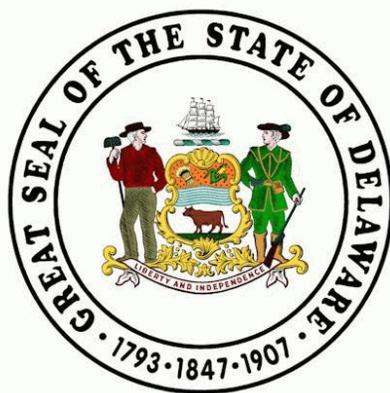


*State of Delaware*

*State Public Integrity Commission*



**ANNUAL REPORT**  
**March 1, 2004**

*Mary Jane Willis, Chair*  
*Arthur V. Episcopo, Vice Chair*

*Paul E. Ellis*  
*Barbara A. Remus*

*Clifton H. Hubbard*  
*Foster (Terry) J. Massie*

*Marla L. Tocker*

# STATE PUBLIC INTEGRITY COMMISSION

## Annual Report - March 1, 2004

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## STATE PUBLIC INTEGRITY COMMISSION

### *HISTORY AND BACKGROUND*

#### ***I. Laws Administered by the Public Integrity Commission***

The State Public Integrity Commission, an independent agency, administers the “Laws Regulating the Conduct of Officers and Employees of the State.”<sup>1</sup> Those laws set the ethical standards of Executive Branch officials and employees; require public officers in the Executive, Legislative and Judicial Branches to disclose personal financial interests; create procedures to prevent “double-dipping” when State employees and officials hold dual State and/or local government jobs; and mandate lobbying registration and expenditure reports requirements.

A substantial part of the Commission’s work, and the key to instilling the public’s confidence in its government, is the issuing of **advisory opinions interpreting the ethics law for the Executive Branch. 29 Del. C. § 5807(c).** **Aside from the advisory guidance so State employees and officials can avoid violating the Code, the Commission may grant a waiver if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an undue hardship on the agency or the employee. 29 Del. C. § 5807(a).** **By law, if the agency or individual who seeks an opinion or waiver fully discloses the facts and, in good faith, relies on the Commission’s advice, they are statutorily protected from disciplinary action. 29 Del. C. § 5807(a) and (c).**

**Further assistance to aid those subject to the law in complying with the requirements is given through training classes; publication of opinion synopses opinions; Ethics Bulletins, and other materials. 29 Del. C. § 5808(A)(a)(1).** **As the Commission normally meets once a**

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<sup>1</sup> Delaware Code, Title 29, Chapter 58.

month, the day-to-day work of providing instruction and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, training etc., are the statutory duties of its Commission Counsel. *Id.* As part of this statutory requirement to provide such materials, the Commission’s legal representative, has also established and maintains a web site with information for those subject to the law and for the public. The web site is: <http://www.state.de.us/pic>.

Aside from issuing advice, waivers, training, etc., the Commission may act on sworn complaints or act on its own initiative on allegations of a violation. 29 Del. C. § 5810(a). A majority (4 members) must find “reasonable grounds to believe”<sup>2</sup> a violation has occurred. 29 Del. C. § 5808(A)(a)(4). If a complaint is sufficient to establish probable cause, the Commission may conduct a hearing. 29 Del. C. § 5810(a). Violations must be proven by clear and convincing evidence. *Commission Rules, “Hearings and Decisions,” ¶11.* If a violation is found, the Commission may impose administrative disciplinary action. 29 Del. C. § 5810(d). Further, it may refer substantial evidence of any criminal law to the appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Complaints that are frivolous or fail to state a violation may be dismissed. 29 Del. C. § 5809(3).

More details of the laws and the purposes of the legislation, are discussed below.

### *A. Code of Conduct*

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<sup>2</sup> “Reasonable grounds to believe” means “probable cause.” *Coleman v. State*, 562 A.2d 111, 1177 (Del. Supr., 1989).

