H, PIC Transcript, pp. 1-2).* It was presumed then, and confirmed by the Reargument Motion, that he was the Town's representative. *Tab A, Reargument Motion, ¶ (3).* He said his knowledge was from "review of the files and minutes" and "meetings." *Tab H, PIC Transcript, p. 4.* He also was copied on correspondence. *See, e.g., Tab G, Brady Ltr, April 30, 2007.* PIC presumes Mr. Post and his Counsel, communicated on the decision to have Mr. Dickerson speak, and knew where his knowledge came from. *DLRPC 1.2 and cmt 1. (With respect to the means by which a client's objectives are pursued, the lawyer shall consult with the client and take such action as impliedly authorized).* An extension of time or rescheduling was not sought. Mr. Dickerson was not treated as, nor acted as, an attorney. He was a fact witness. *Tab H, PIC Transcript, pp. 1-11.*

Argument 2: PIC's Counsel did not ask the Town Solicitor questions about Mr. Post except on another appointment.

No facts or laws are cited requiring PIC's Counsel to ask questions about Mr. Post's appointment of his brother. If this seeks Counsel's work-product or thought processes, those are privileged. *Carlton Investments, v. TLC Beatrice International Holldings, Inc., C.A. No. 13950, Del. Ch., M.C. Parker (Sept. 17, 1996).* Mr. Post's Counsel had the filing. *Tab G, Request to Dismiss.* The filing specifically refers to Mr. Post appointing his brother. *Tab D, Jones Filing ¶ 2.* The Minutes were attached in support. *Tab E, Minutes pp. 2, 4.* These facts could have been challenge if desired. The motion to dismiss did not do so. *Tab G, Request to Dismiss.* PIC considered the facts in the filing, the minutes, Mr. Dickerson's statements, and the Request to Dismiss. It did not consider questions that PIC's Counsel *did not* ask.

[2] Mr. Post is personally knowledgeable of the statute and Rules process, as he has not only sought advice but has filed at least three "complaints" about other officials, which were treated as advisory opinions. *Commission Op. Nos. 05-44, 46, 49 and 63.* Most of them dealt with questions on relatives of officials.

Argument 3. (A) Due to a required appearance of the Town Solicitor's other duty as the Recorder of Deeds for Sussex County, Counsel did not arrive in time for the hearing.

(B) The Town was represented by the Town Manager, George Dickerson, who is not a member of the Delaware Bar.

(C) No questions were asked about Mr. Post.

(A) *See, (B)(4) above.* PIC learned the morning of its meeting that the Solicitor would; be late. *Tab H, PIC Transcript, p. 1.* The Solicitor authorized Mr. Dickerson to proceed. *Id.* *See discussion, Argument 1, ¶(B)(4)(b) above.*

(B) Mr. Dickerson was a fact witness. PIC had the legal position--a motion to dismiss.

(C) The transcript shows questions and discussions about Mr. Post. *Tab H, PIC Transcript, pp. 3, 6, 7, 8, 9, and in general.*

Argument 4. (A) The opinion characterizes that Mayor Post "appointed" his brother. When in fact, Mayor Post who was reading a list of nominees, withheld his brother's name to seek a legal opinion.

(B) No appointment took place and Mayor Post's brother does not, nor has he held any position on a Board since Mayor Donald Post was sworn into office in April of 2006.

(A) "Appointments" are the selection or designation of a person, by the persons having authority to do so, to fill an office or public function and discharge those duties. *Black's Law Dictionary, p. 99, (6th ed., 1990).* The Mayor has the authority; used it; and no one except those on his list was "nominated" or "appointed" by any person for any position. The law on his"appointment" authority was attached to the underlying opinion. *See, Tab B, p. 2, III (2), ¶ 2.*

(B) The Mayor did not just read. "Someone" created the list and named the positions. That was his duty. Also, the Minutes show he did not just read; he commented on his brother's qualifications. *Tab E, Minutes, p. E-4.*

(C) The Mayor did not withhold his brother's name. It was on the list that he moved for acceptance. *Tab E, Minutes, p. E-2.* The Minutes say a vote occurred before Ms. Jones asked about a conflict. *Tab E, Minutes, p. E-4.* The Mayor then said he wanted to see the law precluding his brother from serving. *Id.* At best, he tabled the name.

(D) The issue is not if his brother held or holds a position. It is if the Mayor, in his official duties "reviewed or disposed" of his brother's appointment. *29 Del. C. § 5805(a).* The underlying opinion cites the law and facts establishing the elements. *See also, Response to Argument 4(b).* "Someone" exercised the Mayor's duty, giving specific names for specific Boards. Mere logic says he, at a minimum, "reviewed" those before acting. Moreover, the law does not require Council's approval so he has legal authority to completely "dispose" of the matter. Even the Reargument Motion concedes that the Town Charter may not require Council

to approve. *Tab A, Reargument Motion,* ¶ *5.* We address the Council's "practice" in Argument 5.

(E) The Minutes do not show he withdrew his brother's name. *Tab E, Minutes, p. E-4.* They say the vote was taken with no discussion before Ms. Jones raised the conflict issue. *Id.* The Mayor then said he wanted to see in writing what precluded his brother from serving[3]. *Id.* At best, he tabled the appointment, as he did with Ms. Louise Frey, when a conflict was raised. Only after learning that another law barred him from appointing any alternates, did he cease to proceed.

(F) At the reargument meeting, it was said that the Minutes are not always accurate. That argument was not in the motion to dismiss, although a copy was sent with that motion. It was not in the motion to reargue, although the opinion cited the Minutes as a fact basis, and Mr. Post relies on them in the next argument. Reargument is not for new arguments. However, we address it.

They are the official Minutes. Mr. Dickerson relied on them, and meetings, for his knowledge. He was asked to be the factual representative, presumably with knowledge of where he obtained his facts, and what those facts were. The Minutes show the facts which Ms. Jones also personally observed. No one says the Minutes are inaccurate in the list of appointees which include the Mayor's brother. The Minutes call the acts "appointments." It is the statutory term for the Mayor's duty, so that is not inaccurate. Even the reargument motion says his acts were "appointments," except somehow it was not an "appointment" of his brother. We address that below.

Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor not the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General's office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).

(A) The legal issue is not Council's duties or practice. The fact issues are not if Council approved or not; or if the Solicitor or Town Manager were present. The issue is the Mayor's duties and acts. The "process" he used was consistent with his statutory duties to appoint, and he appointed his brother. Delaware Courts have held that officials do not have to be the final decision maker, or show actual bias or undue influence. *Beebe, supra; Prison Health Services Inc. v. State, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993).* In those cases, the officials were not the final decision makers; did not vote; had only "indirect" and "unsubstantial" involvement, or made only "neutral" and "unbiased" comments. Their interests still required that they not participate. Thus, even if the law or practice was for Council to approve, by appointing his brother, the Mayor's conduct still would be prohibited. Similarly, even if the

[3]Relatives can be public servants; but relatives who are officials cannot review or dispose of that decision.

conduct were not an actual violation, it has been that it would be "prudent" for the Mayor of Odessa and certain Council members to recuse themselves because of their close relative's interest in a zoning matter, even without a financial interest. *Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000).*[4] In essence, the Court was saying that even without a legal conflict, the appearance of impropriety could require recusal.

(B) PIC had the Attorney General opinion to consider. However, that does not protect Mr. Post from PIC's conclusion. Only PIC has statutory authority to interpret the Code of Conduct. Courts have held that if an official gets advice from sources other than the one designated, the advice cannot be used as a defense. *Tab I, Ethics Bulletin, 009 ¶¶ 6-9.* Also, it cannot be argued that he did not know the law required PIC to make the decision. "Ignorance of the law" is no excuse in Delaware. *Kipp v. State, 704 A.2d 839 (Del., 1998).* Moreover, as a factual matter, he knows PIC decides conflicts.[5] We do credit officials who seek advice, even if not from PIC. However, it is only one fact, among the rest. PIC gave him the presumption that he did not intentionally "create"[6] alternate positions and appoint his brother to circumvent the Code or others laws. PIC did not go forward with a complaint or refer it for prosecution. It merely advised that the conduct was improper.

Argument 6: The issue appears to be one of first impression and the Mayor has not had the opportunity to appear before the Commission in order to respond in a formal manner.

(A) This is not an issue of first impression. Delaware case law on officials' participating if close relatives are involved is cited in the underlying opinion. *Prison Health, supra; Harvey, supra.* Also, as a factual matter, Mr. Post has obtained advice from PIC on an official participating if a relative may be involved, and filed complaints against other officials on close relative issues.

(B) We addressed his opportunity to be heard. Also, he appeared at the meeting on this motion, with Counsel. He made statements at the meeting.

III. Conclusion

The motion is denied. Controlling precedents or legal principles were not overlooked.

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[4] In *Harvey*, the Court said: "Although this statutory provision *[29 Del. C. § 5805(a)(2)]* does not apply to employees of a municipality or township, the Court finds that it provides further guidance in this matter." However, on July 22, 1992, the Governor signed Senate Bill No. 406 which specifically provides that: "Subchapter I, Chapter 58 of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation [local code of conduct legislation at least as stringent as the State Code of Conduct] by January 23, 1993." The Town of Odessa has not enacted such legislation. Thus, its employees, elected, and appointed officials are subject to the State Code of Conduct. The Court and Counsel were notified of the application to local governments.

[5] See footnote 2.

[6] See, Tab H. Mr. Dickerson stating that the Mayor wanted to "create" the alternate positions.

PIC, as the fact finder, did not misunderstand the law or facts that would change the underlying decision.

Sincerely,

Terry Massie, Chairman
Public Integrity Commission

Cc: Marion Jones
Mayor Don Post
George Dickerson, Town Manager

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DONALD POST, MAYOR OF THE TOWN OF MILTON Defendant Below Appellant, v. DELAWARE STATE PUBLIC INTEGRITY COMMISSION Plaintiff Below Appellee.	)	C.A. No. 07A-09-008 Notice of Appeal

APPELLEE'S MEMORANDUM IN SUPPORT OF A MOTION TO DISMISS

COMES NOW, the Appellee, Delaware State Public Integrity Commission, by and through its Attorney, seeking dismissal of the above captioned case pursuant to Delaware Superior Court Civil Rule 12(b) and/or 12(c).

The Appellee moves the Court as follows:

THE PARTIES

1. Appellant, Donald Post, Mayor, Town of Milton, 115 Federal Street, Milton, DE 19968.

2. Appellee, Delaware State Public Integrity Commission, a State agency, 410 Federal Street, Suite 3, Dover, DE 19901.

FACTUAL BACKGROUND

3. Paragraphs 1 and 2 are incorporated herein by reference.

4. The Delaware State Public Integrity Commission (hereinafter "PIC") issued advisory opinions to Mayor Donald Post on appointing his brother, William Post, to the Milton Board of Adjustment/Historic Preservation Committee. (Tab A, Advisory Op. No. 07-05, June 25,

2007). It issued a second opinion after a Motion for Reargument. (Tab B, Motion for Reconsideration–07-05, September 5, 2007).

5. Appellant filed a Notice to Appeal on September 24, 2007.

6. The Notice states no legal or factual basis to appeal advisory opinions.

REASONS TO DISMISS APPELLANT'S CLAIMS

7. Paragraphs 1-4 are incorporated herein by reference:

8. The Court lacks subject matter jurisdiction over non-binding advisory opinions. PIC issued advisory opinions to Appellant, under its authority over local officials if there is no local Code of Conduct. 29 Del. C. §5802(4); 29 Del. C. §5807(c); (Tab A, p. 1, ¶ I). Advisory opinions are not binding. Gamble v. Thompson, Del. Super., C.A. No. 96A-12-004-JOH, Herlihy, J., (March 12, 1996) at 3; Council 81, AFSCME v. Dep't of Finance, 288 A.2d 453, 455 (Del. Ch., 1972). They fix no rights and entail no legal consequences. In re: Opinions of the Justices, 88 A.2d 128, 133 (Del., 1952).

9. The Court lacks jurisdiction as advisory opinions cannot be appealed. 29 Del. C. § 5807(c) and (d). They fix no rights. In re: Opinions of the Justices, 88 A.2d at 136. Appeal rights are triggered by a complaint; prosecution; finding of a violation; and imposing an administrative penalty. 29 Del. C. § 5810 and § 5810A. (Tab B, p.2, ¶ II(B)(1). Complaints also may be prosecuted as a criminal act, with its own penalties. 29 Del. C. §5805(f). If statutes have prosecution and punishment procedures, they exclude other procedures. In re: Opinions of the Justices, 88 A.2d at 133. Courts must have express authority to assume jurisdiction over appeals from administrative agencies. IFIDA v. Division of Social Services, Del. Super., C.A. No. 93A-04-019, Alford, J. (February 9, 1994), p. 2.

10. The Court lacks jurisdiction under the Administrative Procedures Act (APA) appeals

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DONALD POST, MAYOR OF THE TOWN OF MILTON,	:
Defendant Below-Appellant,	:
v.	:
DELAWARE STATE PUBLIC INTEGRITY COMMISSION,	:
Plaintiff Below - Appellee.	:

Submitted: January 18, 2008
Decided: April 30, 2008

ORDER

Upon Appellee's Motion to Dismiss.
Granted.

John F. Brady, Esquire of Brady Richardson Beauregard & chasanov, LLC, Georgetown, Delaware; attorneys for Appellant.

Janet A. Wright, Esquire of Delaware State Public Integrity Commission, Dover, Delaware; attorney for Appellee.

WITHAM, R.J.

Donald Post v. Public Integrity Commission
C.A. No. 07A-09-008 WLW
April 30, 2008

Appellant, Donald Post, Mayor of the Town of Milton ("Appellant" or "Mayor Post"), appealed the Advisory Opinion[1] issued by Appellee, Delaware State Public Integrity Commission ("Appellee" or "the Commission"), which advised against his attempted appointment of his brother to the Milton Board of Adjustment/Historic Preservation Committee ("Board of Adjustment"). The Commission filed a Motion to Dismiss. Appellee's motion is *granted* without prejudice on jurisdictional grounds.

BACKGROUND

Mayor Post allegedly appointed his brother, William Post, as an alternate on the Board of Adjustment at the Town Special Council Meeting on April 12, 2006. On January 31, 2007, Marion Jones, who was serving as Commissioner on the Town Board of Adjustments, sent a letter to the Commission complaining about this appointment. The "appointment" involved Mayor Post nominating his brother for the Board of Adjustment/Historic Preservation Commission as an alternate. The appointment was not carried out since the Mayor did not have the legal authority to add an alternate to the Board. The Commission's resulting advisory opinion does not provide finding of facts although it provides a brief introduction stating that it reviewed nepotism allegations by the town's mayor and that they "believe that a violation occurred."

Mayor Post appealed the Advisory Opinion arguing that the Commission did not have authority to issue it and therefore violated the statute. The Commission

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[1]Advisory Op. No. 07-05, June 25, 2007; Motion for Reconsideration–07-05, September 5, 2007).

argues that Advisory Opinions cannot be appealed and therefore this Court does not have jurisdiction.

DISCUSSION

Title 29 Del.C. § 5807(c) provides that "[u]pon the written request of any state employee, state officer, honorary state official or state agency or a public officer as defined in § 5812 of this title, the Commission may issue an advisory opinion as to the applicability of this chapter to any particular fact situation." Marion Jones is a public officer in accordance with § 5812 and therefore the Commission had authority to draft an advisory opinion that addressed the fact situation raised by Mr. Jones. Therefore there were no statutory violations. Since advisory opinions are not final judgments,[2] this Court does not have jurisdiction to review the merits of the appeal.

Conclusion

Based on the aforementioned, the Court *grants* the Commissions Motion to Dismiss. IT IS SO ORDERED.

R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[2]Super. Ct. Civ. Proc. R. 72(b).

CITY OF WILMINGTON, Plaintiff, v. AMERICAN OF FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 1102, and RAYMOND J. DONAHUE, Defendants.

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2003 Del Ch LEXIS 262003 Del. Ch. LEXIS 26; 173 LRRM 2278173 L.R.R.M. 2278

C.A. No. 19561-NC

March 21, 2003, Decided

Editorial Information: Subsequent History

As Corrected April 17, 2003. Later proceeding at City of Wilmington v. AFSCME, Council 81, Local 1102, 2003 Del. Ch. LEXIS 74 (Del. Ch., July 18, 2003)

Disposition Partial summary judgment granted in favor of defendants against city; summary judgment granted in favor of city against defendants, and matter remanded to arbitration with direction.

Counsel Kathleen Furey McDonough, Esquire and Timothy M. Holly, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, for Plaintiff.

Perry F. Goldlust, Esquire of Heiman, Aber, Goldlust & Baker, Wilmington, Delaware, for Defendants.

Judges: John W. Noble, Vice Chancellor.

Opinion

Opinion by: John W. Noble

MEMORANDUM OPINION

NOBLE, Vice Chancellor

Plaintiff City of Wilmington (the "City") seeks the vacation or modification of an arbitration award that restored Defendant Raymond J. Donahue ("Donahue") to his position as a code enforcement officer in the City's Department of Licenses and Inspections (the "Department"). Donahue is a member of the bargaining unit represented by Defendant American Federation of State, County, and Municipal Employees, Council 81, Local Union 1102 (the "Union"). The City contends that the arbitration award must be vacated because it violates a clearly established public policy and because it does not draw its essence from the collective bargaining agreement that governs Donahue's employment with the City. The parties have moved for summary judgment.

For the reasons set forth below, I conclude that, although the City has not shown that it is entitled to relief under the narrow public policy exception available to courts in the review of arbitration awards, it has demonstrated that the arbitration award did not claim its essence from the collective bargaining agreement. Accordingly, the arbitration award will be vacated, and the parties will be directed to return to the arbitration forum for further proceedings consistent with this memorandum opinion.

I. FACTUAL BACKGROUND

Donahue was hired by the City to work on a temporary basis as a code enforcement officer in August 1998. He received a full-time appointment as a Senior Code Enforcement Officer in May 1999 and that position was reclassified to Code Enforcement Inspector in July 1999.

On September 23, 1999, Donahue, dressed in his City uniform and under the influence of alcohol, approached several men on a street corner in Wilmington, identified himself as a police officer (which, of course, he was not), made offensive racial comments, told the men to leave the street corner, and eventually chased one of them away (the "September 23 incident"). The City imposed

certain disciplinary sanctions against Donahue for this conduct. By letter, dated September 30, 1999 (the "September 30 letter"), the Commissioner of the Department of Licenses and Inspection (the "Commissioner"), in addition to informing Donahue of the various other sanctions, specifically advised Donahue that "if in the future . . . your conduct prevents or adversely impacts on your ability to handle any aspect of your responsibilities, you will be dismissed from City employment".1 Donahue signed the September 30 letter, thereby acknowledging his agreement with its terms, and it became part of his personnel file. Donahue did not invoke any available grievance procedure to challenge the discipline meted out.

On February 12, 2000, Donahue, although off duty, was checking on a property which had been the subject of an enforcement action by the Department the day before. Donahue exchanged words with Sidney Roy ("Roy") who was walking down the street. Roy eventually threw a chunk of ice through Donahue's car window, striking him in the face. Donahue contacted the police and then chased after Roy. Before Donahue could catch Roy, two City of Wilmington police officers apprehended Roy. Roy resisted their efforts to subdue him and, according to the police officers, while they were struggling with Roy, Donahue approached them and, first, kicked Roy in the head and then, second, sprayed pepper spray in Roy's face (the "February 12 incident"). The pepper spray also adversely affected the officers. Donahue was arrested and charged with assault. While he was being processed, Donahue made several offensive racial comments. The charges were eventually dismissed.

The February 12 incident resulted in the filing by the City of another set of disciplinary charges against Donahue. A pre-termination hearing was held by the Commissioner on February 23, 2000. The Commissioner, on February 29, 2000, terminated Donahue's employment with the City, with the following explanation:

This is a difficult decision, however, the circumstances surrounding this unfortunate incident are most egregious and contemptuous acts committed by a person sworn to enforce laws, protect and serve the public. Your lack of self control and subsequent acts of violence go to the very core of public distrust and consternation. As to the issue raised by [the Union], stipulating that you were off duty when the incident took place, I find it impossible to separate the on versus off duty public trust employee who kicks an individual in the head as he is lying face down on the ground, under the control of and being handcuffed by the Police. You followed the kick to the head by spraying pepper spray in his face. This following your recent graduation from an "anger control" program. Your poor judgement and lack of self control reflects on the entire Department and all City Employees entrusted with protecting the public. These acts whether committed by you or another employee will not be tolerated.

This is not an isolated incident as evidenced by my September 30, 1999 letter to you relating to the three charges placed against you by the Wilmington Police Department at that time. In that letter (item # 7) you were specifically informed that "if in the future these charges lead to convictions or your conduct prevents or adversely impacts on your ability to handle any aspect of your responsibilities, you will be dismissed from City employment". Even with the disposition of these charges pending, you have not exercised the self control necessary for a sworn officer as evidenced by this most recent incident.2

Donahue and the Union grieved his dismissal. At each step in the grievance process, Donahue's termination was sustained. Donahue and the Union then demanded arbitration of the dispute regarding his dismissal as prescribed in the collective bargaining agreement, dated May 26, 1999, between the City and the Union (the "CBA"). Following the arbitration hearing on October 16, 2001, the arbitrator sustained the grievance. The arbitrator, by his March 18, 2002 opinion (the

"Arbitration Award"),3 ordered that Donahue be reinstated to his position as a code enforcement officer without the loss of seniority but without back pay or other benefits that had been lost because of the termination.4 The arbitrator qualified his chosen remedy by noting that the refusal to award back pay was "not to be viewed as a disciplinary suspension."5

The arbitrator concluded that there was insufficient evidence to find that Donahue, in fact, had kicked Roy in the head while Roy was being subdued by the police officers. He rejected the uncontradicted testimony of one of the police officers because, of the four persons present during the altercation, only one (that police officer) testified that Donahue kicked Roy.6 The arbitrator focused upon Roy's statement to the police following the incident that Donahue had kicked his head to the side. This, the arbitrator found, was inconsistent with the police officer's testimony that Roy's head went backwards after the kick.7 The arbitrator, however, was persuaded that Donahue had discharged the pepper spray in Roy's face, and, thus, concluded that "good and sufficient cause existed to discipline [Donahue] for the use of pepper spray on February 12."8 In addition, the arbitrator found that "the incident of February 12, standing alone, was clearly a serious offense by [Donahue]."9

Despite these findings, the arbitrator concluded that termination was not the appropriate discipline. He premised his decision on his finding that Donahue did not kick Roy in the head and on his separate conclusion that the City had not disciplined another Department employee who had committed a similar offense. The arbitrator, in accepting Donahue's "disparate treatment" defense, did not explore the nature of the other employee's alleged offense and, indeed, specifically made "no findings at all concerning what [the other employee] may or may not have done, as his guilt or innocence [was] not a matter before [the arbitrator]" but, nonetheless, found that "the record evidence in this case . . . establishes the existence of disparate treatment."10 The arbitrator, moreover, was influenced by Donahue's "exceptional and dedicated performance" as a code enforcement officer.11 The arbitrator also concluded that he could not consider Donahue's offensive racial remarks because they had not been cited as a basis for his termination by the Commissioner in the February 29 letter.12

The relationship between the City and Donahue is controlled by the CBA.13 The CBA establishes the grievance and arbitration procedures invoked by Donahue and the Union and provides for arbitration as the final contractual step in the resolution of employment disputes of this nature. The arbitrator's discretion under the CBA, however, is not unfettered. For example, the arbitrator must "limit the decision strictly to the application and interpretation of the provisions of the [CBA]."14 Furthermore, the arbitrator does not have the "power to make decisions contrary to, or inconsistent with, or modifying, or amending, or adding to, or eliminating, or varying in any way, the terms of [the CBA]."15 Disciplinary actions are authorized by Section 4.18 of the CBA which provides that "disciplinary measures may be taken for any good sufficient cause. The extent of the disciplinary action taken shall be commensurate with the offense, provided that the prior employment history of the Employee may also be considered pertinent."16 Finally, the arbitrator may, "modify or reject a disciplinary action" if, among other reasons, "there is not substantial evidence to support the need for disciplinary action" or "the action taken was unreasonable, capricious or arbitrary in view of the offense, the circumstances surrounding the offense and the past record of the Employee."17 Thus, it was under these standards that the arbitrator was charged with resolving the issues surrounding Donahue's termination.

II. CONTENTIONS

The City first argues that the Arbitration Award must be set aside because it violates the clearly established public policy against racial harassment and the clearly established public policy

requiring that City employees maintain the "public trust." The City next asserts that it is entitled to relief because the arbitrator's decision did not "draw its essence" from the CBA. The City further contends that the arbitrator did not appropriately consider the terms of the CBA and the City's reasonableness in terminating Donahue in light of the offense, the circumstances surrounding the offense, and Donahue's past record. The City maintains that either the arbitrator failed to properly apply the September 30 letter's warning that further conduct would result in Donahue's dismissal or the arbitrator implicitly and inappropriately modified the terms of the CBA including the terms of the September 30 letter. The City also contends that the arbitrator's reliance on the disparate treatment of another City employee failed to reflect a proper understanding of applicable law. Finally, the City argues that the arbitrator's decision is internally inconsistent because the arbitrator found that Donahue committed a serious offense but did not impose appropriate discipline in light of Donahue's past record.