**The Code of Conduct establishes the ethical limits of conduct of State employees, officers and honorary officials in the Executive Branch and local government officials, unless the local government adopts a code at least as stringent as the State law.<sup>3</sup> The Code is meant to insure conduct by these employees and officials that will instill the public's respect and confidence. 29 Del. C. § 5802(1). When the conduct exceeds the limits of the ethical rules, the Code sets forth disciplinary measures to insure uniform compliance standards. 29 Del. C. § 5802(2).**

### **(1) Conduct That May Be Prosecuted as a Criminal Violation**

The rules restrict employees and officials from: (1) participating in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) representing or assisting a private enterprise before the State; (3) contracting with the State; and (4) representing or assisting a private enterprise before the State on certain matters for two years after leaving State employment. 29 Del. C. § 5805. Violating those rules may result in administrative disciplinary action or criminal prosecution. 29 Del. C. § 5805(f) and § 5810. The criminal penalty is up to a year in prison and/or a \$10,000 fine. 29 Del. C. § 5805(f).

### **(2) Conduct That May Result In Administrative Discipline**

The Code places limits on accepting gifts, other employment, compensation, or anything of monetary value. 29 Del. C. § 5806(b). It specifically bans the use of public office for private gain or unwarranted privileges, and improper use or improper disclosure of confidential information. 29 Del. C. § 5806(e) thru § 5806(g).

Administrative discipline for violating those provisions may be: (1) a letter of reprimand or censure; (2) removal, suspension, demotion, or other appropriate disciplinary action for persons

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<sup>3</sup>68 Del. Laws c. 433 § 1.

other than elected officials; or (3) a recommendation of removal from office of an honorary State official. 29 Del. C. § 5810(h).

## ***B. Financial Disclosure***

### **(1) Annual Requirements for Senior Level Officials**

Legislation passed in 1994, and effective in 1995, made the Commission responsible for administering the Financial Disclosure Subchapter beginning with the 1995 filings of disclosure reports. More than 300 State officers file disclosure forms each year.

Reports must be filed by public officers in the Executive, Legislative, and Judicial branches within 14 days of becoming a public officer and on February 15 each year thereafter. Those who must file include: candidates for State office; State elected officials; cabinet secretaries, division directors, and members of the judiciary. 29 Del. C. § 5812.

Personal financial information to be reported consists of assets, debts, income, capital gains, reimbursements, honoraria and gifts. 29 Del. C. § 5813. Aside from the public officer's own financial interests, they must disclose assets held with another person if they receive a direct benefit, and assets held by spouses and minor children, even if there is no direct benefit.

#### ***Id.***

Such disclosure is to guard against public officials acting in their official capacity on matters where they have a direct or indirect financial interest. 29 Del. C. § 5811. Whether the financial interests they report raise any ethical issues is decided under the ethics laws applicable to the particular officer.<sup>4</sup>

### **(2) Criminal Penalties for Non-Compliance**

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<sup>4</sup>Executive Branch officers refer to the State Code of Conduct, 29 Del. C., Ch. 58; Legislative Branch officers refer to the Legislative Conflicts of Interest, 29 Del. C. Ch. 10; and Judicial officers refer to the Code of Judicial Conduct, Delaware Rules Annotated.

**Willful failure to file a report is a Class B misdemeanor. Knowingly filing false information is a Class A misdemeanor. 29 Del. C. § 5815. The Commission may refer suspected violations to the Commission Counsel for investigation and Attorney General for investigation and prosecution. *Id.* The penalties are: up to six months incarceration and a fine of up to \$1,150 for a Class B misdemeanor, 11 Del. C. § 4206(b); and up to one year and a fine of up to \$2,300 for a Class A misdemeanor, 11 Del. C. § 4206(a). The Court may also require restitution or set other conditions as it deems appropriate. 11 Del. C. § 4206(a) and (b).**

### **(3) Other Disclosure Requirements**

#### **(a) Executive Order Disclosure Requirements**

Executive Branch officers who must comply with the Financial Disclosure Law, also must notify the Governor's office of any gift received valued at more than \$250. *E. O. No. 8.* Pursuant to the Executive Order, information on those gifts will be posted on the Governor's web site.

#### **(b) Code of Conduct Disclosure Requirements**

In the executive branch, all State employees and officers must, as a condition of commencing and continuing employment with the State, file a "full disclosure" if they have a financial interest in a private enterprise that does business with, or is regulated by, the State. 29 Del. C. § 5805(d). "Honorary State officials," appointees to certain State Boards and Commissions, must file a "full disclosure" if they have a financial interest in a private enterprise that does business with, or is regulated by, the agency to which they are appointed. 29 Del. C. § 5805(d).