III. ANALYSIS

A. Standard of Review of an Arbitrator's Decision

Summary judgment may be granted under Court of Chancery Rule 56 if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.18 "Summary judgment is an 'appropriate judicial mechanism for reviewing an arbitration award, because the complete record is before the court and no de novo hearing is permitted to determine whether [the award should be vacated.]'"19 In addition, "the legal standard by which labor arbitration awards are reviewed is a stringent one."20 Courts rarely set aside an arbitrator's interpretation and application of a collective bargaining agreement because that is what the employer and the union have "bargained for."21 Moreover, "the arbitration of labor disputes has long been held to be an efficient means of resolving these disputes and is strongly supported by public policy."22

B. Whether the Arbitration Award is Violative of a Clearly Established Public Policy

The City contends that Donahue's reinstatement must be set aside because the Arbitration Award violated a clearly established public policy. For purposes of this analysis, I assume that the Arbitration Award is otherwise valid and consistent with the CBA.

An arbitration-ordered reinstatement may fall because a court will "not enforce a collective bargaining agreement that is contrary to public policy."23 The public policy must be "explicit," "well-defined," and "dominant."24 Furthermore, the public policy must be "'ascertainable "by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"'25 However, the "courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law."26 Most importantly, the question is not whether the employee's conduct violated public policy; instead, the question is whether the reinstatement imposed through application of the governing collective bargaining agreement would violate public policy.27

The City first invokes its public policy against racial discrimination and argues that Donahue's offensive racial comments preclude his reinstatement. The arbitrator did not consider this allegation because the February 29 letter did not cite any offensive racial actions or comments as a basis for the termination. The scope of the grievance and the ensuing arbitration in which the employee must defend his position are framed through that termination notice. The City is not free to add new issues as the disciplinary process progresses.28 Thus, because Donahue's racial conduct was not properly before the arbitrator, it does not provide a basis for this Court's application of the public policy exception.

The City next asserts that Donahue's conduct in kicking Roy and discharging the pepper spray precludes his reinstatement. The Court may not consider the allegation that Donahue kicked Roy in

the face as a basis for applying the public policy exception because the arbitrator found that Donahue did not engage in such conduct. While it is easy to appreciate the City's skepticism about this factual finding, the arbitrator heard the testimony, squarely dealt with the issue, and set forth his reasons for disbelieving a police officer's uncontradicted testimony. In light of the latitude given to an arbitrator's factual findings,29 I must accept that Donahue did not kick Roy.30

In determining whether public policy would be violated by reinstatement of Donahue in light of his use of the pepper spray against Roy while Roy was being subdued by the police officers, I must first identify a "well-defined" and "dominant" public policy.31 Donahue's conduct clearly violated a host of well-defined and dominant public policies. That, however, is not the issue. Instead, I must determine if Donahue's reinstatement would violate those policies.

The City identifies several of its policies that, it contends, would be violated by Donahue's reinstatement. The policies all implicate the charge to public employees to maintain the public trust. For example, by his oath of office, Donahue committed that he would "place the public interest above any special or personal interests."32 The Code of the City of Wilmington (the "Code"), Section 2-341(a), mandates that "each city employee, city officer and honorary city official shall endeavor to pursue a course of conduct which will not raise any justifiable suspicion among the public that he is engaging in acts which are in violation of his public trust and which course of conduct will not reflect unfavorably upon the city and its government."33 Also, the Code, Section 2-339(b), identifies the public policy that City employees should "avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated."34

Thus, the City argues that in both of these two instances, the September 23 incident and the February 12 incident, "Donahue undeniably compromised the public's trust."35 This argument, of course, may be correct but it misses the point because the Court's focus is not on whether Donahue's conduct violated public policy or the public's trust. The troubling question presented in this case is whether the City's references to the public trust identify one or more explicit and well-defined public policies and whether reinstatement would violate any of those policies. At the core of the City's objection to the Arbitration Award is its recognition that Donahue's reinstatement would require resumption of close personal contacts with the public, a public with which on two occasions he has demonstrated an inability to interact in an appropriate manner.

The City's argument fails because it has not identified an "explicit" and "well-defined" public policy that would be violated by Donahue's reinstatement. First, the sources invoked to help define the pertinent public policy are neither "explicit" nor "well-defined." The Code provisions which set forth norms of conduct appropriately associated with notions of the public trust are general in nature and, thus, not explicit. Moreover, any conduct that would lead to serious disciplinary sanctions could reasonably be characterized as a violation of the high standards to which we hold our public employees. Thus, the City's contentions do not comport with the principle that "the public policy exception is narrow."36 Second, although a code enforcement officer interacts with the public in stressful situations as a representative of the City, that position does not involve the same strong considerations of public safety that more frequently have provided the underpinning for vacating an arbitration award on public policy grounds.37 Finally, the City has not identified "a bright-line rule mandating dismissal for an incident of [this nature.]"38 Unfortunately, both the September 23 and the February 12 incidents share a common theme: Donahue's inability to control his emotions. While a second chance coupled with counseling may have been the appropriate resolution of the September 23 incident, the considerations that must accompany his reinstatement after either event are not that dissimilar. In short, the City has not explained why reinstatement by the Commissioner after the

September 23 incident was consistent with public policy but reinstatement by the arbitrator following the February 12 incident violated the same public policy.39 Thus, for the foregoing reasons, the City has not demonstrated that the Arbitration Award must be set aside as violative of a clearly established public policy.40

As there are no material facts in dispute41 and Donahue and the Union are entitled to judgment as a matter of law on this issue, partial summary judgment will be entered favor of Donahue and the Union and against the City on the City's claim that the Arbitration Award is violative of public policy.

C. Whether the Arbitration Award "Draws its Essence" from the Collective Bargaining Agreement

The City's next argument starts from the proper premise that an arbitration award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice."42 However, "'as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'"43

At the core of the City's challenge is its contention that the arbitrator did not, perhaps because he could not, reconcile these two critical factors:

(1) The September 30 letter provided for Donahue's dismissal if his conduct thereafter "prevents or adversely impacts on [his] ability to handle any aspect of [his] responsibilities;" and

(2) The arbitrator found that Donahue's conduct on February 12 constituted "good and sufficient cause" for discipline and that it "was clearly a serious offense."

The September 30 letter as a disciplinary action accepted by Donahue with specific potential consequences, together with the CBA, defines his contractual rights and duties as a City employee. The arbitrator was cognizant of the September 23 incident:

The [February 12] incident is even more serious, however, when viewed within the context of the September [23] incident. More specifically, this was not the first time [Donahue] overreacted to a situation and caused considerable difficulty. It was only several months previous that [Donahue] had been disciplined for over-aggressive behavior. In the September incident as well as the February one, [Donahue] apparently took actions based upon the mistaken impression that he could act as a police officer, or at least could portray himself as a police officer to the public.44

Furthermore, the arbitrator was aware of the September 30 letter, which informed Donahue that certain future conduct would lead to his dismissal. Indeed, the arbitrator, in his opinion, set forth most of the text of the September 30 letter.45 However, the arbitrator never addressed the applicability of the September 30 letter to Donahue's conduct on February 12. Instead, as his opinion makes clear, the arbitrator relied upon his perception that Donahue had been subjected to disparate treatment, and then he proceeded to engage in a traditional balancing of factors, which included the nature of the offense and Donahue's employment history. The arbitrator did not consider in his disparate treatment analysis whether the other employee's continued employment with the City was also conditioned upon ongoing requirements such as those imposed upon Donahue by the September 30 letter.46 Accordingly, because of the arbitrator's failure to interpret the September 30 letter and apply it to the February 12 incident, he failed to "draw the essence" of his decision from the applicable agreement that governed Donahue's employment.47 Accordingly, the Arbitration Award reinstating Donahue cannot stand.

The question, thus, becomes one of judicial remedy. The Court's choices are vacating the Arbitration Award or modifying it. Here, the arbitrator did not address what the City has characterized as the "last chance" aspect of the September 30 letter as he evaluated the February 12 incident. Yet, it is the arbitrator's (and not the Court's) analysis and determination of that relationship for which the parties

contracted. Thus, to allow the parties to obtain the benefit of their agreement to arbitrate disputes of this nature, the meaning and effect of the September 30 letter in light of the February 12 incident must, in the first instance, be evaluated in the arbitration forum.

Accordingly, because there are no material facts in dispute and the City, as a matter of law, is entitled to relief, summary judgment is granted in favor of the City and against Donahue and the Union, first, vacating the Arbitration Award requiring Donahue's reinstatement and, second, requiring further proceedings in the arbitration forum to address the meaning and applicability of the September 30 letter in light of Donahue's subsequent conduct during the February 12 incident.

IV. CONCLUSION

For the foregoing reasons, partial summary judgment is granted in favor of Donahue and the Union and against the City on the City's claim that the Arbitration Award should be set aside for violation of a "clearly defined public policy." Summary judgment is granted in favor of the City and against Donahue and the Union (1) vacating the Arbitration Award requiring Donahue's reinstatement as a code enforcement officer, and (2) requiring further proceedings in the arbitration forum as to the effect of the September 30 letter.

IT IS SO ORDERED.

John W. Noble

Vice Chancellor

Footnotes

Footnotes

1 App. to Opening Br. in Supp. of Pl.'s Mot. for Summ. J. Seeking Vacating or Modifying of the Arbitrator's Award ("Appendix") at A054.

2 Id. at A079-80 (emphasis and underlining in original) (the "February 29 letter"). Significantly, Donahue's deplorable race-based comments were not cited as a factor in this decision.

3 Id. at A002-23.

4 Id. at A023.

5 Id. at A022.

6 Roy did not appear at the arbitration hearing. Donahue did not testify at the arbitration hearing. Because he was otherwise engaged in subduing Roy, the other police officer was not in a position to observe whether Donahue did kick Roy. The arbitrator was also troubled by the absence of medical records reflecting an injury consistent with the police officer's testimony.

7 Appendix at A016-17.

8 Id. at A017.

9 Id. at A018.

10 Id. at A021.

11 Id.

12 Id.

13 Excerpts from the CBA appear at Appendix at A024-31.

14 CBA § 4.12.

15 Id. § 4.13.

16 Id. § 4.18(a).

17 Id. § 4.18(g)(1),(4).

18 Cerberus Int'l, Ltd. v. Apollo Management, L.P., 794 A.2d 1141, 1150 (Del. 2002) ; Williams v. Geier, 671 A.2d 1368, 1375 (Del. 1996) .

19 Custom Decorative Moldings, Inc. v. Innovative Plastics Tech., Inc., 2000 Del. Ch. LEXIS 131, 2000 WL 1273301, at *2 (Del. Ch. Aug. 30, 2000) (quoting E.I. duPont de Nemours & Co. v.

Custom Blending Int'l, Inc., 1998 Del. Ch. LEXIS 215, 1998 WL 842289, at *3 (Del. Ch. Nov. 24, 1998)).

20 New Castle County v. Fraternal Order of Police, 1996 Del. Ch. LEXIS 163, 1996 WL 757237, at *1 (Del. Ch. Dec. 17, 1996); see also Meades v. Wilmington Hous. Auth., 2003 Del. Ch. LEXIS 20, 2003 WL 939863, at *4 (Del. Ch. Mar. 6, 2003) ("The role of courts in post-arbitration judicial review is limited.").

21 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960) .

22 Delaware State College v. Delaware State College Chapter of the Am. Assoc. of Univ. Professors, 1987 Del. Ch. LEXIS 536, 1987 WL 25370, at *2 (Del. Ch. Nov. 24, 1987). Although expressly excluded from the scope of Delaware's Uniform Arbitration Act, 10 Del.C. Ch. 57 , by 10 Del.C. § 5725 , this Court's equitable jurisdiction empowers it to hear disputes arising out of public employee labor arbitrations. See id. In addition, the general principles set forth in Delaware's Uniform Arbitration Act have been applied in the context of public employee labor arbitrations. See Board of Educ. of the Appoquinimink Sch. Dist. v. Appoquinimink Educ. Assoc., 1999 Del. Ch. LEXIS 188, 1999 WL 826492, at *4 (Del. Ch. Oct. 6, 1999).

23 W. R. Grace & Co. v. Local Union 294, Int'l Union of Rubber Workers, 461 U.S. 757, 766, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983) .

24 Id.

25 Eastern Associated Coal Corp. v. United Mineworkers, 531 U.S. 57, 62, 148 L. Ed. 2d 354, 121 S. Ct. 462 (2000) (quoting W. R. Grace & Co., 461 U.S. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66, 89 L. Ed. 744, 65 S. Ct. 442 (1945))).

26 Id. at 63 .

27 Id. at 62-63 . I acknowledge that I am relying on federal precedent. Delaware courts, in reviewing labor arbitration matters, routinely look to federal precedent for guidance. See, e.g., Delaware State College, 1987 Del. Ch. LEXIS 536, 1987 WL 25370, at *2-4.

28 The City argues that Donahue had notice of its concerns about his race-based conduct because the officer who processed him on February 12, 2000, and who heard those comments was present at the pre-termination hearing. That, however, does not change the simple fact that the February 29 letter does not include a finding as to race-based conduct and does not rely upon any such conduct for the sanction imposed. Furthermore, although the February 29 letter recites the "fair treatment of all people" as an "expectation inherent in serving the public," it sets forth no facts regarding either "fair treatment" or race-based conduct. I also note that the "Memorandum for Record" from the Commissioner to Donahue regarding his suspension pending his pre-termination hearing was limited to the assault on Roy. See Appendix at A078.

29 Meades, 2003 Del. Ch. LEXIS 20, 2003 WL 939863, at *5 ("The purpose of arbitration is to resolve controversies cheaply and promptly without litigation. That purpose would be defeated if courts were allowed to become appellate tribunals empowered to review the merits of arbitration awards on the basis of legal or factual error.").

30 Thus, the only remaining "wrongful" conduct for consideration is Donahue's discharge of the pepper spray.

31 Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996) , cert. denied, 517 U.S. 1251, 135 L. Ed. 2d 203, 116 S. Ct. 2514 (1996) . Once the appropriate public policy has been ascertained, the Court will then determine if the arbitration award and its implementation would violate that public policy.

32 Appendix at A032.

33 Id. at A035.
34 Id. at A033.
35 Opening Br. in Supp. of Pl.'s Mot. for Summ. J. Seeking Vacating of Modifying of Arbitrator's Award at 14.
36 Eastern Associated Coal Corp., 531 U.S. at 63 .
37 See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993) (vacating arbitrator's reinstatement of a helmsman of an oil tanker who tested positive for marijuana after his ship ran aground); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5th Cir. 1993) , cert. denied, 510 U.S. 965, 126 L. Ed. 2d 375, 114 S. Ct. 441 (1993) (vacating arbitrator's reinstatement of a petro-chemical technician involved in the supply of volative compounds who tested positive for cocaine); Amalgamated Meat Cutters v. Great W. Food Co., 712 F.2d 122 (5th Cir. 1983) (vacating arbitrator's reinstatement of eighteen-wheel rig driver who overturned his truck when driving while intoxicated). But see Eastern Associated Coal Corp., 531 U.S. 57, 148 L. Ed. 2d 354, 121 S. Ct. 462 (refusing to disturb arbitrator's reinstatement of a driver of heavy vehicles on public highways who had twice tested positive for marijuana).
38 New Castle County, 1996 Del. Ch. LEXIS 163, 1996 WL 757327, at *2.
39 Whether the public policy exception would be triggered by continuing incidents of this nature, of course, is not a question presently before the Court.
40 The City relies upon Stroehman Bakeries where the Court set aside an arbitrator's reinstatement of an employee accused of sexual harassment on public policy grounds. Stroehman Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) , cert. denied, 506 U.S. 1022, 121 L. Ed. 2d 585, 113 S. Ct. 660 (1992) . However, "the arbitrator [in Stroehman Bakeries] made no findings concerning the incident, but merely ordered the employee to be reinstated. What [the Court] found violative of the public policy against sexual harassment was the arbitrator's decision to return the employee to work without any findings about the incident. The effect of the award, therefore, undermined not only public policy generally, but also the employer's specific anti-discriminatory practices." New Castle County, 1996 Del. Ch. LEXIS 163, 1996 WL 757237, at *2 (citations omitted). Here, the City did not fairly place Donahue on notice of its allegations of race-based conduct and the arbitrator made detailed findings about Donahue's assault of Roy. In addition, although the arbitrator eschewed the term "disciplinary suspension," he nonetheless crafted an award with the necessary consequence that Donahue suffered a substantial loss of pay and benefits because of his conduct.
41 Although there are material facts that were disputed in the arbitration forum (e.g., whether Donahue kicked Roy in the face), the facts which are material to the claims in this Court are not in dispute.
42 United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987) ; see also Delaware State College, 1987 Del. Ch. LEXIS 536, 1987 WL 25370, at *2; State, Dept. of Correction v. Delaware Pub. Employees Council 82, 1987 Del. Ch. LEXIS 369, 1987 WL 5179, at *3, (Del. Ch. Jan. 7, 1987). This standard has also been framed as whether "the award bears no reasonable relationship to the underlying contract from which it is derived." Meades, 2003 Del. Ch. LEXIS 20, 2003 WL 939863, at *6.
43 Eastern Associated Coal Corp., 531 U.S. at 62 (alteration in original) (quoting Misco, 484 U.S. at 38).
44 Appendix at A018.
45 Id. at A004.
46 Instead, the arbitrator, in his discussion of the City's reliance on its characterization of the

September 30 letter as a "last chance" agreement to refute the disparate treatment argument, noted that the incident involving the other employee "may not have been the first time [he] was involved in an incident involving a physical altercation while employed by the City." Id. at A020. Thus, there was no determination whether Donahue's continued employment and the other employee's continued employment were subject to the same (or similar) condition as imposed on Donahue by the September 30 letter.

47 Thus, I need not consider the City's companion argument that, by simply ignoring the ramifications of the September 30 letter, the arbitrator in substance modified the employment agreement. Similarly, I do not consider the City's other claims regarding the arbitrator's failure to consider appropriately the reasonableness and fairness of its termination decision.

2003 Del. Ch. LEXIS 28::Pocket Change Kahunaville, Inc. v. Kahunaville of Eastwood Mall, Inc.::March 21, 2003, Decided

STATE OF DELAWARE
DELAWARE STATE PUBLIC INTEGRITY COMMISSION
MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

July 30, 2001

The Honorable Carl Goldstein
Superior Court
Daniel L. Herrmann Courthouse
10th & King Streets
Wilmington, DE 19801 N210

Dear Judge Goldstein:

Recently, the State Public Integrity Commission became aware of your decision in *Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. NO. 00A-04-007 CG, J. Goldstein (November 27, 2000).* That opinion states that the State Code of Conduct, *29 Del. C. § 5805,* does not apply to employees of a municipality or township, but was used as guidance in rendering the decision.

We wish to advise you that the State Code of Conduct does apply to employees and elected and appointed officials of any county, municipality or town, unless they have adopted their own Code of Conduct which the Commission must approve as being at least as stringent as the State Code of Conduct. The Town of Odessa has never submitted its own Code of Conduct to this Commission for approval. Thus, they are subject to the State Code of Conduct.

We are aware that this law regarding local governments is not codified within the statutory section of the Code. However, the information is noted in the "Revisor's Note" at the beginning of Title 29, Chapter 58. *(See attached).* The legislation was signed into law by the Governor on July 2, 1992. *(S. B. No. 406, attached).* It is part of the Delaware Laws and can be found at *68 Del. Laws, c. 433.*

As you did, in fact, use the State Code of Conduct, in rendering your decision, we merely wished to bring to your attention that the statement that it did not apply, but was used for guidance, does not completely reflect the status of the law.

We also note that you found that there was no violation of *29 Del. C. § 5805(a)(2),* but that it would have been prudent for the officials to recuse themselves, had that been possible. In effect, a finding under the "rule of necessity." Similarly, under the State Code of Conduct, employees and officials may proceed to act in the face of a

conflict if they have a statutory responsibility that cannot be delegated. *29 Del. C. § 5805(a)(3).* Thus, the Code of Conduct has what may be considered a statutory "rule of necessity."

Under the State Code of Conduct's "rule of necessity," the law requires that officials file a full disclosure with this Commission "promptly after becoming aware of such conflict of interest." *29 Del. C. § 5805(a)(3).* As the Court did not find a conflict, as a matter of law, it appears that no such filing would be required in this instance.

Aside from those matters, as you may know, this Commission is charged with issuing advisory opinions interpreting the State Code of Conduct and granting waivers. *29 Del. C. § 5807(a).* We have provided copies our opinions to all of the Court's law libraries, if you or your law clerks should find them useful in the future. That information also is published on our web site at www.state.de.us/pic.

This letter is copied to the legal counsel in the *Harvey* matter to alert them to the application of the State Code of Conduct.

We hope this information will be of use.

Respectfully submitted,

Janet A. Wright
Commission Counsel

JAW:lha

cc: Clifford B. Hearn, Jr.
Marin Bayard

NOTE: As a result of this decision, PIC requested the Code revisors to move the local government provision into the body of the statute as it was substantive law; not a comment. See, Tab H-6, Legislative History, 68 Del. Laws, c. 433.

KATHLEEN H. HARVEY, Petitioner/Appellant, v. ZONING BOARD OF ADJUSTMENT OF ODESSA, Respondent/Appellees.
2000 Del Super LEXIS 4322000 Del. Super. LEXIS 432
C.A. No. 00A-04-007 CG
November 27, 2000, Date Decided

SUPERIOR COURT OF DELAWARE, NEW CASTLE
GOLDSTEIN, J.

Disposition
Petition GRANTED. Appeal REVERSED.
Counsel: Bayard, Martin, Wilmington, Delaware, Attorney for Petitioner/Appellant.
Clifford B. Hearn, Jr., Wilmington, Delaware, Attorney for Respondent/Appellee.
Opinion
Editorial Information: Subsequent History
Released for Publication by the Court January 12, 2001.
Opinion by: GOLDSTEIN
MEMORANDUM OPINION
GOLDSTEIN, J.

Petitioner/Appellant, Kathleen H. Harvey, has filed a complaint seeking a writ of certiorari pursuant to 22 Del.C. § 328 asking the Court to review a decision of the Zoning Board of Adjustment of Odessa ("Board"). For the reasons set forth below, the Court hereby grants the petition for writ of certiorari and reverses the decision of the Board.

On October 11, 1999, the Town of Odessa, Delaware, by and through its Mayor and Town Council, applied to the Zoning Administrator of Odessa for a zoning permit to construct a veterans memorial in the historic residential district in Odessa. Specifically, the veterans memorial was to be located at 315 Main Street in Odessa, also known as the Old Academy Building. The Zoning Administrator approved the application and issued the permit the same day.

On November 3, 1999, the Historic Commission of the Town of Odessa met to consider the application for the veterans monument. After hearing public comment both in favor and in opposition to the monument, the Historic Commission voted to approve the application.

On December 16, 1999, Harvey filed a Notice of Appeal pursuant to 22 Del.C. § 324 with the Board. Harvey requested formal review of the decisions of the Zoning Administrator and Historic Commission regarding the permit for the veterans memorial. On February 8, 2000, the Board held a public hearing to consider Harvey's appeal. The Board consisted of four members: Peter Cooke, Karlyn Grant, L. D. Shank, and John Tulloch.

Initially, the Board noted that, although Harvey's Notice of Appeal was captioned, "Kathleen H. Harvey, et al," Harvey's legal counsel conceded that she stood alone before the Board. The Board then asked that Harvey indicate how she was an "aggrieved person" so as to be able to bring an appeal before the Board. In response, Harvey testified that she was a resident of, and a taxpayer in, Odessa. Harvey also indicated that a portion of her property was located in the Historic District. Harvey stated that she saw the Old Academy Building frequently and that it was central to the life of Odessa. At the conclusion of the hearing, the Board decided to provide Harvey and counsel for the Town of Odessa with the opportunity to provide "additional legal authorities" on

the subject of whether Harvey was an aggrieved person.

During the February 8, 2000 hearing, Harvey also moved that three of the Board members recuse themselves due to conflict of interest. Specifically, Harvey asked that Karyln Grant recuse herself because she was the wife of the Mayor of Odessa and that John Tulloch and Peter Cooke recuse themselves because they were married to members of the Town Council and Historic Commission, respectively. The Board did not rule on Harvey's motion.

On March 14, 2000, the Board met again to address Harvey's appeal. Initially, the Board considered Harvey's motion that Grant, Tulloch, and Cooke recuse themselves due to conflict of interest. The Board noted that, if the three board members were to recuse themselves, it would be up to the Mayor and Council to appoint replacements, creating another potential conflict. The Board also noted a statutory provision dealing with State employees required a financial interest in order to create a conflict of interest. Grant, Tulloch, and Cooke each stated on the record that they had nofinancial interest in the veterans memorial and that they were capable of rendering an impartial decision.

The Board next considered the issue of Harvey's status as an aggrieved person. Harvey again argued that she was an aggrieved person because she owned property in Odessa which was partially located within the Historic District and because she was a taxpayer in Odessa. Also, Harvey argued that the particular building at issue within the Historic District was deeded to the town with a restriction that public input was necessary to affect significant changes. Finally, Harvey argued that citizens of Odessa had the right to come before the Board to express their opinions regarding the Historic District.

In response, counsel for the Town of Odessa argued that a person must show "a special, financial, personal interest in the issue involved in the decision of the administrative officer, whether it was the Historic person or the Zoning administrator as to whether or not they are an aggrieved party." At the conclusion of the hearing, the Board voted three to one that Harvey was not an aggrieved person and did not have standing to undertake the appeal.

Harvey has now appealed the decision of the Board of Adjustment pursuant to 9 Del.C. § 328.1 in support of her appeal, Harvey raises three grounds. First, Harvey argues that she was denied fundamental due process because three members of the Board had conflicts of interest so as to prevent them from rendering an impartial decision. Second, Harvey argues that the Board erred in its determination that Harvey was not an "aggrieved person" pursuant to Odessa town ordinance 97-1 and 22 Del.C. § 324 so that she did not have standing to ask for administrative review before the Board. Finally, Harvey argues that the "taxpayer standing" language contained in the language of 22 Del.C. § 328 applied to Harvey so as to grant her standing to petition the Board for administrative review of the decisions of the Zoning Administrator and Historic Commission.

This Court's role, in reviewing decisions of the Board of Adjustment, is limited to determining whether substantial evidence contained in the record supports the Board's factual findings and whether the Board's decision is free from legal error. Janaman v. New Castle County Rd. of Adjustment, Del. Super., 364 A.2d 1241, 1242 (1976), aff'd., Del. Supr., 379 A.2d 1118 (1977). This Court may reverse, affirm or modify the Board's decision. 22 Del.C. § 328(c).

Initially, Harvey argues that members of the Board of Adjustment had conflicts of interest involved in rendering their decision regarding her appeal so that Harvey was denied fundamental due process of law. Specifically, as set forth above, three of the Board members are married, respectively, to the Mayor, a Town Council member, and a Historic Commission member. As a result, Harvey argues, she was subject to prejudice and bias because the three Board members

with "disqualifying conflicts of interest" refused to recuse themselves from hearing her appeal.
Respondent argues that the members of the Board cited by Harvey had no conflicts of interest under the factual circumstances of the proceeding before the Board and, thus, Harvey was not denied due process. Initially, Respondent points out that the Town of Odessa has a population of 311 persons. Therefore, finding three replacements for the Board members asked to step down who did not have some type of conflict of interest would be difficult. Respondent concludes that it was not necessary or practical for the three Board members to recuse themselves.
Procedural due process requires a fair hearing and a fair hearing officer. Officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. Tumey v. State of Ohio, 273 U.S. 510, 522, 71 L. Ed. 749, 47 S. Ct. 437 (1927). However, it has been held that all questions of judicial or quasi-judicial qualification do not necessarily involve constitutional validity. Id. at 523. Turney noted that "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." Id. A party's Fourteenth Amendment right to due process of law would be violated where the judge had "a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." Id.
Respondent also states, and Harvey does not dispute, that there is no conflict of interest ordinance in effect regarding personal relatives of a party serving on an administrative board in Odessa. Therefore, it follows that, absent an administrative rule or statute, an administrative hearing officer, such as the members of the Board, should only be disqualified upon the showing of a direct, personal, substantial pecuniary interest in the outcome of the case. Harvey has made no such showing, alleging only that the Board members' "prior involvements with the parties, in the form of their familial relationships, lack actual elements of fairness due to the inherent conflict and bias."
The Court's position is supported by the statutory provision regarding conflicts of interest applicable to state employees, state officers and honorary state officials. Twenty-nine Del.C. § 5805(a)(1) provides that such state employees may not participate in the review or disposition of any matter pending before the State when the state employee "has a personal or private interest...." A "personal or private interest in a matter" is defined as "an interest which tends to impair a person's independence of judgment in the performance of the person's duties 'with respect to that matter." 29 Del.C. § 5805(a)(1). Finally, § 5805(a)(2) defines "an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter" as:
a. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit would accrue to others who are members of the same class or group of persons; or
b. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.
In other words, a state employee or official is considered to have a disqualifying conflict of interest when that person, or a close relative, has a financial interest in, or would accrue a financial benefit from, the subject of the matter pending before him. Although this statutory provision does not apply to employees of a municipality or township, the Court finds that it provides further guidance in this matter.
Finally, the Court notes that, in situations such as the one presented by this appeal, where the party seeking a zoning permit or variance is the Mayor or the Town Council, it is conceivable

that replacing the recused Board members would be an impossibility. Respondent points out that, were the Board members to step aside, it would be up to the Mayor and Town Council to replace them from the remaining eligible citizens of a town of just over three hundred people. Any such replacement would have a potential conflict simply by virtue of being appointed by the very party seeking the zoning permit.

It has been held that, even where a financial interest dictates disqualification of a judge who otherwise would have power to make a determination, an exception exists where the basis for that disqualification would disqualify all other judges as well and therefore leave the parties without an opportunity for their day in court. Stiftel v. Carper, Del. Ch., 378 A.2d 124, 126 (1977), aff'd, Del. Supr., 384 A.2d 2 (1977). In this instance, although the Board members were not required to recuse themselves due to any financial interest, it may have been prudent for them to step aside had it been possible. However, it appears that such action by the Board members may have indeed left Harvey without an opportunity for her "day in court" as their replacements would also have had potential conflict.

In conclusion, the Court finds that Harvey has failed to show that the three members of the Board she identifies as having a conflict of interest have a direct, substantial, pecuniary interest in the subject matter of her appeal to the Board. Therefore, the Court finds that the Board did not violate Harvey's Fourteenth Amendment right to due process of law by failing to remove three of its four members when it considered Harvey's appeal.

Harvey's second argument in support of her appeal is that the Board erred by determining that Harvey was not an "aggrieved person" so that she had no standing to seek review by the Board of the decisions of the Zoning Administrator and Historic Commission. Twenty-two Del.C. § 324 governs appeals to the Board of Adjustment. The statute reads, in pertinent part:

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer.

The issue of standing is a mixed question of fact and law. Oceanport Indus. v. Wilmington Stevedores Del. Supr., 636 A.2d 892, 899 (1994). Whether the Board correctly interpreted the applicable standing provision is a question of law, which the Court reviews de novo. Id. quoting ... To determine the issue of whether Harvey meets the legal test of standing, the Court must decide whether substantial evidence supports the findings below. Id.

As set forth above, at the conclusion of the March 14, 2000 meeting, the Board voted and determined that Harvey did not qualify as an aggrieved person and so denied her appeal due to lack of standing. Both at the Board hearing and in its answering brief, respondent argued that, in order to qualify as an aggrieved person, Harvey had to "present proof of the adverse effect the changed status has or could have on the use, enjoyment, and value of his or her own property."

In support of her appeal, Harvey argues, as she did before the Board, that she owns property within and adjacent to the Historic District and that she is a citizen of the Town of Odessa. Harvey argues that any property owner within the Historic District has not only an economic interest in his or her own property, but in the vitality of the Historic District as a whole.

In response, Respondent argues that Harvey has no standing before the Board because she has not shown any injury or damage other than as a member of the general public and because Harvey produced no evidence that her property value would decrease as a result of the war memorial.

The term, "standing," refers to the right of a party to invoke the jurisdiction of a court, or in this case, an administrative board, to enforce a claim or to redress a grievance. Stuart Kingston, Inc.

v. Robinson, Del. Supr. 596 A.2d 1378, 1382 (1991) (citations omitted.) The issue of standing is concerned, "only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy." Id. Generally, in order to have standing, the plaintiff, or the petitioner in this case, must show that he or she has sustained an injury-in-fact and that the interests he or she seeks to protect are within the zone of interests to be protected by the statute. Committee of Merchants and Citizens Against the Proposed Annexation, Inc. v. Longo, Del. Supr., 669 A.2d 41, 44 (1995) (citing Oceanport, 636 A.2d at 903-904).

In considering whether a citizens group could be considered an "aggrieved person" so as to have standing to obtain judicial review of a decision of a county board of adjustment, the Delaware Supreme Court has adopted a broad rule regarding standing. Specifically, the Court stated,

the "broader rule of standing is entirely consistent with the underlying purpose of our zoning laws. Our municipalities enact zoning ordinances in order to protect the public's health, welfare, and safety. A challenge to a zoning variance focuses the court's attention on this public interest." Vassallo v. Penn Rose Civic Ass'n, Del. Supr., 429 A.2d 168, 170 (1981) (quoting Douglaston Civic Ass'n v. Galvin, N. Y., 36 N.Y.2d 1, 324 N.E.2d 317, 320, 364 N.Y.S.2d 830 (1974)). 2 In applying this standard, this Court previously found that affected landowners located outside the community where the appeal occurs may qualify as "persons aggrieved" so as to have standing before the Court under 22 Del.C. § 328. Brandywine Park Condominium v. Members of the City of Wilmington Zoning Board of Adjustment, Del. Super., 534 A.2d 286 (1987).

As outlined above, Harvey testified before the Board that she owned property within the Town of Odessa and that a portion of that property was within the Historic District. The remainder of the property, where her house is located, adjoins the Historic District Harvey argued to the Board that the value of her property as well as the value of the Historic District as a whole may be affected by the location of the war memorial. According to Harvey, any property owner within the historic district has not only an economic interest in his or her own property, but in the vitality of the Historic District as a whole.

Initially, the Court finds that Harvey satisfied the latter requirement for standing, that is, whether the interests she sought to protect are within the zone of interests to be protected by the statute. The zone of interests intended to be protected by municipal zoning regulations is set forth in 22 Del.C. § 301:

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of the population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

This Court has held that the real design and purpose of zoning ordinances is to promote the general welfare and that the principal reason for restricting the use of property in certain localities is to make the locality a better place in which to live, toprotect the value of the property and provide for the health and safety of those who live there. In re Auditorium, Inc., Del. Super., 45 Del. 430, 84 A.2d 598, 602 (1951).

As to the first requirement for standing, that Harvey show an injury-in-fact, the Court finds initially that the Board erred as a matter of law by focusing solely on whether Harvey has shown a pecuniary loss as a result of the location of the war memorial. Harvey argued before the Board that, aside from the economic impact on the value of her property, she had an interest in the aesthetics of the Historic District as a whole.

It has previously been held that a party's asserted claim to standing may include both economic

and environmental injuries. Oceanport Indus., 636 A.2d at 905. Save the Courthouse Committee v. Lynn, S.D.N.Y, 408 F. Supp. 1323 (1975) analogized the loss of environmental benefits to the loss of aesthetic benefits, such as those claimed by Harvey. In Lynn, a citizens group sought standing as an "adversely affected or aggrieved" party within the meaning of the applicable statute to prevent the proposed demolition of an old courthouse complex as part of an urban renewal project. 408 F. Supp. at 1327. Plaintiffs alleged that the proposed demolition would deprive them of the aesthetic benefit they derived from the courthouse. Id. The court explained:

While it is true that such a benefit hardly can be quantified, this is not to say that it is thereby so insufficient that loss of it will not support a finding of standing. Injury due to loss of benefits that might be derived from natural resources such as camping, hiking, fishing, sight seeing and the like is similarly of an intangible character and yet potential injury to such interests was found . . . to be enough to support standing. The fact that we are concerned here with esthetic enjoyment of a cultural resource with alleged historical and architectural value rather than a natural resource is not significant distinction since injury to such interests can well be said to fall into the same category.

Id. at 1332.

Both Oceanport and Lynn note that, in addition to showing that there is an injury in fact, whether pecuniary, environmental, or aesthetic, the petitioner must show that the alleged injury will affect him or her. Oceanport, 636 A.2d at 905 ("the party claiming standing must show that the alleged environmental injury will actually affect it."); Lynn, at 1332 ("In addition to an injury in fact, the plaintiffs must also show that they themselves have been injured.")

Lynn acknowledges that where the injury in fact presented is aesthetic, it may be somewhat difficult to determine whether the party seeking review is or may be injured by the alleged action. Id. at 1332. Lynn held that,

A mere declaration of harm to such an interest may be sufficient under some circumstances to demonstrate that plaintiffs fall within the group of person whose interest may be injured. . . . However, other factors, such as residence and prior usage and concern with respect to the cultural resource, may serve to buttress such a finding.

Id. (Citations omitted). Lynn found that the plaintiff citizens group had standing to challenge the demolition of the demolition of the courthouse where two of the individual plaintiffs owned property in the vicinity of the courthouse, one of the plaintiffs held a reversionary interest in the property, and one of the plaintiffs had practiced law in the courthouse and was "presumably acquainted with the purported esthetic values of the Courthouse." Id.

Although the Court notes that the holdings in Lynn are not binding upon this Court, its reasoning is persuasive, especially when analogized to the findings of Oceanport regarding environmental harm. In the instant case, Harvey presented evidence to the Board that she was a property owner within and adjacent to the Historic District of Odessa and that she had an interest in the aesthetics of the Historic District Harvey also alleged economic harm to her property value due to the location of the war memorial. Under the analysis set forth above, the Court finds that there is substantial evidence set forth in the record below to support a factual finding that Harvey was an "aggrieved person" so as to have standing to have the Board consider the merits of her appeal. As a result, the decision of the Board must be reversed.

Harvey's third ground in support of her appeal is that the "taxpayer standing" language of 22 Del.C. § 328(a) applies to her so as to grant her standing to petition the board of adjustment. Initially, the Court notes that § 328 governs appeals to this Court from decisions of the board of

adjustment and in no way applies to appeals to the board of adjustment. Because the Court finds that Harvey had standing as a person aggrieved under the applicable statute, § 324, it need not further address Harvey's final ground for relief.

Therefore, for the reasons set forth above, the Court hereby REVERSES the decision of the Board.3

IT IS SO ORDERED.

Carl Goldstein, Judge

Footnotes

Footnotes

1 22 Del.C. § 328(a) states, in pertinent part:

Any person or person, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality.

2 Vassallo also adopted factors set forth in Douglaston to determine whether a citizens group had standing. Id. Although the parties make arguments regarding those factors, this Court finds that those factors provide guidance only to the specific situation of a group of citizens seeking standing as a "person aggrieved."

3 Although it would seem to be more expedient for the Court to remand the matter to the Board with instructions to review Harvey's appeal on its merit, the Court does not have the power, pursuant to 22 Del.C. § 328 to remand such matters to the Board of Adjustment. See 1001 Jefferson Plaza Partnership, L.P. v. New Castle County Dept. of Finance, Del. Supr., 695 A.2d 50, 53 (1996) (interpreting identical statutory language).

2000 Del. Super. LEXIS 430::State v. Jackson::November 27, 2000, Date Decided

[Group:"2000 Del. Super. LEXIS 430"]LNI:426P-NGH0-0039-4059-00000-00

ZONING BOARD OF ADJUSTMENT OF ODESSA, Respondent-Appellee Below, Appellant, v. KATHLEEN H. HARVEY, Petitioner-Appellant Below, Appellee.
781 A2d 697781 A.2d 697; 2001 Del LEXIS 2322001 Del. LEXIS 232
No. 590, 2000
May 23, 2001, Decided

SUPREME COURT OF DELAWARE
Before WALSH, HOLLAND, and BERGER, Justices.

Disposition
AFFIRMED.
Opinion
Editorial Information: Prior History
Court Below: Superior Court of the State of Delaware in and for New Castle County. C.A. No. 00A-04-007.
Editorial Information: Subsequent History
Released for Publication June 8, 2001.
Opinion by: Joseph T. Walsh
ORDER
This 23rd day of May 2001, upon consideration of the briefs of the parties, we conclude that this appeal should be affirmed on the basis of, and for the reasons set forth in, the decision of the Superior Court dated November 27, 2000.
NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,
AFFIRMED.
BY THE COURT:
s/ Joseph T. Walsh
Justice

Beebe Medical Center v. Certificate of Need Appeals Board, et al.
1995 Del Super LEXIS 3291995 Del. Super. LEXIS 329
C.A. No. 94A-01-004
June 30, 1995, Decided

SUPERIOR COURT OF DELAWARE, KENT
N. MAXSON TERRY, JR., RESIDENT JUDGE
Counsel Loretta G. LeBar, Esq., Department of Justice, Wilmington, Delaware.
David R. Hackett, Esq., Griffin & Hackett, Georgetown, Delaware.
William E. Manning, Esq., Bonnie L. Wolfgang, Esq., Duane, Morris & Heckscher, Wilmington, Delaware.
Opinion
Editorial Information: Subsequent History
Released for Publication by the Court August 16, 1995.
Opinion by: N. MAXSON TERRY, JR.

This is an appeal from the denial by the Bureau of Health Planning and Resources Management (the "Bureau") of a Certificate of Need ("CON") for Beebe Medical Center ("BMC") for the establishment of a cardiac catheterization unit. At the same time BMC's application was denied, Nanticoke Memorial Hospital ("NMH") received approval to initiate its own cardiac catheterization laboratory. BMC also appeals that decision.
FACTS
A. The Statutory Framework
In order to understand the facts in this case, it is necessary to explain the statutory procedures involved in obtaining a certificate of need. Under the statutory framework as it existed at the time of the actions herein, a person was required to obtain a CON prior to engaging in a number of activities outlined in 16 Del.C. ' 9304, such as constructing or expanding a health care facility or changing the bed capacity of a health care facility or acquiring major medical equipment. When the Bureau received an application, it was referred to the Health Resources Management Council ("Council") who then made a recommendation to the Bureau who then made the final decision.1 An appeal could thereafter be perfected to a five-person Appeals Board. 16 Del.C. ' 9305(9) (1992 pocket part). The Appeals Board was to review the record from below but when additional evidence was proffered, it remanded the decision to the Bureau so that it could consider the additional evidence.2 An appeal to the Superior Court could then be taken which is on the record.3 16 Del.C. ' 9305(9) (1992 Pocket Part).4
One of the duties of the Council (now known as the Delaware Health Resources Board) was to formulate a State Health Plan (now known as the Health Resources Management Plan) which assesses the supply of health care resources, particularly facilities and medical technologies, and the need for such resources. 16 Del.C. ' 9303(d)(1) (1992 Pocket Part). When the Council5 reviewed an application for a CON, the following seven criteria were to be considered:
1) The relationship of the proposal to the state health plan adopted by the Health Resources Management Council pursuant to ' 9303 of the title;
2) The need of the population for the proposed project;
3) The availability of less costly and/or more effective alternatives to the proposal;
4) The relationship of the proposal to the existing health care delivery system;
5) The immediate and long-term viability of the proposal in terms of the applicant's access to

financial, management and other necessary resources;
6) The anticipated effect of the proposal on the costs of and charges for health care; and
7) The anticipated effect of the proposal on the quality of health care.
16 Del.C. ' 9306 (1992 Supplement).6

B. The Review of BMC's and NMH's Applications

BMC filed an application for a CON with the Bureau in April of 1992 seeking authorization to establish a cardiac catheterization laboratory at its facility. NMH filed a CON application with the Bureau in March also seeking to initiate cardiac catheterization services. Nanticoke proposed to expand its current angiogram capabilities to include cardiac catheterization with a capital expenditure of about $ 220,000. Beebe on the other hand, proposed a laboratory dedicated solely to performing cardiac catheterization at a cost of about $ 1,203,000.

The Bureau referred both applications to the Council who in turn appointed a review committee to review both CONs simultaneously. The review committee held a public hearing on June 25, 1992 at which both hospitals presented evidence. Thereafter, the Council convened a number of meetings to consider the two proposals. A meeting of the review committee was held on August 18, 1992 at which both Nanticoke and Beebe were permitted to make additional presentations. In preparation for the meeting, the review committee sent a detailed letter to each hospital requesting additional information on ten specific points. In addition, the review committee sent a letter to Peninsula Regional Medical Center ("PRMC"), at that time the largest provider of cardiac catheterization services to lower Delaware residents, asking for information pertaining to the services it provided. Throughout the review period, the review committee gathered information relevant to the seven statutory criteria listed above.7 On October 9, 1992 the review committee issued its report to the Council. Of the seven statutory criteria for review, the review committee found that both applicants failed to meet six out of seven. Under the first criteria, the State Health Plan required that a minimum of 300 cardiac catheterizations be performed within three years of implementation. The review committee found that this would not be met by either hospital. Under criterion two, the review committee found that the needs of the population of southern Delaware were adequately met by other in-state facilities and out-of-state facilities, such as PRMC. Neither hospital met criterion three since the review committee found that there were less costly alternatives to the proposal, namely other facilities which could provide the services. NMH and BMC failed criterion five due to the review committee's finding that since neither facility could maintain the required minimum volume, the program would not remain viable. For the same reason, both hospitals failed criterion six since the lack of volume would increase costs. Similarly, the applicants failed criterion seven because the review committee found that quality of service and volume are directly related and failure to meet the 300 procedures threshold suggests compromised quality of service.

The Council voted to reject both applications after considering the review committee's report, the evidence and hearing additional testimony. The Bureau, following the recommendation of the Council, denied both applications. The basis for the denial was the Bureau's belief that neither BMC nor NMH would be able to meet the State Health Plan's threshold requirement of 300 procedures per year after the first three years. The Bureau followed the review committee's and Council's findings, except that the Bureau found that the NMH application was consistent with criterion six and BMC was not.

After this finding, both hospitals appealed the decision to the Appeals Board. However, before the appeal could proceed the Bureau requested that the case be sent back for further consideration in light of additional evidence submitted by NMH pertaining to the State Health

Plan's 300 procedures minimum. The proposals were again considered by the Council as a whole. Both hospitals submitted additional evidence to the Council. A special meeting of the Council was convened on March 31, 1993 to consider the additional evidence. BMC and NMH both made presentations to the Council.

After hearing the additional evidence, the Council went into an executive session to discuss, with advice of counsel, whether these applications could be considered from a regional perspective and to develop a strategy for dealing with the applications. When the Council reconvened after the executive session, it voted to approve NMH's application and deny BMC's. The Bureau then followed this recommendation. It is the decision of the Bureau at this stage that is the subject of this appeal. Based on statistics from 1992 pertaining to the number of Sussex County residents who underwent cardiac catheterization, the Bureau concluded that the necessary market share needed to reach the 300 procedures guideline was much lower than had been previously calculated. Therefore, the Bureau concluded that a lab in Sussex County could be supported but two labs could not. NMH was selected to receive the CON because it "clearly represents the less costly proposal." Bureau of Health Planning and Resources Management, Reconsideration Upon Voluntary Remand, p. 5 (hereinafter, "Remand Decision"). The Bureau cited the fact that NMH, in its second year of operation, projects a charge of $ 1,050 per procedure while BMC projects a cost of $ 1,500. The Bureau also concluded that the NMH proposal would not compromise quality. The Bureau was satisfied that a shared lab, such as the one proposed by NMH, would provide high quality studies. The Bureau stated that it did not find that a quality program was not developed by Beebe, "only that quality is not being compromised at NMH, the lower cost alternative." The Bureau also considered the location of the two competing hospitals. It found that neither was materially better suited to serve the population of Sussex County. However, it did find that NMH was in a better location to capture the market from PRMC in Maryland. The Bureau stated:

In conclusion, the Bureau finds NMH to be the lower cost alternative without compromising quality. Neither applicant is felt to offer a locational advantage in terms of serving the population. Nanticoke's location may be advantageous in terms of market capture.

STANDARD OF REVIEW

This Court's role on appeal from an administrative ruling is to determine if the agency has exceeded its statutory authority, has properly interpreted the applicable law and reached a decision based on substantial evidence. Manor Care, Inc. v. State of Delaware, Del. Super., C.A. No. 81A-MY-5, Walsh, J. (Aug. 20, 1981). The Court must apply the substantial evidence standard of review. St. Francis Hospital, Inc. v. Appeals Board, Del. Super., C.A. No. 92A-12-2, Del Pesco, J. (Aug. 12, 1993), (citing, Olney v. Cooch, Del. Supr., 425 A.2d 610, 612-12 (1981)). This Court will not substitute its judgment for that of an administrative agency as long as there is substantial evidence to support the findings of the agency. Olney, 425 A.2d at 613. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. Olney, 425 A.2d at 614, (citing, Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966).

DISCUSSION

Appellant, BMC, alleges both procedural and substantive deficits in the Bureau's Remand Decision. Procedurally, BMC alleges that the Council violated procedural rules such as the Freedom of Information Act by deliberating in an executive session during the March 31, 1993 meeting. **BMC also alleges that there were impermissible conflicts of interest in the Council which rendered the decision making process impartial.** On the substantive side, BMC asserts that the guidelines in the State Health Plan are unenforceable since their promulgation did not

occur in compliance with the Administrative Procedures Act. Next, BMC alleges that the Bureau's decision was not supported by substantial evidence in the record primarily due to the fact that the
Bureau did not comparatively assess the two competing applications. I will address each of the Appellant's arguments.
A. Allegations of Procedural Default.
1. The Executive Session
BMC alleges that the Council violated the Freedom of Information Act, ("FOIA") 29 Del.C. ' 10001 et. seq. by holding an executive session that resulted in substantial rulemaking, thereby denying BMC the ability to observe and monitor the decision-making process. Appellants assert that there was no FOIA violation and argues that even if there were, the appropriate forum for this complaint is in the Court of Chancery.
29 Del.C. ' 10004 requires that meetings of public bodies shall be open to the public, except in certain situations. One such exception is found in 29 Del.C. ' 10004(b)(4) :
Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.
The code provides that actions taken at a meeting in violation of this chapter may be voidable by the Court of Chancery. 29 Del.C. ' 10005(a) . It appears from a review of the case law that Superior Court can entertain allegations of FOIA violations. See, e.g., East Coast Resorts, Inc. v. Board of Adjustment, Del. Super., C.A. No. 91A-10-002, Lee, J. (June 17, 1993).
Although BMC argues that only the Court of Chancery can entertain an application to void an action taken in violation of the FOIA, I am inclined to maintain jurisdiction over any FOIA violations in the context of this appeal. The Court in East Coast Resorts considered alleged FOIA violations in the context of an appeal from the Board of Adjustment pursuant to 22 Del.C. ' 328 . The Court ruled on the validity of the FOIA violations in addition to the substantive issues on appeal. Similarly, BMC's avenue for review of the CON application is with this Court pursuant to 16 Del.C. ' 9305(9) , so I will, in the interest of judicial economy, consider the FOIA violations. I believe that it is within the Superior Court's power, to reverse the Bureau and to remand for a rehearing if the situation warrants such a remedy.
Subsequent to oral argument a complete transcript of the discussion which occurred at the Council's executive session was produced by the Bureau and reviewed by me together with written comments submitted by the parties. While the executive session discussion can be said to have ranged beyond what is permissible in the context of pending or potential litigation, I must decide whether the appropriate remedy for any violation of the FOIA should include voiding the action taken by the Council.
A little background information is helpful. The Bureau referred the two applicantions to the Council for review and a recommendation. The ultimate decision in respect to the two applicants was made by the Bureau which consisted of one man, Robert Welch.
The Council gathered a considerable amount of information both directly and through a review committee as noted previously. Then it held a public hearing on March 31, 1993. The public portion of this hearing was lengthy and both NMH and BMC were afforded time to fully present evidence and argument relating to each of their applications. At the public hearing considerable evidence was presented by both applicants in respect to the need for the service in Sussex

County, the number of procedures which could potentially be performed, quality and cost. A considerable period of time was also taken up by questions from the Council.

It became evident that some members of the Council were troubled by the guidelines in the State Health Plan which provides that a new cardiac lab should not be opened unless it could be expected to perform at least 300 procedures per year and that additional labs could not be established until the existing labs were performing over 500 procedures per year. PRMC in Salisbury, Maryland had a cardiac lab and the concern was whether opening a new one in Sussex County would adversely affect PRMC and whether, when determining whether a lab was needed in Sussex County, the Council should only look at what was available in Delaware or whether the Council should take a regional approach and consider the proximity of PRMC. It was then decided to go into an executive session to obtain legal advice on this question.

The primary topic of discussion in the executive session was whether the applications had to be considered on a State (Delaware) basis or could they be considered on a regional basis. Other topics discussed included whether if a regional basis applied, would the guidelines be impaired as to PRMC in Maryland due to the loss of procedures going to new facilities in Delaware; whether certain actions, if taken, would be legally supportable; the source of business for the applicants in respect to the contention that they would perform 300 procedures per year; and the procedural aspects relating to the choices the Council could make. The Council ultimately decided to take a regional approach which did not involve new rulemaking since that is apparently the approach which had been followed in the past. The Council also discussed the fact that an application could be granted for a facility in Sussex County which would not draw enough business away from PRMC to put it below 500 procedures per unit per year, thus not running afoul of regional considerations. Thus, during the executive session a consensus appeared to develop that taking a regional approach would not preclude the approval of a new lab in Sussex County.

The Council then returned to public session, had some more discussion and voted to recommend approval of the NMH application and voted not to change its recommendation that the BMC application be denied.

I do not find that the Council engaged in making new rules in the executive session. Rather they reaffirmed the regional approach which had apparently been used in the past. The ultimate conclusion that using the regional approach would not prohibit the creation of a new lab in Sussex County was, in fact, what both applicants wanted and, therefore, even if it can be said that a rule was made, neither applicant was prejudiced. The Council also discussed the State guidelines in respect to the 300/500 procedures formula, but this cannot be considered rulemaking since no change in the existing guidelines occurred.

Finally, assuming that a violation of the FOIA occurred because the discussion at times drifted beyond the legal advice area, I must also bear in mind the fact that invalidation of the Council's action is a drastic remedy. Ianni v. The Department of Elections of New Castle Co., Del. Ch. C.A. No. 8590, Allen, C. (August 29, 1986). This is not a case where the Council's action was entirely taken in executive session. Rather, this is a case where there was ample input from the applicants and the public; where there was a full public discussion; and where any violation of the FOIA was de minimus when taken in context with the entire process. Further, the Council's action is advisory. In view of the lengthy fact finding, review and hearing process which has occurred in this case, I do not feel that a violation of the FOIA, if it occurred, harmed Beebe Hospital or the general public and therefore I decline to invalidate the action of the Council.

2. Conflicts of Interest

The second procedural defect alleged by BM C surrounds a number of alleged conflicts of interest within the Council. Firs t, BMC alleges that one member o f the Council, L. Glenn Davis, an administrator at Milford Memorial Ho spital, had a direct a nd personal interest in awarding the CON to NMH. This conflict is based on the fact that 14 days after the Bureau's decision in favor of NMH an alliance between NMH and Milford Memorial Hospital was publicly announced. The alliance involved use of the new cardia c catheterization services at NMH. Mr. Davi s was the Adminis trator of Milford Memorial Hospital. At the Council's Ma rch 31, 1993 meeting, following the voluntary remand, Davis declared his possible c onflict but was present for the Council's deliberations.8 A review of the transcript of the public hearing shows that Davis did not participate in the discussions leading up to the vote nor did he actually vote. BMC asserts that Davis' participation in the pr ocess violated the Council's own bylaws and 29 Del.C. ' 5805(a)(1) [9,] both of w hich generally prohibit partic ipation in the disposition of a pending matter when a conflict of intere st is pres ent. BMC argues that these violations denied it a fair and impartial tribunal.

When examining the proceedings of an agency, I note that there is a s trong presumption of honesty and integrity in the administrative adjudicators. Levinson v. Delaw are Comp. Rating Bureau, Del. Supr., 616 A.2d 1182, 1 191 (1992) (citing, Blin der Robinson & Co. v. Bruton, Del. Supr., 552 A.2d 466, 473 (1989)). Ho wever, when a party claims bias, the Court will employ an objectiv e standard. Jone s v. Boar d of Education, Del. Super., C.A. No. 93A-06-003, Graves, J. (Jan. 19, 1994), mem. op. at 9 (citing, Qu aker Hill Place v. Saville, Del. Super., 523 A.2d 947, 966 (1987), aff'd on other grounds, Del. Supr., 531 A.2d 201 (1987)). The Court in the Quak er Hill Place case stated, "It is elemental that a litigant is entitled to an impartial hearing before an agency that is not biased against him." Quaker Hill Place, 523 A.2d at 966 (citations omitted).

The record does not clearly establish bias on the part of Mr. Davis since we do not know when the concept of a s trategic alliance between NMH and Milford Memorial Hospital was first discussed, ie. before or after the Council's ac tion in favor of the NMH application. Jones, however, holds that under certa in circumstances bias can be imputed and since Mr. Davis ultimately declared a conflict, I w ill assume that he was biased in favor of NMH and, therefore, did have a conflict of interest which should have been declared at the outset.

Since Mr. Davis did not vote and did nothin g at the public hearing to favor either applicant, the issue is whether he did somethin g during the executive session in the sense of advocating the NMH application which so p rejudiced BMC that I should invalidate th e approval of the NMH application and the denial of the BMC application. I have review ed the complete transcript of the executive sess ion and find that Mr. Davis' participation w as limited to a comment advocatin g a region al approach to applications; a comment that PRMC supports the BMC application; a request for a summarization of what had changed since the Council's o riginal decision; a com ment that in the orig inal decision the Council found that the issue of cost favored NMH; initia tion of a discussion about whether a unit at NMH would cause PRMC to drop below 500 procedures; and questions regardin g procedural matters.

This limited participation in the discussi on did not favor either applicant and w as essentially neutral. The facts do not rise to the level found in the cases cited by BMC. In Acierno v. Folsom, Del. Supr., 337 A.2d 309 (1975), the Delaware Supreme Court found that the appellant was denied due process due to the particip ation of an obviously interested chairman, whose vote forced a tie. Similarly, in Jones, the offending member of the Board of Education participated in the vo te which resulted in a bare majo rity. In the case at bar, Davis, while admitting to a conflict, did not participate in the discussions of the Council during the March 31, 1993 public meeting. The minutes of the executive sessio n established that his participation in the disc ussion was extremely limited and neutral. Mr. Davis did not vote on the NMH application, which passed five to one, nor did he vote on the BMC application which failed six to zero. Finally, the vote taken by the Council was only a recommendation. I find that no thing Mr. D avis did prejudiced the BMC applicatio n, although since Mr. Davis admittedly had a conf lict he s hould have recused himself fr om participation in this matter at the outset.

The second alleged conflict pertained to Council member Max Kenyon, the President of Principal Health Care. BMC asserts that Principal was engaged in "rancorous" negotiations with BMC and that this prejudiced Kenyon against the application of BMC. If such a situation existed BMC was in a unique position to know about it and to raise the issue at the outset of the hearing. BMC is asking this Court to speculate on the potential conflict here. Kenyon did not declare a conflict at the meeting and nothing in the record supports this notion. Based on the case law cited above, more is necessary to establish a conflict of interest. Furthermore, by not raising the issue in a timely manner, BMC has waived its right to complain.

Finally, BMC asserts that a conflict ex isted with former Council member Ro ger Wick. Mr. Wick appeared on behalf of NMH, actin g as a facilita tor, introducing witnesses and making an introductory statement. In his intr oductory statement, Wick indicated that he had served on the Council for five years a nd that he had been a member of NMH's board of directors for seven years. BMC argues that Wick's participation in this meeting violated 29 Del.C. ' 5805(d) , which prohibits former state officials from assistin g a private enterprise in any matter involvin g the State for two years, if that official w as directly and materially responsible for that matte r while he was a state official. While Wick w as a member of the Council, he participated in th e review of CONs; however, the record shows that he did not take part in the review of the applications of BMC or NMH. Since he appeared before the Council in a matter fo r which he had no direct and material responsibility while on the Council, he did not viola te the statute. T here is no evidence in the record to suggest otherwise.

3. Violations of the Administrative Procedures Act

BMC asserts that the guidelines under the State Health Plan pertaining to cardiac catheterization are unenforceable because they were not promulgated in substantial compliance with the Administrative Procedures Act.10 I find this argument to be without merit. First, the Department of Health and Social Services ("DHSS"), of which the Council is a constituent member, is not subject to the APA. See, 29 Del. C. ' 10161 ; Manor Care Inc. v. State of Delaware, Del. Super., C.A. No. 81A-MY-5, Walsh, J. (Aug. 20, 1981) ("The Department of Health and Social Services

is not a State agency specifically designated as subject to the Act"). The cases cited by BMC do not support the proposition that DHSS must abide by the mandates of the APA. The court in Delmar Fire Dept., Inc. v. Delaware Gaming Control Board, Del. Super., C.A. No. 87C-FE8, Chandler, J. (Feb. 12, 1988) used the APA as a guide in the absence of comparable provisions in the code pertaining to the Gaming Control Board. It does not require all agencies not subject to the APA to abide by the dictates of the Act. Naff v. Rouselle, Del. Super., C.A.No. 89C-DE-1, Ridgely, J. (Dec. 26, 1990) requires agencies not subject to the APA to adopt rules and regulations affecting the rights of individuals in such a way as to put the public on notice of their existence and application. There is no evidence in the record to suggest that the State Health Plan, and specifically the guidelines at issue, were enacted without public notice and comment.

Furthermore, I am not convinced that this is the proper forum for deciding this issue. Those standards have been in place for a number of years. BMC has had ample opportunity to raise this issue with the Bureau and the Council. Indeed, as Appellees point out, BMC recognized the State guidelines through the whole process and sought to prove it could attain the required thresholds. A similar issue arose in St. Francis Hospital, Inc. v. Appeals Board, Del. Super., C.A. No. 92A-12-2, Del Pesco, J. (Aug. 12, 1993) where the appellants attempted to argue that an annual per unit treatment volume used by the Bureau in reaching its decision was erroneous. The court rejected that argument and recognized that during the course of the proceedings, the appellant in that case had repeatedly argued that its unit would exceed the per unit guidelines. The court found that the appellant was judicially estopped from arguing that the figure was erroneous. Id., at 8 (citing, Southmark Prime Plus, L.P v. Falzone, D.Del. 776 F. Supp. 888, 889 (1991).

B. Allegations of Lack of Substantial Evidence

The issue is whether there was substantial evidence in the record to support the Bureau's decision rejecting BMC's CON and approving the application of NMH. BMC argues that the decision was not supported by substantial evidence and that the Bureau should have engaged in a comparative review of the applications, but it failed to do so and finally, that the Bureau's decision fails to fulfill the mandates of the State Health Plan.

When considered in light of the statutorily mandated review criteria in 16 Del.C. ' 9306 , the Bureau's decision is supported by substantial evidence. Section 9306 says, "In conducting reviews under this chapter, the Health Resources Management Council and the State Agency [meaning the Bureau] shall consider as appropriate at least the following:" (emphasis added). The statute then lists the seven criteria for review.11 From the Bureau's opinion it is clear that it abided by the statutory mandate. The first criterion, the relationship of the proposal to the state health plan was considered at length in the Bureau's opinion. The Bureau explained that the initial denial of both applications was due to the inability of either facility to achieve the 300 procedures per year minimum required by the guidelines in the State Health Plan. However, updated utilization data was available during the remand period which indicated that one cardiac catheterization lab in Sussex County would be appropriate, but not two. The Bureau stated in its opinion:

The October 29, 1992 decision indicated that based on projected population changes in the various relevant age groups (45, 45-64 and 65+) the number of cardiac catheterization procedures could be expected to increase by 10.4 percent between 1992 and 1996. Thus, to be "on target" to reach 300 procedures in 1996, there should be an expectation of performing 272 in 1992. This 272 procedures represents just 44 percent of the estimated 624 catheterizations medically appropriate for a lab in Sussex County.

Thus, the Bureau found that one lab was justified. However, Guideline four of the State Health Plan does not allow new units until existing units achieve 500 studies per year. Therefore, the Bureau concluded one of the two potential labs would have to be performing at least 500 procedures per year before a second lab could be approved.

Finding that one lab was appropriate, the Bureau concluded that NMH should be awarded the CON. The Bureau found that NMH was the less costly proposal without compromising quality. Clearly the Bureau engaged in a comparative analysis of cost, which is found in Criteria three and six. In its decision, the Bureau stated:

For the second year of operations, NMH projects an average charge of $ 1,050, compared to BMC's $ 1,500. In terms of annual operating expenses (with supply expenses deducted), NMH projects an average expense per procedure of $ 607 for the second year, compared to $ 853 at BMC. It was further noted that NMH's expenses include $ 55,800 of annual depreciation expense which is already being incurred....

The Bureau also addressed the issue of quality, contained in Criterion seven. The Bureau noted that the difference in equipment between the two facilities was discussed at length during the initial review process.12 In its opinion, however, the Bureau focuses on the quality of the NMH proposal. The Bureau relied on the opinion of ECRI, an independent non-profit agency which assesses medical technology, which opined that NMH's system is sufficient. The Bureau also relied on the opinion of Dr. Jeffrey Brinker, Director of Interventional Cardiology at Johns Hopkins, who assured the Bureau that the equipment proposed by NMH can provide high quality work. Other factors cited by the Board include the physicians at NMH and the establishment of a Quality Assurance Program in conjunction with a tertiary care facility, possibly Johns Hopkins. The Bureau did state that this does not mean that a quality program has not been developed by BMC, just that NMH does not compromise quality, while offering a less costly alternative.

Finally, the Bureau considered the location of the two facilities. The Bureau concluded that neither BMC nor NMH is materially better suited to serve the population of Sussex County. However, the Bureau found that NMH is in a better location to potentially capture the market from PRMC, the major provider of cardiac catheterization services to Sussex Countians.13

Thus, it is apparent that the Bureau engaged in a comparative review of the criteria susceptible to comparative review. Cost was considered on a comparative basis with NMH proving that it offered the less costly alternative. There is substantial evidence in the record to support this conclusion by the Bureau. Criterion four, the relationship of the proposal to the existing health care delivery system was met by both parties as evidenced by the Bureau's original decision.14

BMC argues most strenuously that quality was not considered on a comparative basis. It is clear from the Bureau's opinion that it believed both facilities developed quality programs. As a result, the less costly proposal was discussed more fully. The overall impression one is left with after reading the Bureau's decision is that both CON applications were meritorious and basically equal on most levels except for cost. Therefore, cost, and to a lesser extent, location were the dividing features of the two proposals. There was substantial evidence in the record to support the Bureau's award of the CON to NMH on these bases.

CONCLUSION

The decision of the Bureau is affirmed.

IT IS SO ORDERED.

N. Maxson Terry, Jr.

Resident Judge

Footnotes

1 The statutes have been amended since the parties in this action went through the process. Currently, pursuant to 16 Del C. ' 9303(d)(2) , the Delaware Health Resources Board (the "Board") is charged with the responsibility of reviewing Certificate of Need applications.

2 Under the current statutory scheme, after the decision is made by the Board, any person can request a public hearing for purposes of reconsideration of a Board decision. An applicant may appeal to the Superior Court after a denial following review by the Board or following an administrative reconsideration. 16 Del.C. ' 9305(8) .

3 In their briefs, both parties object to evidence presented within the briefs that is not contained within the record. As this is an appeal on the record, the Court will only consider evidence presented in the proceedings below. Since the appeal in this case is from the Bureau's decision, the Court will consider evidence presented that would have been considered by the Bureau when it made its final decision, after the case was voluntarily remanded from the Appeals Board. Any evidence added to the record after that time will not be considered.

4 Under the current statutory scheme the appeal to Superior Court is also on the record. 16 Del.C. 9305(8) .

5 Hereafter, reference is made to the Council even though under the current statutory scheme, the Delaware Health Resources Board performs the Council's functions. I add this clarification because the parties refer to the Council rather than the Board.

6 These are the considerations that were in place at the time of the Council's review in this case. I note that in the recent amendments to ' 9306, the Delaware Health Resources Board can consider the availability of less costly and/or more effective alternatives to the proposal, including alternatives involving the use of resources located outside the State. 16 Del.C. ' 9306(3) .

7 Such information included a report from an independent agency, ECRI, which evaluated the two proposals for quality of service and statistics from area hospitals performing cardiac catheterization.

8 The transcript of the meeting reveals the following conversation which took place in the beginning of the meeting.
DUNCAN: Now before we get started, are there any members who would like to take a moment to declare a conflict of interest?
DAVIS: I would like to reserve that until possibly at the end of the presentation. If I may?
DUNCAN: Okay. I'll come back to you.
DAVIS: Give me one more shot.
At the end of the meeting, before the vote was taken, the following conversation took place:
DUNCAN: Have you determined if you do or do not have a conflict of interest?
DAVIS: I do.
DUNCAN: You have a conflict of interest.
DAVIS: I do and I would like to declare it.
DUNCAN: Alright, would the record please show that Mr. Davis declares a conflict of interest.

9 29 Del.C. ' 5805(a)(1) states, in relevant part:
(a) Restrictions on exercise of official authority.
(1) No state employee, state officer or honorary state official may participate on behalf of the State in the review or disposition of any matter pending before the State in which he has a personal or private interest...

10 These guidelines require that the establishment of a new cardiac catheterization unit would not be allowed unless it is proved that the facility would be capable of attaining a volume of 300 procedures per year and no new units would be allowed until existing units achieved a volume of 500 procedures per year.

11 See page 3 supra.

12 BMC proposes a "dedicated" unit, while NMH proposes to expand its existing facility to include cardiac cath capabilities, resulting in a "shared" lab.

13 BMC argues that "market capture" is not an appropriate criterion to consider in reviewing the CONs. However, the list of criteria contained in 16 Del.C. ' 9306 is not exclusive. The statute requires the Bureau to consider at least the listed criteria. It does not exclude other relevant factors.

14 Criterion 5, the immediate and long-term viability of the proposal in terms of the applicant's access to financial, management and other necessary resources, was met by both parties, according to the Bureau's original decision and Beebe has not argued the findings of the Bureau pertaining to this Criterion.

LOUIS GOLDSTEIN, Petitioner, v. MUNICIPAL COURT FOR THE CITY OF WILMINGTON and JUDGE CARL GOLDSTEIN, Respondents
Superior Court of Delaware, New Castle
1991 Del Super LEXIS 1381991 Del. Super. LEXIS 138
Civil Action No. 89A-AP-13
November 7, 1990, Submitted
January 7, 1991, Decided
Editorial Information: Subsequent History
{1991 Del. Super. LEXIS 1} Reargument Denied March 20, 1991, Reported at 1991 Del. Super. LEXIS 137.
Editorial Information: Prior History
Upon Motion of the Municipal Court of the City of Wilmington to Dismiss the Appeal; GRANTED in Part, DENIED in Part, Upon Petition of Louis Goldstein for Writ of Certiorari; Decision-Below AFFIRMED.
Disposition: Upon Motion of the Municipal Court of the City of Wilmington to Dismiss the Appeal; GRANTED in Part, DENIED in Part, Upon Petition of Louis Goldstein for Writ of Certiorari; Decision-Below AFFIRMED.
Counsel Victor F. Battaglia, Esquire, and Philip B. Bartoshesky, Esquire, of Biggs & Battaglia, Wilmington, Delaware attorneys for petitioner Louis Goldstein.
Donald L. Gouge, Jr., Esquire, of Heiman, Aber & Goldlust, and Michael P. Reynolds, Esquire, City Solicitor, attorneys for respondent Municipal Court for the City of Wilmington.
Judges: Richard S. Gebelein, Judge.
Opinion
Opinion by: GEBELEIN
In March 1989, the petitioner was found guilty of nine City Code violations in Municipal Court. On April 19, 1989, the petitioner received the following sentences:
(a) N89-04-0710, 0711, 0712, 0715: two $ 500 fines (0710, 0712) and two $ 1,000 fines and six months incarceration suspended for probation (0711, {1991 Del. Super. LEXIS 2} 0715);
(b) N89-04-0708 and 0714: two thirty-day periods of incarceration;
(c) N89-04-0709, 0713, 0716: three $ 100 fines. [These cases will be cited hereafter as paragraph (a), (b) or (c) respectively.]
Immediately after sentencing, the petitioner filed a Notice of Appeal on all nine convictions in the Superior Court seeking a trial de novo.
The statutes provide that the proceedings in all cases in the Municipal Court shall be with the right of appeal as provided in Article IV, § 28 of the State Constitution. 11 Del. C. § 5701. Under the Delaware Constitution, "there shall be an appeal to the Superior Court in all cases in which the sentence shall be imprisonment exceeding one (1) month or a fine exceeding One Hundred Dollars ($ 100.00)." Art. IV, § 28; see also, Marker v. State, Del. Supr., 450 A.2d 397 (1982). The proceedings on appeal from the Municipal Court in the Superior Court are by trial de novo. See, State v. Cloud, Del. Supr., 52 Del. 439, 159 A.2d 588 (1960); and Sheldon v. State, Del. Supr., 291 A.2d 273 (1972). When there is an appeal de novo, an information is filed and the

proceedings continue in accordance{1991 Del. Super. LEXIS 3} with Superior Court Criminal Rules. Super. Ct. Crim. R. 37.1(b). 1

Under the Superior Court Rules, "All appeals to the Superior Court, unless otherwise provided by statute, shall be taken within 15 days from the date of sentence. It shall be the duty of the Court below to file forthwith in the office of the Prothonotary the appeal bond and a certified transcript of the record." Super. Ct. Crim. R. 37.

After the Notice of Appeal was filed, the Municipal Court set bond at $ 2,500 for the convictions in paragraph (a) above. 2 The Court refused to set a bond amount or allow an appeal for the convictions in paragraph (b) because each sentence did not exceed the one-month jurisdictional limit of {1991 Del. Super. LEXIS 4} the State Constitution. Likewise, the Court did not set bond for the convictions in paragraph (c) because each sentence did not meet the $ 100 jurisdictional limit of the State Constitution.

The petitioner, through the Superior Court, sought bond and stay of execution for the convictions in paragraph (b), arguing that the sentences should be aggregated and, thus, would meet the jurisdictional prerequisite for appeal. That motion was denied and has been appealed to the Supreme Court of Delaware. City of Wilmington v. Goldstein, Del. Super., Cr. A. No. N89-04-0708-0716, {1991 Del. Super. LEXIS 5} Balick, J. (Apr. 19, 1989) (Ltr. Op.). 3

Petitioner then petitioned for a writ of certiorari for review of the sentences in paragraph (b). The writ was granted and bond was set at $ 10,000 for those convictions. Goldstein v. Municipal Court for the City of Wilmington, 1989 Del. Super. LEXIS 141, Del. Super., C.A. No. 89A-AP-13, Gebelein, J. (Apr. 21, 1989).

Petitioner posted the $ 10,000 bond for the convictions in paragraph (b) on April 21, 1989. As of June 7, 1989, the Municipal Court had not received the bond of $ 2,500 as set for the convictions in paragraph (a). On July 11, 1989, the City moved to dismiss and remand the convictions in paragraph (a) because no bond had been posted. It also moved to dismiss and remand the convictions in paragraph (c) because they did not meet the jurisdictional amount of $ 100.

The day after{1991 Del. Super. LEXIS 6} the motion to dismiss was filed, according to a letter from the petitioner's attorney to the Commissioner of the Municipal Court, the petitioner attempted to post the $ 2,500 bond. According to the letter, the Municipal Court refused to accept the bond. 4

The City argues that Superior Court Criminal Rule 37, which allows 15 days to take an appeal and requires the Court below to file the appeal bond, was not complied with because bond was not posted within 15 days. The City further argues that failure to comply with the rule also deprives this Court of jurisdiction. The City asks that the appeal be dismissed. This argument is based on Superior Court Criminal Rule 39.1, which states that, "An appeal may be dismissed for lack of jurisdiction or failure to comply with a statutory requirement or rule or order of this Court."

Petitioner argues{1991 Del. Super. LEXIS 7} that the bond was improperly rejected by the Municipal Court. He makes no argument and cites no legal authority for this claim. 5 He then argues that Rule 37 does not require the posting of a bond to perfect an appeal because Rule 38 states that posting bond operates to stay the sentence. 6

Unlike appeal from other courts, there is no clear statutory requirement that on an appeal from the Municipal Court the petitioner post bond. See, e.g., 10 Del.C. § 960(d) (appeal from Family Court requires "Appellant shall give bond to the State. . . .) [Emphasis added.] Wiland v. Wiland, Del. Supr., 549 A.2d 306, 308 n. 7 (1988) ("In fact, the only provisions past or present which

make posting a bond a prerequisite{1991 Del. Super. LEXIS 8} to appellate jurisdiction have been statutory."); 10 Del.C. § 9571 (appeal procedure from justice of the peace decision requires "The party appealing shall offer security in such sum as the justice deems sufficient to cover the judgment appealed from and the costs of the appeal" [Emphasis added] and that "On appeal, a cash deposit may be made in lieu of a bond with security."); C & G Const. Co. v. Wright, Del. Super., 355 A.2d 895 (1976) (No distinction between justice of the peace appeals to Superior Court and Common Pleas appeals to the Superior Court in regard to appeal bonds.); Curry v. Shachtman, Del. Supr., 567 A.2d 420 (1989) (Order) (under 10 Del.C. § 9571, failure to post, apply for, or request waiver for bond is fatal to appellate review if no bond is posted because the jurisdictional statute is unambiguous.)

Additionally, the parties have advanced no case law addressing the specific issue of whether failure to post bond in Municipal Court within 15 days under Superior Court Criminal Rule 37 requires dismissal because it creates a jurisdictional defeat.

Reading Rule 37 in conjunction with Rule 39.1, which states{1991 Del. Super. LEXIS 9} that, "An appeal may be dismissed for lack of jurisdiction or failure to comply with a statutory requirement or rule or order of this Court" [Emphasis added], it appears that the dismissal is discretionary, unlike those cases where posting a bond is unambiguously made a jurisdictional prerequisite by statute.

The purpose of a bond which acts as a stay or supersedeas is to protect the appellee by providing for compensation to the appellee in the event any damages are incurred by a stay of the trial court's judgment or a stay of execution thereon. Wiland, 549 A.2d at 308.

In Wiland, the Court interpreted Supreme Court Rule 32 which provides for a supersedeas bond if the appellant seeks to stay the judgment of the trial court. It concluded that if the appellant does not seek to avoid the effect of the judgment of the trial court, during an appeal, no indemnification to the appellee was required. It held that the posting of bond was not a jurisdictional prerequisite in a direct non-custody appeal from the Family Court to the Supreme Court. 7

{1991 Del. Super. LEXIS 10} While Wiland was a non-custody appeal, it has applicability here because the effect of the bond in both cases is to operate as a stay. Thus, if the petitioner does not seek to avoid the effect of the judgment of the Municipal Court, no indemnification is required. The appeal would not act as a stay under these circumstances; and if the petitioner does not pay the fine promptly, he is subject to a civil judgment being entered against him. 8

{1991 Del. Super. LEXIS 11} Thus, this Court concludes that the petitioner is not required to post bond for the convictions in paragraph (a) as a jurisdictional prerequisite to appeal; but that, absent posting such a bond, the appeal will not stay imposition of the sentences.

Regarding the motion to dismiss for lack of jurisdiction on the convictions in paragraph (c), the City argues that the convictions do not meet the jurisdictional amount of $ 100. 9 The Delaware Constitution requires that a fine exceeding $ 100 be imposed before an appeal to the Superior Court is permitted. The petitioner was fined $ 100 for each of the convictions in paragraph (c). The Court has consistently applied the Constitutional requirement and denied appeal to those receiving a sentence below the constitutional prerequisite. See, Marker, supra.

The Constitution is clear that this Court has no appeal jurisdiction over cases where fines of $ 100 or less were imposed. Finally, this Court{1991 Del. Super. LEXIS 12} has held that separate, distinct convictions cannot be aggregated to circumvent jurisdictional requirements. City of Wilmington v. Goldstein, supra. While that case is presently on appeal, it is consistent

with holdings in other states in similar situations. See, Ex Parte Genevoc, Tex. Supr., 143 Tex. 476, 186 S.W.2d 225 (where statute provided that, "The district court may punish any person guilty of contempt of such court by fine not exceeding one hundred dollars and by imprisonment not exceeding three days," and the court imposed a fine of $ 1,500 and imprisonment for 30 days, the Court held that because the total was based on separate, distinct violations imposed after a hearing, there was no violation of due process and jurisdiction was valid. (Cited in Annotation, Power to Include Separate Acts of Contempt in a Single Contempt Proceeding, 160 A.L.R. 1104; See also, Frank v. United States, 395 U.S. 147, 89 S. Ct. 1503, 23 L. Ed. 2d 162 (1969), reh'g denied, 396 U.S. 869, 90 S. Ct. 34, 24 L. Ed. 2d 123 (1969) (in ordinary criminal prosecution the severity of the penalty authorized, not the penalty imposed, is the relevant criterion in determining {1991 Del. Super. LEXIS 13} constitutional right to jury trial and court could impose five year probation term even though statute provided for imprisonment of no more than six months); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974) (holding that where the total punishment meted out during trial exceeded the statutory limits, it would not invalidate contempt convictions where each contempt was dealt with as a discrete and separate matter, except where summary contempt proceedings were held post-trial); compare with, Pitts v. State, Del. Supr., 421 A.2d 901 (1980) (where defendant was convicted to dual five-month sentences for two criminal contempts summarily adjudicated, and subsequent contemptuous act was so interwoven with prior conduct as to be inseparable therefrom, second conviction and sentence could not stand); see also, Annotation, Power to Base Separate Contempt Prosecution or Punishment on Successive Refusals to Respond to the Same or Similar Questions, 94 A.L.R. 2d 1246.

While the above citations concern contempt proceedings, a contempt is analogous to a misdemeanor, and one indictment or information may contain{1991 Del. Super. LEXIS 14} any number of separate counts each charging separate misdemeanors, and there may be had in one proceeding separate convictions on each count. Ex Parte Genecov, 186 S.W.2d at 227.

Thus, because the convictions in paragraph (c) were separate and distinct charges involving several properties, they are dismissed and remanded to the Municipal Court. The City is directed to proceed with the offenses enumerated in paragraph (a), supra.

Delaware law provides that "Proceedings of the Municipal Court for the City of Wilmington shall be subject to revision by the Superior Court in and for New Castle County upon writs of certiorari; . . ." [Emphasis added.] 11 Del.C. § 5716.

Petitioner seeks to have the transcript of the Municipal Court accepted as part of the record to be reviewed by this Court on a Writ of Certiorari. He argues that § 5716 allows the Court a broader scope of review than that allowed at common law because the statute says that "proceedings" shall be subject to "revision" and that there is no better way to determine whether the lower court's proceedings should be revised than through an examination of the record.

The{1991 Del. Super. LEXIS 15} City argues that because the statute is silent regarding a requirement for a transcript, the scope of review on certiorari does not permit the transcript to be a part of the record. It argues that the scope of review upon certiorari is limited to reviewing the jurisdiction of the lower court to act and that this Court may merely look at the regularity of the proceedings.

The early commentators have noted that in Delaware the Writ of Certiorari is a limited remedy:

A writ of certiorari is a writ issued by a superior to an inferior court of record, requiring the latter to send to the former some proceeding therein pending, or the record and proceedings in some

cause already terminated, to the end that a party who considers himself aggrieved by the determination of his rights by the inferior court, without or in excess of its jurisdiction or without compliance with the requirements of law, may have justice done him.
Woolley, Del. Practice § 894. The commentator further notes:
In Delaware the writ of certiorari is not a statutory writ, but is a writ which retains the essential characteristics of the writ at common law, with the exception of the prerogative quality, the statute{1991 Del. Super. LEXIS 16} providing that the writ may be granted of course.
Id. at § 894.
The review anticipated in a Common Law Writ of Certiorari is limited to the record presented:
It is a general rule that on certiorari, in ascertaining whether or not the inferior court or tribunal has exceeded its jurisdiction or has proceeded irregularly in making the determination complained of, the reviewing court is confined to the consideration of the record returned in obedience to the writ, by which error, if any, must appear and that the Court can hear no evidence aliunde to show jurisdiction or regularity or the want of it.
Id. at § 897. Finally, the nature of the judgment of Superior Court upon a Writ of Certiorari is "a judgment of affirmance or reversal of the proceedings below." Id. at § 944.
Rules of statutory construction require that interpretations be consistent with the manifest intent of the General Assembly. 1 Del.C. § 301. In determining legislative intent, the Court must first look to the statutory language. Here, the provision is silent regarding whether review includes the transcript for the Municipal Court. Generally, where the legislature is silent the Court will{1991 Del. Super. LEXIS 17} not graft additional language onto the statute because such action would place the court in a position of making law. State v. Rose, Del. Super., 33 Del. 168, 132 A. 864, 867 (1926).
The General Assembly is presumed to have been aware that the common law writ of certiorari does not provide extensive review but has been limited in nature. The General Assembly has specifically broadened the scope of review by so providing in statute. 10 The Courts, in interpreting these statutes, have recognized that only when the statute provides for a review of the record is the transcript of the trial a part of the record. DuPont v. Family Court for New Castle County, Del. Supr., 52 Del. 72, 153 A.2d 189, 194 (1959) (Writ of Certiorari is not the equivalent of an appeal on the record, "for in such proceedings the evidence received in the inferior court is not part of the record to be reviewed in a certiorari proceeding.") (Citing Thompson v. Thompson, Supr. Ct., 33 Del. 593, 140 A. 697 (1928); Kowal v. State, 49 Del. 549, 121 A.2d 675 (1956); Rodenhiser v. Dept. of Public Safety, Super. Ct., 50 Del. 585, 137 A.2d 392 (1957)).
{1991 Del. Super. LEXIS 18} In Rodenhiser, the statute did not provide a right of appeal from dismissal from the city police department. At the trial board's proceeding, the petitioner had full trial rights, such as representation by counsel, right to testify and call witnesses and to cross-examine. He sought review and reversal by Writ of Certiorari on the ground that there was no evidence before the Trial Board to support its conclusion. The defendants included a court reporter's transcript of testimony and other proceedings before the Board in the record transmitted to the Court, in response to the Writ of Certiorari. The Court held that it could not review testimony to determine if there was no evidence before the Board to support its conclusion because the evidence before the Board was not a proper part of the record presented for review by a certiorari proceeding. In reaching its decision, the Court distinguished those

cases where the evidence adduced in other proceedings was allowed by noting that the statute in those cases provided for a review on the record.

Similarly, the Court has limited the scope of review in criminal actions. Castner v. State, Del. Supr., 311 A.2d 858 (1973).{1991 Del. Super. LEXIS 19} In Castner, the petitioner was convicted in a justice of the peace proceeding. He received a trial de novo in Superior Court and sought through certiorari to have the Court determine that proof beyond a reasonable doubt was not adduced at trial. He argued that in a certiorari proceeding the trial testimony was part of the record on which the Court makes its judgment so the Court must weigh and evaluate the evidence. The Court held that certiorari only involves errors that appear on the face of the record and it could not review the evidence. Again, the Court distinguished those cases where the statute specifically provided that judicial review was to be on the record. It noted that the statute in the case where such review was allowed, "record" was defined as a typewritten copy of the evidence. The statute under which the petitioner was proceeding had no statutory definition of "record" and the Court dismissed the writ.

The Court had made a similar holding regarding the scope of review in a certiorari proceeding following a trial in the Court of Common Pleas. Kowal, supra. In Kowal, on petition for certiorari, the plaintiffs sought to have the Court{1991 Del. Super. LEXIS 20} of Common Pleas incorporate the transcript in the record. They argued that they would be without remedy if the transcript were not included and the evidence reviewed. The Court said that a substantial argument could be made to the contrary, but it concluded that irrespective of whether they had any other remedy, the plaintiffs were not entitled to have the evidence of the lower court made part of the record.

Based on the assumption that the General Assembly was aware of the limited review of the Writ of Certiorari; the fact that in both civil and criminal statutes the legislature has extended that review where it believed it necessary; the case law interpreting the scope of review as prohibiting review of the transcript except where provided by statute; and the absence of any statutory language defining the record of Municipal Court as including a transcript of the proceedings, this Court concludes that no review of the transcript is permitted under 11 Del.C. § 5716. 11 {1991 Del. Super. LEXIS 21} The statutory scope of certiorari under 11 Del.C. § 5716 is broader than that envisioned at Common Law. The Court is empowered by the General Assembly to "revise" decisions of Municipal Court upon certiorari. The exact scope or limit of this review, however, remains undefined. There is no expressed intent to broaden the record that is to be reviewed and absent such unambiguous intent, this Court is bound to follow precedent. 12

Based on this conclusion, this Court cannot address the petitioner's argument that no evidence was presented to the Municipal Court that he was the owner of the properties in question. Rodenhiser, supra, (denying review and reversal by certiorari where petitioner{1991 Del. Super. LEXIS 22} alleged there was no evidence before the trial board to support its conclusion).

In a certiorari proceeding, the Court may review jurisdictional matters and may look at irregularities in the proceedings that appear on the face of the record. Shoemaker v. State, Del. Supr., 375 A.2d 431, 437 (1977) (certiorari differs from an appeal in that the latter brings the case up on its merits while the former brings up the record only so that the reviewing Court can merely look at the regularity of the proceedings); Brown v. State, Del. Supr., 245 A.2d 925, 926 (1968) ("The writ of certiorari is a writ of review to ascertain whether or not an inferior Court has exceeded its jurisdiction."); Woolley, Del. Practice §§ 896-897 (review on certiorari is

confined to the record to determine whether or not the inferior court has exceeded its jurisdiction, or has proceeded irregularly; the reviewing court is not to inquire into and re-decide the merits of the case).

Thus, this Court will review the petitioner's second argument which alleges that the Municipal Court was without jurisdiction because the City failed to grant the petitioner the right of review{1991 Del. Super. LEXIS 23} before a Board prior to trial.

The petitioner also argues that the judge abused his discretion by not giving reasons for his decision that the petitioner was the owner of the property. Both parties agree that the Court made an oral ruling on this matter during the second day of trial. This Court cannot consider that oral decision because it would require making the transcript a part of the record. 13 However, petitioner also alleges that the Municipal Court judge did not give his reasons in his written opinion. It is an abuse of discretion for a trial court not to supply reasons for judicial decisions. Cannon v. Miller, Del. Supr., 412 A.2d 946 (1980) (a two-paragraph conclusory order was determined entirely inadequate and was abuse of discretion, even without a review of the transcript). The Court will review the written decision to determine if, on its face, the opinion shows an irregularity.

Delaware law provides that the chief executive officer of a municipal corporation of the State may appoint and employ code enforcement constables as necessary to enforce ordinances pertaining to building, housing, sanitation or public health code. 10 Del.C. § 2901. In the enacting legislation defining the duties and authority of such constables, the legislature provided that:

Notwithstanding any other law, a code enforcement constable may lawfully issue a summons to any person he has reasonable ground to believe has committed an offense against any ordinance pertaining to building, housing, sanitation, zoning or public health code of the county or municipal corporation by whom he is employed, directing the person to appear before the court having jurisdiction over such offense whether or not the offense was committed in his presence. 10 Del.C. § 2902(d) (Supp. 1990).

After passage of this legislation on June 30, 1986, the City of Wilmington adopted an ordinance instituting this power and provided that constables may enforce ordinances pertaining to building, housing, sanitation or public health codes by issuing written citations in{1991 Del. Super. LEXIS 25} lieu of arrest and as "a procedure in lieu of the issuance of a 'notice of violation' as may be otherwise provided in any of the aforesaid [Chapters 24, 33, 34 and 36] codes." 1 Wilm. C. § 20-2.1(1). Further, the ordinance provided that the citation "shall require the appearance by the person to whom it is issued in the municipal court. . . ." 1 Wilm. C. § 20-2.1(b)(2).

In September 1988, a code enforcement officer inspected properties at 704 and 804 Monroe Street, Wilmington. He then issued "constable summonses" to the petitioner for violations of the building code under Chapter 24. These required petitioner to appear in Municipal Court for arraignment.

Petitioner contends that the Municipal Court was without jurisdiction because the Wilmington Municipal Charter provides that those aggrieved by any city inspection "shall upon request be furnished with a written statement of the reasons for the action taken and afforded a hearing thereon by the board of license and inspection review." [Emphasis added.] 1 Wilm. C. § 5-705. He argues that the Charter gives him a right to have the action of the building official reviewed

by the Board and that the institution of any legal{1991 Del. Super. LEXIS 26} action, including a prosecution, in contravention of the Charter is a nullity.

The City contends that passage of 10 Del.C. § 2902 and the city ordinances implementing that statute, impliedly repealed the City Charter provision.

In 1986, the General Assembly, through the Home Rule Enabling Act, empowered every county and municipal corporation in the State to adopt a home rule charter. 22 Del.C. §§ 801-836. In that Act, it provided that municipalities could amend their charters to assume all powers which the General Assembly could constitutionally grant by specific enumeration and not denied by the State. 22 Del.C. § 802. Municipal corporations are creatures of the legislature. It may create, regulate or abolish them almost at will. Abrahams v. Superior Court, Del. Supr., 50 Del. 394, 131 A.2d 662, 669 (1957) (holding that implied repeal of Wilmington City Charter provision by general state statute must meet Constitutional requirements).

The City of Wilmington adopted such a charter, effective July 1, 1965. The City Charter also provides that the City has those powers which the General Assembly can constitutionally grant by specific enumeration and that are not{1991 Del. Super. LEXIS 27} denied by statute. 1 Wilm. C. § 101; see also, City of Wilmington v. Lord, Del. Super., 340 A.2d 182, 183-184 (1975) (holding that the General Assembly's authority to determine City of Wilmington's powers through general statutes is not inconsistent with City's status as a sovereign). As part of its charter, the City provided that, "The board of license and inspection review shall provide any appeal procedure for those aggrieved . . . as a result of any city inspection." 1 Wilm. C., § 5-705.

Subsequently, the General Assembly, by statute gave the counties and municipalities the additional power to appoint Code enforcement constables to enforce ordinances pertaining to building, housing, sanitation or public health code. 10 Del.C. § 2901. It also provided that, "Notwithstanding any other law, a code enforcement constable may issue a summons . . . directing the person to appear before the court having jurisdiction over such offense. . . ." 10 Del.C. § 2902(d).

The Wilmington City Council, noting the General Assembly's enactment of this bill in its ordinance, deemed it "necessary and proper to amend Chapter 20 of the City Code to establish provisions{1991 Del. Super. LEXIS 28} by which the enforcement powers of code enforcement constables, as authorized by 10 Del.C. Ch. 29, may be implemented." Wilmington, Delaware Ordinance 86-099 (Nov. 20, 1986, effective as of Jan. 2, 1987). The ordinance amended Chapter 20 to allow constables to issue citations "in lieu of arrest," and "in lieu of, and not in addition to, the issuance of a notice of violation as . . . otherwise provided in the aforesaid [Chapters 24, 33, 34 and 36] codes." 1 Wilm. C. § 20-2.1(b)(1). It also provided that the citation "require the appearance by the person to whom it is issued in the Municipal Court." 1 Wilm. C. § 20-2.1(b)(2).

The law requires that statutory provisions be given effect unless a constitutional infirmity exists. Abrahams, supra. This Court previously held that the State provision does not constitute an unlawful delegation of authority by the legislature; that the enforcement provisions enacted by the City are valid; that the above procedure was in lieu of the administrative procedure provided by the Wilmington Building Code, 1 Wilm. C. § 24-3(a)(22), which is similar in language to the Charter provision; that there was no abuse of discretion{1991 Del. Super. LEXIS 29} by the municipality; and that the above procedure did not violate procedural due process by allowing a court proceeding in lieu of an administrative hearing. State v. West Ninth Street Corp., 1988 Del. Super. LEXIS 327, Del. Super., Cr. A. No. 87-12-1206 through 1208A, Martin, J. (Sep. 12,

1988). The Court concludes that no constitutional infirmity exists and that these powers may be constitutionally granted by the General Assembly.

In addition to meeting constitutional requirements, the general statute, to be effective as an amendment to the City Charter, must meet the statutory requirement that the Act be passed with the concurrence of two-thirds of the members of each House. 22 Del.C. § 813; see, Abrahams, 131 A.2d at 669.

The petitioner argues that the statute on its face does not state that it was passed by the two-thirds majority required to amend the Charter (or for that matter state any intention to amend the Charter). However, that is not necessary because every act need not make a specific reference to all prior acts. Abrahams, 131 A.2d at 669. To so require would be "a contradiction in terms because if an implied repeal must be expressly set forth, {1991 Del. Super. LEXIS 30} it ceases to be implied." Abrahams, 131 A.2d at 669-70.

Thus, this Court must look to the legislative intent to determine if the statute impliedly repealed the Charter provision. 1 Del.C. § 301 (statutory construction should be consistent with the manifest intent of the General Assembly); Abrahams, 131 A.2d at 672 (question of implied repeal by general statute of City Charter is basically one of legislative intent). See also, Wilmington Savings Fund Society v. Green, Del. Supr., 288 A.2d 273 (1972) (statute that failed to recite that it was passed by a two-thirds majority created rebuttable presumption that statute received only a simple majority; Court could consider legislative journal showing that the general bill passed unanimously and, therefore, amended corporate charter). 14

{1991 Del. Super. LEXIS 31} Here, the legislation as amended 15 was passed by the House with 39 "yes" votes on June 19, 1986 (28 votes constitute a two-thirds majority in the House). The roll call records also reflect that 20 Senators voted "yes" and one Senator was absent on June 26, 1986 when the legislation was passed by the Senate (14 votes constitute a majority in the Senate). Thus, the Act was passed by the required majority in each House.

Additionally, general rules of statutory construction require that all words of a statute be given meaning. Sutherland, Statutory Construction, Vol. 3A at 208. Here, the legislature provided that, "Notwithstanding any other law, a code enforcement constable may lawfully issue a summons . . . directing the person to appear before{1991 Del. Super. LEXIS 32} the court having jurisdiction over such offense. . . ." 10 Del.C. § 2902(d). Additionally, the General Assembly specifically amended the statute to include "any ordinance pertaining to building." To give full effect to all words, this Court concludes that, "Notwithstanding any other law" includes municipal charter language, especially when read in the full context of the statute which grants this power to municipal corporations. It is presumed that the General Assembly, in writing that language, was aware that counties and municipal corporations, prior to the enactment of this general statute, had devised other procedures for enforcement of local ordinances; and likewise was aware of the specific provisions of the Wilmington Charter.

In addition, the General Assembly specifically stated the types of ordinances affected by the legislation, including building ordinances; it, thus, seems clear that by granting municipalities the power to use constables to issue citations "directing the person to appear before the court," the legislature was establishing the procedural remedy for violations of these particular types of ordinances that relate to public health and safety, 16 a procedure{1991 Del. Super. LEXIS 33} with more due process rights than an administrative hearing.

The petitioner argues that because the general statute does not provide an administrative hearing and the Charter does, that he should be entitled to both procedures. 17 However, the general

statute does not provide for such administrative hearings and where {1991 Del. Super. LEXIS 34} the legislature is silent, the Court will not graft words onto the statute because it places the Court in the position of making law. State v. Rose, Del. Super., 33 Del. 168, 132 A. 864, 867 (1926).

The Act was passed by the required two-thirds vote, thereby receiving the majority required to amend the Municipal Charter. It is apparent from reading the Act that it includes the procedures for appointment and use of Wilmington Code enforcement constables because it grants such power to "any county or municipal corporation" [Emphasis added]; that its repeated use of the phrase, "notwithstanding any other law" must be given meaning by including laws developed by the municipality of Wilmington; and that the General Assembly in amending the statute to include building ordinances deliberately extended the constable{1991 Del. Super. LEXIS 35} power to that area of the law. This Court concludes that the General Assembly intended to repeal other procedural remedies and allow persons cited under the enumerated ordinances direct access to the Court. Thus, the Court holds the Municipal Court's jurisdiction over the petitioner was valid.

The petitioner argues that the written opinion by the Municipal Court failed to state reasons why it found that (1) the petitioner was the owner of the properties and (2) the City could take actions in violation of the City Charter.

A review of the written opinion reflects that the Court concluded that the legal issues resulting from motions and issues raised during the trial included: (1) "The effect of an unrecorded deed on the determination of title and ownership in the prosecution of housing cases," and (2) "The validity of the use of constable tickets by the City of Wilmington in the initiation of housing cases."

The Court, in determining whether the City could use constable tickets and require the defendants to appear before the Court rather than have an administrative hearing, concluded that the applicable law was 10 Del.C. Chapter 29 and cited cases interpreting{1991 Del. Super. LEXIS 36} that provision. It held that the statute established a valid procedure for commencing housing prosecutions. It stated that it disagreed with petitioner's interpretation of the terms of the City Code provisions regarding appeal to the Board because the State statute that provided otherwise had been declared valid.

Regarding the ownership question, the Court's opinion stated that based on the evidence of the unrecorded deed and the factual circumstances surrounding the alleged transfer of ownership that delivery of title had not been made. Based on the law it found applicable, which it cited in the opinion, the Court concluded that ownership was not transferred from the petitioner.

The purpose for providing reasons for a decision is so that parties know the reason for the decision and that should the decision be reviewed, the appellate function can be fulfilled by the Court. General Motors Corp. v. Cox, Del. Supr., 304 A.2d 55 (1973).

A review of the seven page written opinion reflects that the Municipal Court did provide a reasoned basis for its decisions on both issues and included the legal authority it considered applicable. It is not a mere conclusory order{1991 Del. Super. LEXIS 37} like the one in Cannon, supra. It provides reasons sufficient to meet the purposes stated above. Therefore, this Court concludes there was no abuse of discretion by the Municipal Court.

Finally, the petitioner raises two constitutional issues. First, petitioner alleges that there is a denial of equal protection based upon the existence of appeals in similar cases in other courts and

the denial of appeal in Municipal Court. This Court has previously dealt with that issue. See, City of Wilmington v. Goldstein, supra. That decision remains the law of this case.

Second, petitioner argues that the criminal procedure as established denies him a right to a jury trial and, thus, violates his due process rights. Succinctly stated, petitioner argues that by vindictive prosecution he could be sentenced to life imprisonment in thirty-day segments with no right to appeal or no right to a jury trial. He cites as evidence of this hundreds of violations being brought against him and a record of prosecution spanning years.

Review of constitutional issues may be had by Writ of Certiorari in the appropriate case. See, Shoemaker, supra.{1991 Del. Super. LEXIS 38}

Delaware has established four criteria for the review of constitutional issues on a Writ of Certiorari: (1) the act of the lower tribunal must be final; (2) there must be no right of appeal, (3) a question of grave public policy and interest must be involved; and (4) there must be no other basis for review available. Shoemaker, 375 A.2d at 438; Becker v. State, Del. Super., 37 Del. 454, 185 A. 92, 96 (1936). While the arguments posed by petitioner are clearly of importance, the Court remains unconvinced that they have been established in this case.

Petitioner alleges that his sixth and fourteenth amendments were violated because he was denied a jury trial. Clearly, such an argument assumes that he will receive a sentence in excess of six months. Cf. Baldwin v. New York, 399 U.S. 66, 26 L. Ed. 2d 437, 90 S. Ct. 1886 (1970); Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). Under the facts presented by this case that constitutional prerequisite has not been reached. In fact, petitioner has received two thirty-day sentences on two separate violations. He has received appealable sentences on other charges, and fines on still other charges. No pattern of prosecutorial{1991 Del. Super. LEXIS 39} intention to prevent appeal or to deny petitioner a jury trial exists. No basis for complicity by the court-below in such activity has been shown. The court-below has acted within its jurisdiction and in a reasonable manner.

In an appropriate case, this Court, by Writ of Certiorari, could review an abuse of the judicial process in Municipal Court, should that process be abused to prevent review and/or the right to a jury trial. The facts as established by the record in this case do not indicate any such abuse. A Writ of Certiorari is not a substitute for appeal, it may not be used to circumvent appeal procedures. Castner, supra.

The verdicts and sentences of the court-below as to the charges in paragraph (b), supra, are AFFIRMED.

ORDER ON NOTICE.

Footnotes

1

Note that while appeals de novo are to be conducted in accordance with the Superior Court Criminal Rules, on an appeal on the record, "Superior Court Rule 72 shall govern" unless it is inconsistent with the express rules or otherwise inapplicable. That Rule requires bond only for non-residents. Super. Ct. Civ. R. 72(f).

2

In addition to Super. Ct. Crim. R. 37, 11 Del. C. § 4104(b) provides that,

Any Court, including a justice of the peace, may, in its discretion permit any person sentenced to pay a fine upon conviction of crime, in lieu of the payment of the fine ordered, to execute a bond acknowledging the amount of the fine imposed upon him as a debt due and owing to this State and binding himself unto this State in an amount equal to 10 times the fine imposed.

3

The appeal has been stayed by the consent of the parties until a decision is reached on the writ of certiorari. Goldstein v. City of Wilmington, Del. Supr., No. 191, 1989, Christie, C.J. (May 25, 1989) (Order).

4

There is no explanation why the petitioner waited almost three months before attempting to pay bond and no explanation why the bond was rejected.

5

The City also presents no argument or authority on this issue.

6

Superior Court Criminal Rule 38(a) states that,

Upon giving the required bond, an appeal to the Superior Court shall operate as a complete stay or supersedeas of the judgment or proceedings in the court below. . . .

7

An earlier version of this statute was analyzed by the Court in Mary A. O. v. John J. O., Del. Supr., 471 A.2d 993 (1983). That case held that the posting of security was mandated by 10 Del. C. § 960(d) and was a jurisdictional prerequisite of an appeal from the Family Court to the Superior Court. The precedential value of that decision was eliminated when that statute was amended and the appellate court which reviews non-custody decisions of the Family Court was changed [to the Supreme Court].

Wiland, 549 A.2d at 307, n. 6.

8

11 Del. C. § 4101(b) states that,

Immediately upon imposition by a court . . . of any sentence to pay a fine . . ., the same shall be a judgment against the convicted person for the full amount of the fine. . . . If not paid promptly, upon its imposition or in accordance with the terms of the order of the court, the clerk or Prothonotary shall cause the judgment to be entered upon the civil judgment docket of the court whence it may be executed and enforced or transferred in the same manner as other judgments of the court; provided, however, that where a stay of execution is otherwise permitted by law such a stay shall not be granted as a matter of right but only within the discretion of the court.

9

Petitioner did not respond to this argument in his brief.

10

A survey of Delaware statutes reveals that in both criminal and civil matters, the General Assembly has provided various ranges of review on writ of certiorari proceedings. See, e.g., 11 Del. C. § 5717 (in transfer of offenses affecting public streets, lanes or alleys of the City, the Clerk shall transmit a copy of the record); 11 Del. C. § 5719 (where defendant is committed for failure to satisfy judgment rendered by the Municipal Court for violation of city ordinance, "the filing of a transcript, mode of trial and forms of proceeding shall be as in cases of appeal from judgment of the justices of the peace"); 4 Del. C. § 541 (when litigating a liquor license requirement a record shall be kept to include the evidence, findings of fact, commissioner's decision and reasons therefore and, "In every appeal the cause shall be decided by the Court from the record. . . .") [Emphasis added.] (In interpreting this provision, the Court held that a certiorari proceeding must meet the same statutory requirement that applies to an appeal, and is subject to the limitations of the statute. Bicow v. Delaware ABC Comm'n., Del. Super., 297 A.2d 397 (1972); 9 Del. C. §§ 1353 and 4918 (allows Court review of Board of Adjustment decisions by Writ of Certiorari and provides that the Board must return papers acted on or the portions called for by the writ, and that the Court may take additional evidence that will be part of the proceedings upon which the determination of the Court is made.) (In interpreting this provision, the Court held that the scope of review of factual findings allowed by the statute was limited to determining whether there was substantial evidence.); 9 Del. C. § 6918 (statutory language is essentially the same as §§ 1353 and 4918, except it provides that "the cost of the transcript of the hearing appealed shall be the responsibility of the person appealing unless the costs are allowed against the Board); 10 Del. C. § 9505 (The records of the justice of the peace shall contain an entry indicating the information given by the justice of the peace) (failure of the docket of the justice to show entry of information as to right of appeal is not jurisdictional so does not render judgment defective on certiorari proceedings); 11 Del. C. § 5914 (a justice of the peace, on request and payment of legal fee shall make a true transcript of all docket entries in any cause before him or if specially required, a full copy of all records, entries, process and papers touching such cause. Such transcript or copy shall be received in evidence in any Court. Upon certiorari, the justice shall make a full copy of the entire record and proceedings); 13 Del. C. § 1522 (In divorce and annulment proceedings, parties to any proceedings brought under this chapter have the right to appeal on the record and a complete record shall be made of all proceedings in which testimony is taken under this section); 16 Del. C. § 6609 (persons aggrieved by decision of Fire Prevention Commission may present petition to Superior Court and on presentation Court may allow writ of certiorari to review the decisions; Commission shall return papers acted on by it with pertinent and material facts set forth and Court

may take evidence, or appoint referee to make findings of fact and conclusions of law and they shall constitute a part of the proceedings); 18 Del. C. §§ 2308-2309 (in petition for review by appeal or Writ of Certiorari for cease and desist and penalty order, transcript of the entire record of the proceeding, including all the evidence taken, shall be filed in Chancery Court and Commission's findings of facts, if supported by the evidence shall be conclusive); 19 Del.C. § 2350 (In case of every appeal to the Superior Court, the cause shall be determined by the Court from the record, which shall include a typewritten copy of the evidence and the findings and award of the Board); 22 Del.C. §§ 328, 330, 331); (See remarks under 9 Del.C. §§ 1353 and 4918, above.)

11

In exercising statutory as distinguished from common law jurisdiction, the Court is limited to the express language of the statute creating such jurisdiction.

12

On October 31, 1990 petitioner submitted for the Court's consideration a transcript of proceedings in other cases involving this same petitioner. The City by letter of November 5, 1990 objects to the Court's consideration of those transcripts. The Court agrees and strikes those transcripts from the record.

13

Even if the Court could consider the transcript, the proceedings on the day on which this oral ruling was made are no longer available because the tape was erased.

14

While Wilmington Savings was an interpretation of the Delaware Constitution, Art. IX § 1, whose provisions do not apply to municipal corporations, this Court finds the case persuasive here because the constitution requires a two-thirds concurrence of the members elected to each House before a corporate charter may be amended, which is similar to the factual situation and statutory language applicable here. Also persuasive is the Supreme Court's rationale that such extrinsic evidence may be considered to determine a statute's validity because there is no undue burden in searching to establish a statute's validity, where the irregularity in the legislative process is apparent on the statute's face and that irregularity may be overcome by a simple inquiry into the legislative voting record as recorded in the journals.

15

House Bill Number 623 as amended by House Amendment Number 1 of the 133rd General Assembly. The Amendment was made to specifically include building ordinances as one of the areas in which constables could issue citations, directing the person to the court of jurisdiction.

16

The Court notes that the procedure established by this legislation parallels other criminal citations, such as motor vehicle violations and certain other misdemeanors. See, 21 Del.C. § 703 (in establishing jurisdiction of motor vehicle offenses, the statute provides that, "the arresting officer may issue a summons to the person arrested for an appearance at a subsequent date before a justice of the peace, or . . . a Judge of the Municipal Court). See, 11 Del.C. § 1907 (where it is lawful for a peace officer to arrest without a warrant a person for a misdemeanor, he may give him a written summons, which directs the person to appear at the time and place indicated to stand trial).

17

The Court notes that the record is devoid of any indication that the petitioner ever sought or requested the administrative hearing he purports to have had a right to, before the Court proceedings.

1991 Del. Super. LEXIS 33::Andersen v. State::November 5, 1990

[Group:"1991 Del. Super. LEXIS 33"]LNI:3RRT-B4W0-003C-K1RN-00000-00

BEEBE MEDICAL CENTER, INC., Appellant Below, Appellant,
v.
CERTIFICATE OF NEED APPEALS BOARD AND NANTICOKE MEMORIAL HOSPITAL, INC., Appellees Below, Appellees.
1996 Del LEXIS 311996 Del. LEXIS 31
No. 304, 1995
January 29, 1996, Decided
SUPREME COURT OF DELAWARE

Before VEASEY, Chief Justice, HOLLAND and BERGER, Justices.
Disposition
AFFIRMED.
Opinion
Editorial Information: Prior History
Court Below: Superior Court of the State of Delaware in and for Kent County. C.A. No. 94A-01-004.
Editorial Information: Subsequent History
Released for Publication February 14, 1996.
Opinion by: E. Norman Veasey

ORDER

This 29th day of January 1996, upon consideration of the briefs of the parties, it appears to the Court that the matter should be affirmed on the basis of and for the reasons stated in the well-reasoned decision of Superior Court dated June 30, 1995,

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:
E. Norman Veasey
Chief Justice

1993 Del. Ch. LEXIS 107 PRISON HEALTH SERVS. V. STATE (Ch. Ct. 1993)

Prison Health Services, Inc. v. State of Delaware et al.

Civil Action No. 13,010

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

1993 Del. Ch. LEXIS 107

June 29, 1993, Decided

COUNSEL

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JUDGES

HARTNETT, III

AUTHOR: HARTNETT

OPINION

Plaintiff Prison Health Services, Inc. ("Prison Health") is a taxpayer and the unsuccessful bidder on a contract to provide medical services to prisoners in the custody of defendant Department of Corrections ("the Department"), an agency of defendant State of Delaware. Prison Health has sued to enjoin the execution of the contract between the Department and the designated successful contractor, defendant ARA Health Services, Inc. ("ARA").

A preliminary injunction may be granted only to prevent irreparable injury after a showing of a reasonable probability of success on the merits. The Court must also balance the equities between the affected interests. **Allen v. Prime Computer, Inc.**, Del. Supr., 540 A.2d 417 (1988). Prison Health has not demonstrated a reasonable probability of success on the merits. Furthermore, after balancing the equities, it must be concluded that the State's interest in ensuring that the health care of the inmates in its prisons is not interrupted by this procurement dispute outweighs any potential harm to the taxpayers or to Prison Health that would result from the entry of a preliminary injunction.

I.

Because the current contract for the rendering of health services to the prisons expires on June 30, it is not possible to outline all of the relevant facts.

Prison Health alleges that the proposed award of the contract to ARA is improper on three grounds. The first is that the proposed award is tainted because the chief of the Bureau of Prisons, Henry Risley, is married to a nurse who works for the proposed awardee and incumbent contractor, ARA. Prison Health suggests that Risley thereby violated 11 **Del.C.** ' 6559, that prohibits Department employees from being "interested" in a Department contract, and 29 **Del.C.** Ch. **58, the State Employees', Officers' and Officials' Code of Conduct.**

None of the parties cites any Delaware authority as to the degree of official involvement and interest sufficient to set aside the award of the challenged contract. The New Jersey Supreme Court has held that "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." **Van Itallie v. Borough of Franklin Lakes,** 28 N.J. 258, 146 A.2d 111, 116 (N.J. 1958).

The record here shows that Risley was not a member of the five-member Evaluation Committee that unanimously recommended that ARA be awarded the contract. Risley's activities were limited to 1) providing a list of Bureau of Prisons employees from which Larry Sussman B the Department's Administrative Services Division employee who oversaw the award of the contract -- could select a Bureau of Prisons representative, and 2) attending and asking three questions (but not voting) at the meeting of the Department's Executive Committee that is comprised of the Department's four division chiefs when Sussman presented the selection committee's recommendation to Commissioner Watson, chief of the Department. There is no evidence that any of the members of the Evaluation Committee or the Executive Committee were not disinterested or not fully informed.

Undoubtedly Risley's conduct was inappropriate and he should have abstained from even this limited role in the procurement process because his wife is an employee (albeit a fairly low-level employee) of one of the bidders. His personal participation, however, was not direct and substantial and therefore Prison Health has not established a reasonable probability that his involvement so tainted the procurement process as to require that the award of the contract be set aside. **See** 63A AM.JUR.2d **Public Officers and Employees** ' 338-47.

II

The language in the General Assembly's Annual Appropriation Act for the fiscal year ending June 30, 1993 (S.B. 444) in ' 166 of its so-called "epilogue" directed the Department to "issue a request for proposal ('RFP') for a new medical contract" and to "submit such RFP to the Office of State Personnel for a review prior to submitting any proposal to the open market for competitive bids." Assuming, arguendo, that the General Assembly could have constitutionally provided a mandate as to the procedures to be followed by the Department in soliciting proposals, **(see** Del. Const., art. II, ' 16) the Annual Appropriations Act did not do so. The General Assembly did not provide that the solicitation be pursuant to 29 **Del.C.** Ch. 69. Prison Health contends that the General Assembly's use of the term "competitive bids" meant that the Department was obligated to use sealed bidding procedures under 29 **Del.C.** ' 6903 and therefore, pursuant to 29 **Del.C.** ' 6907, the Department was required to award the contract to the lowest responsible bidder, **i.e.,** Prison Health. 29 **Del.C.** ' 6903, however, by its terms, does not apply to professional services.

Also, the General Assembly only directed the Department to issue a request for a **proposal.** By this language, it did not limit the Department to seeking competitive sealed bids pursuant to 29 **Del.C.** Ch. 69. And 29 **Del.C.** ' 6922(c)(5) permits the award of a contract based on competitive sealed **proposals** to be based on factors other than price.

Even if Prison Health is correct and the epilogue language obliged the Department to award the contract to the bidder that submitted the lowest price, this "defect" was apparent in the Request for Proposals that specified that "reasonable pricing" was one of ten equally weighted factors to be considered in the award.

Prison Health could have raised that objection as soon as the solicitation was issued in March 1993. It surely should have raised it at the pre-bid meeting. Instead it chose to remain silent, and in reliance on the absence of objections, the Department proceeded to evaluate the proposals as provided in the Request for Proposals and to select ARA for the award of the contract. Therefore, it is reasonably probable that Prison Health will not prevail on this argument because of laches or waiver.

III

Public contracting agencies are vested with broad discretion in carrying out their functions. **Fetters v. Mayor and Council of Wilmington,** 31 Del. Ch. 319, 72 A.2d 626, 629 (1950). A Court will not overturn the decision of an agency to award a contract that is not illegal unless that decision is made arbitrarily, capriciously, or in bad faith. **Gannett Co., Inc. v. State,** Del. Ch., C.A. No. 12,815-NC, Hartnett, V.C., slip op. at 9 (Jan. 11, 1993). Where the agency has actually signed the contract -- rather than merely selecting the successful bidder -- the challenger's burden is heightened and he must show that the agency clearly acted illegally in making the award. **Id.** That heightened burden is not applicable here because the State represented at oral argument that the contract with ARA had not been signed.

ARA was recommended by the Evaluation Committee to be awarded the contract based on its opinion that three of the evaluation factors set forth in the Request for Proposals favored ARA while two of the evaluation factors favored Prison Health and neither had an advantage as to the remaining five factors. Prison Health contends that the Department acted arbitrarily and capriciously in determining that certain factors favored ARA and in failing to determine that other factors favored Prison Health.

First, Prison Health contends that the Department acted arbitrarily in favoring ARA as to the financial background factor because the Department considered the financial strength of ARA's parent corporation, as well as ARA's financial strength, in making that determination. While reasonable minds may differ as to how much weight a parent's financial resources should be given in evaluating the financial condition of its subsidiary, it cannot be said that it is entirely unreasonable to consider it. Therefore, Prison Health has not established a reasonable probability that the Department acted arbitrarily in favoring ARA as to this factor.

Prison Health also complains that the Department acted arbitrarily in preferring ARA as to the general experience and reputation factor because the Department considered information that ARA submitted in connection with this factor as to its "original customers" and the academic qualifications of its personnel. Prison Health contends that it too could have submitted information as to its "original customers" and its equally well-qualified personnel but that it did not expressly mention them in its proposal because the solicitation did not specifically require such information. What Prison Health is really complaining of is superior salesmanship by ARA and not arbitrary action by the Department.

Prison Health also contends that the Department acted arbitrarily in favoring ARA as to the demonstrated ability factor, when it found that ARA had more accredited facilities than Prison Health. While reasonable minds can differ as to the wisdom of this analysis, it is not so clearly unreasonable so as to be arbitrary.

More meritorious is Prison Health's argument that favoring ARA as to this factor was arbitrary because the determination was based in part on an erroneous finding that the average length of hospital stay was longer for the recipients of health care from Prison Health than for ARA when in fact the reverse was the case.

When an agency makes a factual mistake because it relied on incorrect information, it cannot be said to have made a rational decision. **E.S. Ianni Associates v. State,** Del. Ch., C.A. No. 8111-NC, Hartnett, V.C., letter op. at 7 (Nov. 18, 1985). However, all of the members of the selection committee and Commissioner Watson have submitted affidavits stating that their decision to recommend ARA would not have been different had they had the correct information at the time. While these affidavits may to some extent be self-serving, on a motion for a Preliminary Injunction they must be given deference and, therefore, the Court cannot conclude from the present record that this mistake was so central to the question of determining which contractor was best qualified that the selection

of the successful contractor must be set aside as being arbitrary.

The same mistake was cited in the Department's decision to not favor Prison Health as to the reasonable Price factor notwithstanding that Prison Health's offered price was somewhat lower than that of ARA.

The Department patterned its Request for Proposals on 29 **Del.C.** ' 6922. Neither that section nor the Request for Proposals requires that price should be a major factor in the selection process.

While the amount of the difference in the bid amounts varies depending on whether certain optional services are included, Prison Health's overall proposal was less than 1% less than that of ARA. Because price is not a major factor in Professional Services contracts and because the Request for Proposals stated that a reasonable price was only one of several factors to be considered, this difference is not so substantial that the failure to favor Prison Health as to the reasonable pricing factor was arbitrary.

The discretion that public procurement officials are afforded is sufficiently broad to allow them to assign equal weight as to price reasonableness where the difference between the proposed prices is less than 1%. **See** Comp. Gen. Dec. No. B209776 (Sep. 29, 1983) reported in 31 Contract Cases Federal (CCH) P 71,758. Therefore, Prison Health has not established a reasonable probability that the Department acted arbitrarily when it assigned equal weight to the two proposals as to price reasonableness.

IV

Even if Prison Health had demonstrated that there is a reasonable probability of its success on the merits, the equities weigh against granting the preliminary injunction.

The Department's current contract expires on June 30, 1993. That contract contains an option permitting the current contract to be extended for another year. At oral argument the State stated that it could no longer exercise that option. Therefore, if the Court were to enjoin the award of the new contract, as of July 1, 1993 the State would have no means in place to provide medical services to inmates in its correctional facilities as required by the Eighth and Fourteenth Amendments to the United States Constitution. **Estelle v. Gamble,** 429 U.S. 97, 103, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). Even if it would be possible to do so, as a practical matter, negotiating a temporary contract to provide continuity of services in the few hours that remain before the existing contract expires would present tremendous difficulties. Prison Health's offer to furnish some type of health services beginning on July 1, 1993 likewise leaves real problems of administration that might adversely affect the health of the inmates. This potential harm to the inmates outweighs the potential harm to Prison Health and the taxpayers that would result from the entry of a preliminary injunction.

V

Prison Health's motion for a preliminary injunction is therefore denied.

IT IS SO ORDERED.

Maurice A. Hartnett, III

OFFICIAL MISCONDUCT

STATE of Delaware

v.

John W. GREEN and A. Edwards Danforth.

Superior Court of Delaware, New Castle County.

Argued April 11, 1977.

Decided July 13, 1977.

Defendants, State Bank Commissioner and officer of state bank, filed motions to dismiss various charges, which included official misconduct, conspiracy, and false swearing and which related to certain loans made to State Bank Commissioner. The Superior Court, New Castle County, Balick, J., held that: (1) official misconduct statute was not unconstitutionally vague; (2) under official misconduct statute, the phrase "a duty which is clearly inherent in the nature of his office" meant those unspecified duties which were so essential to accomplishment of purposes for which office was created that they were clearly inherent in nature of office, and thus statute did not include duty of avoiding violation of unspecified conflict-of-interest or other ethical standards; (3) State Bank Commissioner's acceptance of benefit of certain loans were not omissions to perform acts and thus did not fall within official misconduct statutes; (4) conspiracy charge failed to charge an offense; (5) where indictment charged that state bank officers swore falsely but did not state before whom oath or affirmation was administered, charge of perjury in the second degree would be dismissed, and (6) charge of official misconduct failed to state essential facts constituting offense charged.

All counts of indictment dismissed.

1. Constitutional Law ⇐258
Criminal Law ⇐13.1(1)

Terms of a penal statute creating new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; statute which forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates first essential of due process of law. 11 Del.C. § 201(2).

2. Criminal Law ⇐13.1(1)

Test of whether a criminal statute is unconstitutionally vague is not stricter than common understanding requires or ordinary language permits.

3. Officers ⇐121

At common law, prosecution for nonfeasance could be based on a duty inherent in the nature of the office.

4. Criminal Law ⇐13.1(1)

Statute that might otherwise be subject to attack on ground of vagueness may be saved by requirement that actor have a particular state of mind.

5. Officers ⇐121

Official misconduct statute includes as an element of the offense of official misconduct that a public servant must "knowingly" refrain from performing his duty, and this prescribed state of mind applies to all elements of the offense; thus state must prove that defendant knew he was refraining from performing duty which is clearly inherent in the nature of his office. 11 Del.C. §§ 252, 1211, 1211(2); Penal Law N.Y. § 195.00.

6. Officers ⇐121

Element of official misconduct statute is that the defendant must intend to obtain personal benefit or to cause harm to another person. 11 Del.C. § 1211.

7. Criminal Law ⇐13.1(2)

Official misconduct statute is not unconstitutionally vague. 11 Del.C. § 1211.

8. Officers ⇐121

Under official misconduct statute, phrase "duty which is clearly inherent in the nature of his office" means those unspecified duties that are so essential to accomplishment of purposes for which office was created that they are clearly inherent

in the nature of the office; meaning of phrase does not include duty of avoiding violation of unspecified conflict-of-interest or other ethical standards. 11 Del.C. § 1211.

See publication Words and Phrases for other judicial constructions and definitions.

9. Banks and Banking ⇐17

Where indictment charging official misconduct alleged that State Bank Commissioner accepted benefit of loans from state bank and accepted benefit of state bank acting as surety on loan from an out-of-state bank but where there was no specific standard barring State Bank Commissioner from accepting loans from state banks, official misconduct counts of indictment failed to charge offenses and would be dismissed. 11 Del.C. § 1211.

10. Constitutional Law ⇐70.1(12)
States ⇐81

Officers and employees of state must have benefit of specific standards to guide their conduct and should be subject to criminal penalties only for violation of those standards that are found to be especially vital to government; specification of such ethical standards and appropriate sanctions for their violation is a legislative function, not one to be performed by a court in a prosecution for official misconduct. 11 Del.C. § 1211.

11. Banks and Banking ⇐17

Official misconduct counts of indictment, which alleged that State Bank Commissioner accepted benefit of loans from state bank and accepted benefit of state bank acting as surety on loan from out of state bank, did not charge omissions to perform acts and thus failed to charge offenses under official misconduct statute. 11 Del.C. § 1211(2).

12. Conspiracy ⇐43(6)

Where official misconduct count of indictment failed to charge an offense, other count which charged that defendants conspired to commit offense purportedly charged in official misconduct count also failed to charge an offense. 11 Del.C. § 1211.

13. Indictment and Information ⇐144.2
Perjury ⇐23

Where second-degree perjury count of indictment charged that defendants swore falsely but did not state before whom oath or affirmation was administered and where, in bill of particulars, state acknowledged that there was no such person but contended that defendant was nevertheless guilty of a lesser included offense of making a false written statement, count charging defendant with perjury in the second degree failed to charge an offense and would be dismissed, and any lesser or different charge not requiring proof of an oath would have to be brought by new indictment or information. 11 Del.C. §§ 1222, 1224, 1235(a), 3103.

14. Fraud ⇐68

Unlike definition of perjury in the second degree, definitions of offenses that generally prohibit making a false written statement and specifically prohibit making a false statement to deceive a bank examiner do not include as an element that the statement must be made under oath. 5 Del.C. § 128; 11 Del.C. § 1233.

15. Indictment and Information ⇐144.-1(3), 144.2

Where it appears from bill of particulars and state admits in argument on pretrial motion to dismiss that it will not be able to prove one of the elements of the offense charged in the indictment, indictment must be dismissed and any lesser or different charge not requiring proof of element in question must be brought by new indictment or information.

16. Banks and Banking ⇐17

Duty of reviewing and taking some remedial action where false statement is made with intent to deceive bank examiner is clearly inherent in nature of office of State Bank Commissioner. 5 Del.C. §§ 121–124.

17. Indictment and Information ⇐60

An indictment must state essential facts constituting offense charged, and essential facts are those that will clearly inform defendant of the precise offense charged so that he may prepare his defense and will be protected against later prosecution for the same offense.

18. Indictment and Information ⇐98

Each count of an indictment is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are incorporated by reference.

19. States ⇐81

Where count of indictment charging State Bank Commissioner with official misconduct alleged that State Bank Commissioner failed to reveal falsity of and take remedial action on certain questionnaire filed by bank officer but failed to allege that questionnaire was false and that false statement was made in the course of an examination by State Bank Commissioner, count failed to charge an offense, even though allegations which count failed to make were doubtlessly intended and were included in other count of indictment but were not incorporated by reference or otherwise stated in official misconduct count. 11 Del.C. § 1211(2); Superior Court Rules, Criminal rule 7(c), Del.C.Ann.

Norman A. Barron, Deputy Atty. Gen., Wilmington, for the State.

Victor F. Battaglia and Robert K. Beste, Jr., of Biggs & Battaglia, Wilmington, for defendant John W. Green.

Carl Schnee and Michael N. Castle, of Schnee & Castle, Wilmington, for defendant A. Edwards Danforth.

BALICK, Judge.

The defendants have filed motions to dismiss the charges in a seven count indictment on the grounds of unconstitutional vagueness of the section of the criminal code defining the offense of official misconduct and failure to charge offenses.

At the time of the alleged offenses John W. Green was State Bank Commissioner and A. Edwards Danforth was chairman of the board and an officer of the Farmers Bank of the State of Delaware. Counts I and II charge that Green accepted the benefit of loans of $1,778 and $2,500 respectively between Farmers Bank and his wife. Count III charges conspiracy to commit the offense charged in Count II. Count IV charges that Green accepted a loan of $30,819.64 from a New York bank "secured by the Farmers Bank of the State of Delaware, with a mortgage" given by Green and his wife to the Farmers Bank. Count V charges that Green accepted the benefit of a $1,500 loan between Farmers Bank and Green and his wife. Count VI charges that Danforth swore falsely in an officer's questionnaire in an annual joint state-federal examination that Farmers Bank had not extended any credit that was a direct or indirect liability of any bank examiner of Farmers Bank. Count VII charges that Green failed "to reveal the falsity of and take remedial action on" the officer's questionnaire described in Count VI.

Counts I, II, IV, V, and VII charge Green with official misconduct in violation of 11 *Del.C.* § 1211, which provides in pertinent part as follows:

> "A public servant is guilty of official misconduct when, intending to obtain a personal benefit . . . : . . . (2) He knowingly refrains from performing a duty which . . . is clearly inherent in the nature of his office . . . ."

[1] In order to avoid being held unconstitutionally vague, a statute must meet the following test:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

guess at its meaning and differ as to its application violates the first essential of due process of law. * * *."

Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *State v. Robinson*, Del.Supr., 251 A.2d 552 (1969); cf. 11 *Del.C.* § 201(2)

[2, 3] The test of constitutionality is not stricter than common understanding requires or ordinary language permits. § 1211(2) is the modern, codified version of the common law offense of nonfeasance in office. See commentary on § 1211. It is probably impossible and certainly impracticable to express all the duties of public offices in statutes. It was recognized at common law that a prosecution for nonfeasance could be based on a duty inherent in the nature of the office. 67 C.J.S. Officers § 110; 4 McQuillin Mun.Corp. (3rd Ed.) § 12.228a. For example, in a prosecution of a justice of the peace for nonfeasance in office, the defendant was charged with failing to notify the State of a hearing on a charge within his jurisdiction and failing to hear the State's witnesses, and the court instructed the jury that these were duties of the office where the governing statute simply provided that the justice of the peace shall "proceed to hear fully and to determine the case." *State v. Matushefske*, Del.Super., 215 A.2d 443 (1965).

[4–7] A statute that might otherwise be subject to attack may be saved by a requirement that the actor have a particular state of mind. The common law offense of nonfeasance in office prohibited the "wilful" failure to act. See commentary on § 1211. Wilfulness is not defined as a state of mind under the Delaware Criminal Code, but § 1211(2) includes as an element of the offense of official misconduct that a public servant must "knowingly" refrain from performing his duty. This prescribed state of mind applies to all elements of the offense. § 252. Thus the State must prove that the defendant knew that he was refraining from performing a duty which is clearly inherent in the nature of his office. See the practice commentary on the section of the New York Penal Law that is the model for § 1211(2). N.Y. Penal Law § 195.00 (McKinney 1975). Moreover, whereas no corrupt motive was required at common law, an element of § 1211 is that the defendant must intend to obtain a personal benefit or to cause harm to another person. See commentary on § 1211. Where the State must prove that a defendant acted with this knowledge and intent, the definition of the offense is not unconstitutionally vague. Cf. *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

Although § 1211(2) is not unconstitutionally vague, the issue remains whether the counts of the indictment charging official misconduct charge failure to perform "a duty which . . . is clearly inherent in the nature of [the] office [of State Bank Commissioner,]" as that phrase is used in § 1211(2). Counts I, II, and V charge that Green accepted the benefit of loans from a state bank and Count IV is apparently intended to charge that he accepted the benefit of a state bank acting as surety on a loan from an out of state bank. These charges are based on alleged conflicts of interest. The State contends that a duty clearly inherent in the nature of an office is that the public servant must avoid conflicts of interest and that if he fails to do so and the other elements of the offense are proven, he is guilty of official misconduct.

The legislature has enacted laws regulating the conduct of officers and employees of the State. 29 *Del.C.* Ch. 58A. In so doing, the General Assembly made the following finding:

> "To ensure propriety and to preserve public confidence, officers and employees of the State must have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to guarantee uniform maintenance of those standards. Some standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties." § 5851(2).

The provision in the code of ethics on acceptance of loans says as follows:

"If any employee [shall] have an unsecured loan exceeding $5000 from any business which is subject, in whole or in part, to the regulatory jurisdiction of . . . any State agency [,] he shall file with the State Personnel Commission a written statement fully disclosing the same. . . . " § 5855(f)(3).

This chapter provides that an employee having other types of conflicts of interest is subject to criminal penalties, but that an employee who fails to file the required written statement disclosing unsecured loans exceeding $5000 is subject only to removal, suspension, demotion, or other disciplinary action by the State Personnel Commission. § 5858(c)(4).

Although there is a federal statute barring federal bank examiners from accepting loans from banks that they examine, there is no similar specific standard barring the State Bank Commissioner from accepting loans from state banks. 18 U.S.C.A. § 213. Other than the provision in the code of ethics quoted above, the only statute bearing on this subject limits the conditions under which a bank or trust company may make loans to its directors, officers, or employees. 5 *Del.C.* § 909(d).

[8–10] The phrase "a duty which . . . is clearly inherent in the nature of his office" means those unspecified duties that are so essential to the accomplishment of the purposes for which the office was created that they are clearly inherent in the nature of the office. The meaning of the phrase does not include the duty of avoiding violation of unspecified conflict-of-interest or other ethical standards. Such an interpretation would defeat the legislative policy that officers and employees of the State must have the benefit of specific standards to guide their conduct and should be subject to criminal penalties only for violation of those standards that are found to be especially vital to government. Specification of such ethical standards and appropriate sanctions for their violation is a legislative function, not one to be performed by a court in a prosecution for official misconduct.

[11] Counts I, II, IV, and V fail to charge offenses for another reason as well. The conduct defined as a criminal offense in § 1211(2) is the omission to perform an act. See § 242. This was called "nonfeasance" at common law. See commentary on § 1211. Accepting the benefit of loans from a state bank, as charged in Counts I, II, and V, or accepting the benefit of a state bank acting as surety on a loan from an out of state bank, as charged in Count IV, are acts, not omissions to perform acts. Since these counts do not charge omissions to perform acts, they fail to charge offenses under § 1211(2).

[12] Since Count II fails to charge an offense, Count III, which charges that the defendants conspired to commit the offense charged in Count II, also fails to charge an offense.

Count VI charges Danforth with perjury in the second degree in violation of 11 *Del.C.* § 1222. One of the elements of perjury in the second degree is that the defendant must swear falsely. "Swears falsely" is defined in the criminal code thus: "A person 'swears falsely' when he intentionally makes a false statement . . . under oath in a written instrument. . . . " § 1224. "Oath" is defined thus: "'Oath' includes an affirmation and every other mode authorized by law of attesting the truth of that which is stated." § 1235(a).

There are statutes giving the method of administering oaths and providing who has authority to do so. See 10 *Del.C.* Ch. 53. It is also provided by statute that, "[i]n an indictment for perjury, it is sufficient to set forth the substance of the offense charged, stating before whom . . . the oath or affirmation, was administered or taken . . . ." 11 *Del.C.* § 3103.

[13, 14] Although the indictment charges that the defendant swore falsely, it does not state before whom the oath or affirmation was administered. In the bill of particulars the State acknowledges that there is no such person. The State thus in effect admits that the allegedly false an-

swer was not made under oath, but contends that the defendant is nevertheless guilty of a lesser included offense of making a false written statement. Unlike perjury in the second degree, the definitions of the offenses that generally prohibit making a false written statement, 11 *Del.C.* § 1233, and specifically prohibit making a false statement to deceive a bank examiner, 5 *Del.C.* § 123, do not include as an element that the statement must be made under oath.

[15] Where it appears from the bill of particulars and the State admits in argument on a pretrial motion to dismiss that it will not be able to prove one of the elements of the offense charged in the indictment, the indictment must be dismissed and any lesser or different charge not requiring proof of the element in question must be brought by a new indictment or information. It is unnecessary to consider Danforth's other contentions regarding this count.

[16] Unlike the other counts charging official misconduct, Count VII does charge an omission to perform an act, and I conclude for the following reasons that the act is an inherent duty of the State Bank Commissioner. The fundamental purpose of the office is to supervise and regulate banks and other financial institutions. 5 *Del.C.* § 121. It is expressly provided by statute that the State Bank Commissioner shall conduct a thorough examination of banks at least once in each year and file a detailed report of the examination. §§ 122, 124. It is a criminal violation for any director or officer of any bank subject to such an examination to make a false statement with intent to deceive the examiner. § 123. It follows that the duty of revealing and taking some remedial action where such a false statement is made is clearly inherent in the nature of the office of State Bank Commissioner.

[17–19] Count VII nevertheless fails to charge an offense. The indictment must state the essential facts constituting the offense charged. Superior Court Criminal Rule 7(c). The essential facts are those that will clearly inform the defendant of the precise offense charged so that he may prepare his defense and will be protected against later prosecution for the same offense. *Lasby v. State*, Del.Supr., 185 A.2d 271 (1962); Wright, Federal Practice and Procedure: Criminal § 125, p. 232. Each count is considered as if it were a separate indictment and must be sufficient without reference to other counts unless they are incorporated by reference. Wright § 123, p. 222. Count VI states wherein the officer's questionnaire was false and that the false statement was made in the course of an examination by the State Bank Commissioner. Although these allegations are doubtlessly intended, they are not incorporated by reference or otherwise stated in Count VII. Without these essential facts, Count VII fails to charge an offense under § 1211(2).

For these reasons, all counts of the indictment must be dismissed for failure to charge offenses.

Counsel may present an order.

W. PAYNTER SHARP & SON, INC., a corporation of the State of Delaware, Plaintiff, v. Austin N. HELLER, Secretary of the Department of Natural Resources and Environmental Control, Defendant
Court of Chancery of Delaware, Kent
280 A.2d 748;1971 Del. Ch. LEXIS 124

[NO NUMBER IN ORIGINAL]

June 28, 1971
Counsel **{1971 Del. Ch. LEXIS 1}** John E. Messick, of Tunnell & Raysor, Georgetown, for plaintiff. Richard H. Schliem, III, Deputy Atty. Gen., State of Delaware, for defendant.

Judges: Duffy, Chancellor.

Opinion

Opinion by: **DUFFY**

{280 A.2d 749} In this action W. Paynter Sharp & Son, Inc. (plaintiff), seeks an order restraining the Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware from awarding three contracts to another bidder for public work. Plaintiff submitted the low bids (totaling about $66,774) on each of three contracts for boat ramp repairs, restoration of a bulkhead and the erection of launching facilities. Plaintiff applied for a restraining order on June 17 but the State agreed to defer (without order) the award of any contract until the record was supplemented and counsel had further opportunity to be heard. Thereafter the State filed an answer, both parties filed affidavits and then were heard on June 28.

Because funds available for the work must be committed by June 30, the decision on the motion will, for practical purposes, be determinative of the action. This, then, is the decision on plaintiff's motion for what I regard as a permanent injunction.

{280 A.2d 750} {1971 Del. Ch. LEXIS 2} A.

The State tacitly concedes that plaintiff's bids were regular in all respects and, presumably, it would have been awarded the contracts in the ordinary course of events. The Secretary decided, however, to award the contracts to another vendor for reasons which appear in identical letters he wrote to plaintiff on June 11; the letters read:

"Dear Mr. Sharp: You are a member of the Fish and Wildlife Advisory Council and therefore must be treated as a person closely associated with the Department of Natural Resources and Environmental Control and the State of Delaware. Based on consultation with the Attorney General's office, and pursuant to Title 29, Section 6908 of the Delaware Code Annotated, it is my decision as Secretary of DNREC and the policy of the Department, that the best interest of the State will be served by awarding the above contracts to a vendor other than one who has a close association with DNREC; this will avoid any allegation or suggestion of undue influence in the letting of contracts by this Department. In doing so, I wish to state that this in no way reflects on your integrity or on any work that you have done for the State in the past. For {1971 Del. Ch. LEXIS 3} this reason, your bid on the above numbered contracts is rejected."

B.

Plaintiff makes two arguments challenging the Secretary's right to rely on the statute which he cited.

First, it says that 6908 is applicable to a State "agency" and the Secretary of the Department is not an agency within the meaning of that statute. 1 29 Del.C. 6901 provides that in the Chapter of the Code relating to contracts for public improvements "agency" has the same meaning as the definition in 6301. 2 Under that definition agency includes a "department" or a "person" executing a governmental function. Quite plainly, the Secretary is the administrator and head of the Department, 29 Del.C. 8002, with power to supervise and direct its affairs and in so doing he executes a governmental function. It follows that he is an "agency" within the meaning of 6908.

Second, plaintiff argues that the statute requires that the agency "shall set down in its minutes the reason or reasons for granting the contract to the person other than the lowest responsible vendor," and the record does not show compliance with this requirement. There has been no showing that the Department or the Secretary maintains minutes and/or that the {280 A.2d 751} Secretary's reason for going to another vendor is reflected by a formal writing in any place other than in the letter to plaintiff. The language of 6908 probably requires modification to bring it into conformity with the recent restructuring of the Executive branch{1971 Del. Ch. LEXIS 5} of State government, but the absence of "minutes" is not fatal to the State's position. I say this because the purpose of requiring a statement of reasons in minutes, in this context, is to make a public record of those reasons. For present purposes, I regard the substance of that purpose as having been accomplished here by the Secretary's letter to plaintiff. 3 In view of the centralization of authority in one person (the Secretary), a different result would give preference to form at the expense of substance.

An affidavit filed by the State says that the "Division of Fish and Wildlife has specific authority and responsibility with respect to the subject matter covered by the contracts" in issue in this lawsuit. By statute there is established a Council on Game and Fish which{1971 Del. Ch. LEXIS 6} has a duty to serve in "an advisory capacity to the Director of Fish and Wildlife." 29 Del. C. 8005. The complaint states that plaintiff's president, W. Paynter Sharp, is a member of that Council. 4 The State's affidavits also show that Fish and Wildlife personnel assisted in preparation of the contracts and that a Council member who requests information about the responsibilities of the Division is never refused access to it; at its meetings the Council discusses and makes recommendations on all facets of the Division's policies and operations, including the expenditure of moneys allocated to it.

The connection of plaintiff, through its President, with the Division was thus used by the Secretary as the basis on which he determined that the best interest of the State would be served by awarding the contracts to another vendor. His stated purpose was to avoid any allegation or suggestion of undue {1971 Del. Ch. LEXIS 7} influence in the awarding of the contracts.

In Fetters v. Mayor and Council of Wilmington, 31 Del.Ch. 319, 72 A.2d 626 (1950), Chancellor Seitz discussed statutes dealing with bidding on public work and said this:

"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."

That purpose would be accomplished here, in one sense, at least, by the award of these contracts to plaintiff, because its bids were about $9,000 lower than those of competitors. But the saving of money, which is certainly desirable, is not the exclusive test by which a vendor is to be chosen. We must look to State policy as expressed in the statute regarding the award of contracts. But before doing so, it is appropriate to say that Delaware does not have a statute (of general application) with respect to conflict of interest or undue influence in the awarding of contracts{1971 Del. Ch. LEXIS 8} for public work. There is not an Executive Order dealing with this subject. And the Secretary has not adopted or attempted to adopt a policy of Department-wide application as to them. 5 This void points up a {280 A.2d 752} significant weakness in the State's position: the standard for rejection of low bids because of the appearance of undue influence (and, implicitly, of a conflict of interest) has been made for these contracts only; the determination has not been made on the basis of general standards. But the weakness is not fatal.

The directive of 6908 is that a contract is to be awarded to the lowest responsible vendor unless in the "opinion of the agency" the interest of the State shall be "better{1971 Del. Ch. LEXIS 9} served" by going to another vendor "which may then be done." The language is broad, the discretion substantial. Basically, the agency has authority to reject even a responsible bidder who is lowest if in its "opinion" the State would be better served by another vendor. And that broad language is emphasized in this case by the statutory power of the Secretary who may "Make * * * any * * * contracts * * * whenever the same shall be deemed by [him] * * * necessary or desirable in the performance of the functions of the Department. * * *" 29 Del. C. 8003(e).

On May 22, 1970 the Department contracted with plaintiff while Mr. Sharp was a member of the Council on Game and Fish. I do not regard that, however, as a waiver of the Secretary's right to act under 6908 as to the contracts now in issue, nor must it be controlling as to his decision on later bids. 6

{1971 Del. Ch. LEXIS 10} Given the very broad discretion vested in the Secretary, I am unable to say as a matter of law that he is not authorized to make the decision that he did in this case as to what is in the best interest of the State. In short, I cannot say that his "opinion" was arbitrary or capricious or otherwise without foundation in law. The award of contracts for public work has been suspect, often, because of alleged favoritism, undue influence, conflicts and the like. In my view it is vital that a public agency have the confidence of the people it serves and, for this reason, it must avoid not only evil but the appearance of evil as well. There is nothing whatever in this record, as the Secretary concedes, to show that either plaintiff or Mr. Sharp secured the contracts as the result of anything other than submitting the lowest responsible bid. But confidence in the Department is vital and, while $9,000 is a lot of money, I refuse to say, as a matter of law, that the Secretary was without authority to act upon his opinion that it was in the State's best interest to spend that additional amount on these contracts. 7

{1971 Del. Ch. LEXIS 11} Under the law, as I view it, the Court cannot say that the Secretary's decision was not authorized by 6908. Plaintiff's motion for injunctive relief is denied. It is so ordered.

As a matter of law, I decline to say that the Secretary's decision was not authorized under 6908. The application for a restraining order is denied. It is so ordered.

Footnotes

1

29 Del. C. 6908 provides:

"The bids shall be publicly opened at the time and place specified and the contract shall be awarded within 30 days thereafter by the agency or a representative delegated by the agency, in accordance with regulations prescribed by the agency, to the lowest responsible vendor unless, in the opinion of the agency or its delegated representative, the interest of the State shall be better served by the awarding of the contract to some other vendor, which may then be done, provided the agency shall set down in its minutes the reason or reasons for granting the contract to the person other than the lowest responsible vendor, and clearly describing how the interest of the State shall be better served by awarding the contract to other than the lowest vendor. * * * The agency or its delegated representative may reject all bids."

2

29 Del. C. 6301 states:

"'Agency' includes every board, department, bureau, commission, person or group of persons or other authority created and now existing or hereafter to be created to exclude, supervise, control and/or administer governmental functions under the laws of this State or to perform such other duties as may be prescribed or to whom any moneys are appropriated under any budget appropriation act or supplemental appropriation act. * * *"

3

As a matter of procedure, it seems to me that until 6908 is modified to reflect the present structure in the Executive branch, it is desirable for the Secretary to maintain formal "minutes" or a record book under that statute.

4

It is not argued that the Court should distinguish between Mr. Sharp personally and the corporate bidder.

5

Mr. Heller took office as the first Secretary of the newly created Department on March 2, 1970. In the fall of 1970 the Department adopted a procurement policy which includes provisions for "Ethics in Purchasing" but, according to his affidavit, nothing contained therein is relevant to the present case.

6

Plaintiff relies on Opinion of the Justices, 104 N.H. 261, 183 A.2d 909 (1962) but I do not think it pertinent; we are here concerned with whether a decision to eliminate a possible allegation of undue influence may be sustained under a statutory grant of power, not with whether there is in fact a conflict of interest.

7

In his affidavit Mr. Sharp states that the Council has not considered any matter relating to any contract proposed by the Department, including the three contracts in dispute. The awarding of a contract is not, however, the final event in a State-bidder relationship. It is, indeed, only the beginning. Performance follows award and with it certainly the possibility of differences as to quality of work and whether it is done on time. These contracts are to be administered by the Director of Fish and Wildlife. The Council serves in an "advisory capacity to the Director" of that Division and it shall "consider matters relating to the protection, conservation and propagation of all forms of fish and protected wildlife of this State and such other matters" as may be referred to it by the Director. 29 Del. C. 8005. Before acceptance of the work required by these contracts the Department may want the views of the Council (as the statute contemplates).

IN THE MATTER OF HENRY J. RIDGELY, ESQUIRE
48 Del 46448 Del. 464; 106 A2d 527106 A.2d 527; 1954 Del LEXIS 661954 Del. LEXIS 66
No. 19
June 29, 1954, Decided
Supreme Court of Delaware

SOUTHERLAND, C. J., and WOLCOTT and TUNNELL, J. J., sitting.

Counsel

S. Samuel Arsht for the Censor Committee.
William Prickett for Henry J. Ridgely.

Opinion by: SOUTHERLAND

{48 Del. 465} {106 A.2d 528} SOUTHERLAND, C. J.:

There is before us for review under Supreme Court Rule 32, Del.C. Ann., a report of the Censor Committee of the Court recommending disciplinary action against Henry J. Ridgely, a member of the bar and until recently Deputy Attorney General for Kent County. Two cases of alleged unprofessional conduct form the basis of the Committee's action. Both of them involve the important and delicate question of the representation of conflicting interests by an attorney who occupies the office of a Deputy Attorney General and who is also engaged in private practice.

1. The Villa Case.

The primary facts were found by the Committee and appear to be undisputed. The following statement for the most part is based on these findings, supplemented by the Court's examination of the record.

On May 23, 1953, Lieutenant Charles Villa, an Air Force Pilot stationed at the Dover Air Force Base, bought a Mercury {48 Del. 466} automobile from Biter's Auto Service, Inc., automobile dealers in Dover. The total consideration was $ 3,123.04, made up as follows:

Trade-in allowance for Ford car	$ 1,745.60
Note to finance company secured by conditional sales contract	1,000.00
Personal Note	357.44
Cash	20.00

Villa believed he was buying a new 1953 Mercury. The price was that fixed for a new car. The purchase order signed by him and accepted by Edward P. Biter, President of the corporation, specified a new car. In fact, the car was not new. As Biter and the salesman knew, it was a used car. It had been driven about 800 miles, had been involved in an accident, {106 A.2d 529} and had been traded in to Biter's by the prior owner. The speedometer had been turned back (by whom, does not appear) to show only eight miles of driving.

By chance Villa learned the facts a few days later. Incensed, he consulted Lieutenant H. M. Finkelstein, then Assistant Staff Judge Advocate, at the Air Base, who told him to see Ridgely,

the Deputy Attorney General. Finkelstein then called Ridgely on the telephone, stated the facts, and expressed his opinion that a violation of the criminal law was involved. Ridgely told Finkelstein to have Villa come to his (Ridgely's) office. Although Finkelstein cautioned Villa not to let his anger against Biter lead him to overlook his own financial interests, it is quite clear from the evidence that Villa was referred to Ridgely in the latter's official capacity.

On Thursday, May 28th, Villa went to Ridgely's office on the Green in Dover. He told Ridgely the facts, and demanded prosecution -- he wanted to "hang Biter". Ridgely believed that the facts justified criminal proceedings, but sought to dissuade Villa from immediate prosecution because he thought such a course would delay a civil settlement. While Villa was there, {48 Del. 467} Ridgely telephoned the Biter office and talked to Mr. Murphy, the salesman. Ridgely told Murphy that Lieutenant Villa was with him, complaining that he (Villa) "had been gypped" in his purchase of the car, and that Villa was "pretty well burned up" about it. Ridgely asked Murphy to have Biter call him. Biter did not call him back, and on the following day (Friday, May 29th), Ridgely called Biter. Ridgely told Biter of Villa's complaint, and Biter admitted that his company had sold a used car as a new one. Ridgely questioned him about returning the Ford that Villa had traded in. Biter said it had been sold. Ridgely said Lieutenant Villa wanted to call off the transaction and would not take a new Mercury under any circumstances. Ridgely suggested, in effect, that Biter settle the matter. Ridgely testified:

"I stated to him, that in the interests of his corporation, that a matter like this, if it got spread all around the community, that it would damage his reputation, and that he should seriously consider putting everything back the way it was before it happened."

Shortly after this conversation Villa returned to Ridgely's office. He renewed his request for criminal action. Ridgely again advised against immediate criminal prosecution, but Villa wanted it. Ridgely sent him to the Attorney General's office, where his statement of facts was reduced to writing. He then swore out warrants before the Clerk of the Court of Common Pleas for the arrest of Biter and Murphy on charges of obtaining money by false pretences. However, Ridgely directed his secretary to instruct the Clerk of the Court to hold the warrants and not to serve them. Asked why he held up the warrants, Ridgely testified:

"Well, if Mr. Biter had been arrested I felt reasonably certain that, as a defendant in a criminal action, he wouldn't pay off the money, or pay back to Lieutenant Villa what he had involved in the transaction or call it off. He might eventually, but not in the foreseeable future."

{48 Del. 468} After swearing out warrants Villa returned to Ridgely's office. The matter of recovering his car was discussed. Apparently Villa asked whether a civil settlement would interfere with prosecution, and Ridgely said it would not. Ridgely called Biter, and the possible recovery of Villa's car, or alternatively, a payment to Villa of the trade-in price, was discussed, but nothing was agreed upon. Ridgely advised Villa to go to Biter's, taking some one with him, and obtain, if possible, "some sort of statements or admissions".

Nothing seems to have occurred with respect to the case during the following three days (Saturday, Sunday and Monday), except that on Monday, June 1st,Ridgely again told his secretary that the warrants should not be served.

On Tuesday, June 2nd, Villa came again to Ridgely's office. As a result of Ridgely's {106 A.2d 530} recommendations, he had decided to accept restitution, and told Ridgely he would "take his money back" -- that is, an amount representing the value of the Ford car that he had traded in. Ridgely telephoned Biter to this effect, and told Biter that Villa would come to discuss the matter.

Before Villa left his office, Ridgely told him there would be an attorney's fee, and suggested that

Villa get Biter to pay it. The amount was not mentioned. Villa went to see Biter. There is no substantial dispute as to what occurred. Villa asked for $ 1800 (the trade-in value of his Ford plus $ 35 of expenses), the cancellation of his obligations, and an attorney's fee. Without any haggling Biter immediately agreed to these terms. The amount of the fee was not mentioned.

On the following day (June 3d) the settlement was consummated on the agreed basis. Ridgely then stated that his fee would be $ 624, representing twenty per cent of $ 3,120, the approximate total of the amounts of Villa's obligations and the trade-in value of the car. Biter was "amazed and surprised" (according to Villa, he "got kind of choked up"), and said (in effect) that if he had thought it was going to be that much, he {48 Del. 469} would have let the customer take legal proceedings.1 Without further demur, however, he paid the bill. He subsequently wrote Ridgely, complaining about the amount of the fee, but Ridgely refused to reduce it. Ridgely never took any further steps to prosecute the criminal charges.

In early December a resident of Dover sent a letter to the press purporting to state the facts of the Villa-Biter settlement. Informed of the contents of the letter, the Attorney General telephoned Ridgely for an explanation. In order to confirm his report to his superior officer, Ridgely sent for Biter and asked him to talk to the Attorney General. Biter refused to talk until he consulted his lawyer. Later he did talk.

Ridgely, at the request of the Attorney General, wrote a letter for the newspapers in justification or explanation of his conduct. This letter contained four statements that Ridegly now admits to have been erroneous: (1) that the matter began as a civil one and had no connection with the Attorney General's office; (2) that he had been retained on the basis of the amount collected; (3) that Villa without any investigation or advice secured warrants of arrest; and (4) that after the issuance of the warrants, he (Ridgely) requested that no further action be taken until complete details were made available.

Upon publication of these letters this Court directed the Censor Committee to proceed with an investigation of Ridgely's conduct.

The findings of the Censor Committee upon the Villa matter are to the effect that Ridgely's conduct was unprofessional in that it was (1) a violation of certain of the canons of professional and judicial ethics, and (2) a violation of his duty as a public officer in that he had placed himself in a position where his personal interests were opposed to his duty to the public.

We think it unnecessary to determine whether this case falls within the language of the canons cited by the Committee.2 {48 Del. 470} Their underlying intent is to apply to the conduct of the lawyer the injunction that no man can serve two masters. A lawyer cannot represent conflicting interests, because he owes to every client the duty of undivided loyalty. In civil cases he may ordinarily choose between two {106 A.2d 531} clients whose interests conflict, with full disclosure when required. But a public prosecutor permitted to engage in private practice has no such freedom of choice. His private interest must yield to the public one.

The facts of the Villa matter show beyond doubt that Ridgely subordinated the public interest to his own. From the beginning he treated Villa as a possible client. According to his testimony, he felt that from the time of his first interview with Villa he was aiding and advising Villa as a private attorney. Speaking of his dealings with Villa, he testified:

"A. He [Villa] was just a difficult client to try to keep going along a path that would serve his own best interests.

"Q. As he saw it? A. As I saw it."

From this point of view it was natural for him to discourage prosecution and advise a civil settlement. Before Villa was content to withhold prosecution, Ridgely undertook to negotiate

such a settlement. Moreover, his suggestion to Biter that it was to the latter's interest to avoid public knowledge of the matter was necessarily inconsistent with any intention to prosecute. He believed that Villa's interests required civil action, and that criminal proceedings would prejudice civil recovery. After the warrants had been sworn out, he directed the Court Clerk not to serve them. He finally persuaded Villa to withhold prosecution and accept restitution.

{48 Del. 471} In all this he acted as an attorney would act for a private client -- the client's interest came first. It necessarily follows that, as the Committee concluded, he violated the duty that he owed to the public.

In explaining his actions before the Censor Committee, Ridgely sought to show that the case against Biter was weak because the car sold to Villa was probably worth what was paid for it.3 That argument was also made before us. He also expressed to the Committee an opinion that the misrepresentation in respect of the mileage driven, effected by turning back the speedometer, was not a material misrepresentation. These suggestions have no merit. To sell a used automobile as a new one and turn back its speedometer to conceal its mileage is an extremely shoddy piece of business, to say the least, and reflects no credit upon those who participated in it. Certainly, as Ridgely conceded, a prosecution could be founded upon it.

But this is not the point of the matter. What Ridgely undertook to do was, as Deputy Attorney General, to withhold prosecution because, as Villa's private attorney, he thought that prosecution conflicted with Villa's interests.

It is quite true that there are cases of criminal fraud or injury to property in which the prosecuting officer may properly determine that the public interest will not be prejudiced by withholding prosecution if full restitution is made. But in other cases the violation of law may be so serious that he should listen to no suggestion that the prosecution be dropped.

Now, the exercise of this power by the prosecuting officer -- the decision to prosecute or not to prosecute fraud cases -- involves the performance of one of the most difficult and delicate functions of his office. It requires the weighing and balancing of interests that may, and often do, conflict -- those of the public and those of the victim of the fraud. One thing is certain. {48 Del. 472} The prosecuting officer cannot perform this function -- he cannot discharge his public obligation -- if his personal interests are involved. And his representation of the defrauded person at once gives him a personal interest in the matter that disables him from the proper performance of his official duty.

If Ridgely's view was correct that the matter was primarily a civil fraud, he {106 A.2d 532} should have referred Villa to independent counsel. If it was his view that the violation of law justified the institution of criminal proceedings, he should have instituted them; and if after full consideration he had then concluded on sufficient grounds to permit a civil settlement, at the urging of independent counsel, he could have done so. What he could not properly do was to act in two capacities -- as Deputy Attorney General and as Villa's attorney. The result of Ridgely's course of conduct was in effect to deprive the State of the services of its prosecuting officer in a matter requiring the impartial exercise of official judgment.

But this is not all. There is another feature of this case that has a most unpleasant aspect. That is the collection of the fee from Biter. We ask at once: Why did Biter pay this fee? Why should Ridgely have thought that he might pay it? As an experienced business man Biter must have known that attorney's fees are not collectible from the defendant in a case of this kind. Certainly Ridgely knew it. Yet, without knowing the amount to be charged, Biter agreed at once to pay it. When the amount was told him, he protested but nevertheless paid. He testified that "anyone would assume" such an obligation "in the course of a normal settlement with a customer"; but

admitted that he had not on any other occasion paid any customer's counsel fees. At one time in testifying he said that the thought of a criminal violation never entered his mind; but at another time he was asked about the meaning of the phrase "press charges" that he said he had used in his protest against the amount of Ridgely's fee, and he replied that the only charge that he could think of would be misrepresentation. He admitted that the car sold to Villa could not honestly have been represented as a new car. Misrepresentation {48 Del. 473} he understood to have a criminal aspect. At the time of the settlement he knew that the speedometer had been turned back and that this was a violation of law. After the settlement he learned of the issuance of the warrant, but did not inquire about it, because he felt that there had been "a mutual settlement". He felt that the settlement "wouldcancel out" any criminal prosecution because Villa had been made whole. And when asked by Ridgely to explain the matter to the Attorney General, he refused to talk until he had consulted counsel.

We have no doubt that Biter's ready acceptance of the settlement terms, and his payment of the fee, were prompted by anxiety to hush up the matter, and by the belief that he would avert prosecution on a criminal charge.

We should say at once that there is no evidence that Ridgely or Villa ever threatened Biter with criminal prosecution. But the result -- the payment of a fee to Ridgely, a prosecuting officer as well as a private attorney -- is deplorable. As the Censor Committee observed, such an act necessarily tends to destroy the confidence of the public in the prosecuting officer. It was grossly improper for Ridgely to suggest or receive the payment of any fee by Biter. And to some extent the matter is made worse by the large amount charged -- an amount clearly exorbitant, as Ridgely's counsel candidly admits.

As we have indicated, there is no evidence of Ridgely's intentional use of the powers of his office to obtain money. His serious final mistake in the matter of the fee is probably traceable to the initial one -- the adoption of Villa as a private client. From this he was led on to a position where, we suspect, he had become blind to the possible implications of what he was doing. The line between public duty and private interest was blurred. The record suggests, however, a certain uneasiness in his mind about the matter. Thus he did not go with Villa to see Biter, because (he said) he was Deputy Attorney General, and it might not appear proper. And an adverse inference must be drawn from the erroneous statements in his letter to the press. {48 Del. 474} They may have been made hastily, under pressure of time, but it is hard to believe that they do {106 A.2d 533} not evidence some consciousness of the impropriety of his conduct.

The Committee's findings of unprofessional conduct in the Villa matter must be approved.

2. The Polin Case.

As Deputy Attorney General for Kent County, Ridegly's official duties included the representation of the State Board of Health in matters in that County. Prior to 1954 he had been consulted officially by the State Board of Health on more than one occasion.

From June 1951, Ridgely was the attorney for Isadore Polin, founder and president of the Polin Poultry Co., Inc. Polin had acquired a site for a proposed plant in Clayton, Delaware, and Ridgely had advised him on certain legal matters with respect thereto. In 1951 the Town of Clayton refused Polin's request to be allowed to operate a poultry processing plant in the town. In January 1952 the business was incorporated, Ridgely handling the matter. On February 8, 1952, the corporation applied to the State Board of Health for a license to operate a poultry processing plant. The application was denied by the Board on February 15th, for the reason that the town had refused to accept the effluent from the poultry plant into its sewage system. In March 1952 an ordinance was passed by the Town of Clayton prohibiting the erection of poultry

processing plants within the town. The corporation made a subsequent application to the Board of Health on July 18, 1952. Sometime during the summer or fall of 1952 Ridgely telephoned the executive secretary of the Board and requested that a decision be given on the second application. This application was likewisedenied.

During this time Ridgely shared offices with David Buckson, another attorney. They were not partners but were close associates. Ridgely associated Buckson with him as counsel for the Polin Poultry Co. in connection with its application for a license. In November 1952 the poultry company filed an appeal to the {48 Del. 475} Superior Court from the decision of the State Board of Health denying its application. The appeal was filed and signed by Buckson, but Buckson throughout acted under Ridgely's instructions, since the poultry company was Ridgely's client.

In November of 1952 Ridgely called Chief Deputy Attorney General Theisen, stationed in Wilmington, and explained his association with Polin and the Polin Poultry Co., and told Theisen that he could not appear for the Attorney General's office to represent the State Board of Health upon the appeal. He did not tell Theisen that he intended to appear for the poultry company.

The ground for the appeal was that the action of the Board in denying the poultry company's application was arbitrary, capricious and unreasonable. The appeal was heard before Judge Terry and at the trial both Buckson and Ridgely appeared on behalf of the Polin Poultry Co., and actively participated in the trial. Mr. Theisen represented the State.

The court held that the action of the State Board of Health was not arbitrary and dismissed the appeal with prejudice.

Upon these facts the Censor Committee made a finding of unprofessional conduct, in that Ridgely violated Canon 6 of the Canons of Professional Ethics, relating to the representation of conflicting interests, and Canon 31 of the Canons of Judicial Ethics, above referred to.

We are in accord with the Committee's finding with respect to Canon 6. It is unnecessary to consider Canon 31. As we have heretofore indicated, public duty commands precedence. It was therefore improper for Ridgely, officially counsel for the State Board of Health, to take a case against it. He nevertheless did so, and 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. We should add that even if Ridgely had not appeared in court the error would not have been cured. The {106 A.2d 534} client was Ridgely's and he could not escape {48 Del. 476} the burden of official duty by delegating the case to a lawyer associated with him. At that stage of the case he should have sent his client to other counsel.4 Moreover, unless he was willing to resign from his office, he should have taken that action as soon as the probable conflict of interests appeared, that is, as soon as action before the Board of Health became necessary.

For a law officer of the State to accept private employment in State matters and engage in litigation or the prosecution of claims against a fellow member of the Attorney General's staff is manifestly improper. It is suggested that this has happened frequently in connection with claims for tax refunds before the State Tax Board. If so, that practice is wrong.

Before the Censor Committee, and again before us, Ridgely's counsel has earnestly pressed the argument that no conflict of interest existed in the Polin case, because the Board of Health was a nominal defendant only, the Town of Clayton being the real party in interest. This argument is founded upon the assertion that Polin had complied with the regulations of the Board, and that the only obstacle to the issuance of the license was the existence of the town ordinance. This is an incorrect view of the matter. The appeal papers charged the Board with arbitrary and

capricious action, and the Board was required to defend its action. The executive secretary of the Board and many of the technicians testified in the case. According to Mr. Theisen the Board was the defendant in fact as well as in name. Probably, as Theisen also said, the Board would have been satisfied if the Town of Clayton had been satisfied, but this fact does not change the situation. The State Board of Health -- Ridgely's client as well as Theisen's -- had determined official policy and had taken official action. This action Ridgely sought to have annulled on the ground that it was arbitrary. There was a direct conflict of interest.

{48 Del. 477} Ridgely's counsel makes another argument designed to show the inconsistency of the Censor Committee's findings in the Polin case. It is founded on the following circumstances:

The charges against Ridgely originally included charges of unprofessional conduct in representing private clients in matters before the State Highway Department and the Delaware Liquor Commission. Both these state agencies employ special counsel and are not represented by the Attorney General's office. It has been the practice in this State for many years for members of the Attorney General's staff to represent private interests before these agencies. The Committee accordingly determined during the hearing that no unprofessional conduct could be founded upon instances of this kind, because the agency had independent counsel, and because Ridgely merely followed a settled practice never before called in question. Upon these matters, therefore, it took no testimony. Ridgely's counsel insists that if the Committee was right in its determination in these cases (as he says it was), it must be wrong in its conclusion in the Polin matter, since in both cases the State is opposed by its own law officer and a conflict of interest exists to some extent. There is some logical force in the argument, but if it were pressed to conclusion the result would not help Ridgely's case; it would merely suggest the impropriety of the State's law officer in appearing for private clients before any State agency.

But we think the Committee was right in deciding to go no further into these matters. Ridgely is not to be blamed for doing what has been done for years without suggestion of criticism. All that the argument shows is that the practices that have grown {106 A.2d 535} up in these matters may be inconsistent. This is not surprising; they depend largely upon custom. Indeed such inconsistencies exist in the legislative policy. Thus, the judges of certain of our inferior courts are permitted to engage in private practice, and the judges of other inferior courts are expressly forbidden by law to do so.

This matter of representation by the State's law officers of private clients before agencies having independent counsel is {48 Del. 478} of importance here only in furnishing an illustration of the difficulties that inevitably flow from the practice of permitting the members of the Attorney General's staff to engage in private practice. We shall have more to say hereafter upon this subject.

As to the Polin matter, it is proper to say that, unlike the Villa case, it does not appear that the public interest suffered by reason of Ridgely's conduct. The State was adequately represented. But Ridgely's conduct was nevertheless a violation of the rule not to represent conflicting interests, and the Committee's finding to that effect is approved.

Unprofessional conduct having been found we must determine what disciplinary action should be taken.

One mitigating circumstance at once presents itself. We have already alluded to it. In Delaware, all the members of the Attorney General's staff are permitted by long-established usage to engage in the private practice of law. This, notwithstanding the fact that all of the State's legal business, civil and criminal (with the exception of that appertaining to agencies with independent counsel), is concentrated in the office of the Attorney General. This situation is the outgrowth of

legislative policy, which, as we have recently pointed out, permits the State to obtain the services of well-qualified attorneys at salaries that would not be attractive if the official were required to devote his entire time to his duties.5

This policy has unfortunate consequences. Its result is to cast upon the occupant of the office the burden of determining for himself the limits which must circumscribe his private practice. It is easy to say that in a doubtful case he should decide against himself. That is true. But lawyers, of course, are subject to human weakness, and the inevitable result is that in some cases -- relatively few, we like to think -- considerations of self-interest will entice the holder of the office away from the performance of his duty. Moreover, as the Censor Committee observed {48 Del. 479} in its report, the established custom of permitting the State's law officers to engage in private practice has led to confusion and misunderstanding in the minds of the lawyers, because in many cases the line between propriety and impropriety is hard to draw.

The modern tendency is to remedy this evil by striking at its root -- by prohibiting lawyers representing the State from engaging in private practice. As of January 1, 1953, lawyers employed by the Department of Justice are prohibited (except by special permission of the Attorney General) from engaging in private practice.6

The situation in Delaware suggests strongly the need for the General Assembly to review and reconsider its policy in these matters. It is for the General Assembly and not for the courts to determine legislative policy; but the subject is one that touches closely the administration of justice. As such, we think it a proper one for judicial criticism.

The pertinency of these observations to the case before us lies in the fact that when Ridgely assumed his office he, like all others who have held it, became a part of an unfortunate system. For the inherent weaknesses and difficulties of that system he is not to be blamed. Its existence tends to mitigate his offense.

We take into consideration also the fact of the publicity and adverse criticism that have attended this matter.We cannot {106 A.2d 536} doubt that he has suffered from it in many ways.

These considerations have led us to the conclusion that the disciplinary action to be taken should be limited to a severe reprimand, provided certain conditions are met. These conditions concern the fees collected or billed in the two cases. Since the fee of $ 624 in the Villa case was improperly collected, it should be returned to the Biter Company; in fact, Ridgely has expressed his willingness to return it. As for the fee in the Polin {48 Del. 480} matter, it appears that at the time of the hearing, a bill for $ 2,000, representing all of Ridgely's services to the Polin Company, had been sent but not paid. So much of this fee as is allocable to proceedings before the Board of Health, as well as to the appeal proceedings, should not be collected or retained by Ridgely, since it represents payment for work done in opposing the interests of the State.

If Ridgely elects to comply with these conditions, his assent may be evidenced by an appropriate certificate of his counsel, filed with the Clerk. In that event, disciplinary action will be limited as above indicated, and the reprimand administered at the next session of this Court. Otherwise, the matter will be further considered.

Footnotes

Footnotes

1 According to Biter, he said: "I would have let him press charges on me."

2 Canon 36 of the Canons of Professional Ethics relates primarily to the acceptance of private employment by a public officer, after retirement from office, in connection with a matter which he has investigated or passed upon while in office.

Canon 31 of the Canons of Judicial Ethics relates to the practice of law by judges of inferior

courts. The Committee on Professional Ethics and Grievances of the American Bar Association has applied it to public prosecutors.

3 The record indicates that it was resold on June 6th as a used car for a price slightly higher than that paid by Villa.

4 "The injunction not to represent conflicting interests applies equally to law partners representing different clients who have interests conflicting with one another; also to lawyers, not partners, having offices together;* * * ." Drinker, Legal Ethics, 1953, Columbia University Press, N. Y., p. 106.

5 Application of Young, Del., 34 Del. Ch. 322, 104 A.2d 263.

6 Order No. 4231, Attorney General, Dec. 15, 1952.