In the context of these filings, "financial interest" includes: (1) ownership or investment interests; (2) receiving \$5,000 or more as an employee, officer, director, trustee or independent

contractor; or (3) creditor of a private enterprise. 29 Del. C. § 5804(5). “Full disclosure” requires more details than the annual reports filed pursuant to the Financial Disclosure law by Senior Level officials. “Full disclosure” means sufficient information for the Commission to decide if there is any conflict of interest. *Commission Op. No. 98-23.*

### ***C. Compensation Policy - Dual Government Jobs***

Some elected State officials and other paid appointed officials are concurrently employed by State agencies or other jurisdictions of government. 29 Del. C. § 5821(a). The General Assembly believed taxpayers should not pay an individual more than once for coinciding hours of the workday. 29 Del. C. § 5821(b). To ensure taxpayers do not pay such employees and officials from more than one tax-funded source during overlapping hours—that is, they do not “double-dip,” those holding dual government positions must keep certain time records to verify the hours worked at the full-time job on any day they miss work due to the elected or paid appointed position. 29 Del. C. § 5821(c) and § 5822(a). The supervisor must verify the time records and, where appropriate, the full-time salary will be prorated. *Id.*

The restrictions against “double-dipping” are further reinforced by the State Code of Conduct restrictions on holding “other employment.” *See, 29 Del. C.* § 5806(b). Compliance with that ethics provision is meant to insure that not only is there no “double-dipping,” but also insures that the “other employment” does not raise other ethical issues.

As another means of insuring compliance, the State Auditor audits the time records. 29 Del. C. § 5823. Discrepancies are reported to the Commission for investigation under its complaint procedures, and/or to the Attorney General for possible prosecution under any appropriate criminal provision. 29 Del. C. § 5823.

### ***D. Registration of Lobbyists***

The Commission began administering the Lobbying Law in 1996. Individuals authorized to act on behalf of another must register with the Commission if they will be acting to promote, advocate, influence or oppose any matter pending before the General Assembly or a State agency by direct communication. 29 Del. C. § 5831.

As of the end of 2003, 230 lobbyists, representing 370 organizations, were registered with the Commission. As compared to 2002, those numbers show a decrease of four (4) registered lobbyists, but an increase of 43 organizations represented by lobbyists. Those numbers also reflect 600 filings of lobbyists' registration forms and employers' authorization forms, as compared to 561 filings at the end of 2002. Each lobbyist must also file a quarterly report on behalf of the organization they represent, disclosing all direct expenditures on General Assembly members and employees and/or members of any State agency. 29 Del. C. § 5835. During 2002, there were 936 expenditure reports for the organizations represented. That number increased to 1,480 in 2003.

Lobbyist registration informs the public and government officials of the identity of persons seeking access to officials and the interests the lobbyist represents. *Commission Op. No. 96-14 (citing United States v. Harriss, 347 U.S. 612 (1954))*. The expense reports identify what, if any, funds were spent on food, refreshments, entertainment, travel, lodging and gifts given to members of the General Assembly and/or employees or officials of State agencies in the process of their lobbying efforts. 29 Del. C. § 5835.

#### Penalties for Non-Compliance

Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. 29 Del. C. § 5837. An unclassified misdemeanor carries a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other

conditions as the Court deems appropriate. *11 Del. C. § 4206(c)*. Failure to file an authorization or report serves as a cancellation of the lobbyist's registration. *Id.* They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.*

## ***II. State Public Integrity Commission - Structure***

The Governor appoints the seven members of the State Public Integrity Commission. The Senate must then confirm their nomination. *29 Del. C. § 5808*. The Commission members elect the Chair. *Id.*

Members may not hold any elected or appointed office, or be a candidate for federal or State office. *Id.* They also cannot hold any political party office or be an officer in any political campaign. *Id.* No more than four members of the Commission may be registered with the same political party. *Id.* While the statute does not require that each county be represented on the Commission, the appointments to the Commission have resulted in appointees from each of the three counties.

When their term expires, they may continue to serve until their successor has been appointed and qualified. *Id.*

Commission members are authorized compensation of \$100 for each day devoted to performing official duties and reimbursement for reasonable and necessary expenses incurred in performing official duties. *29 Del. C. § 5808*.

During 2003, the Commission met eleven (11) times to consider requests for advisory opinions, waivers, and complaints. The meetings were held at the Margaret O'Neill Building, Dover, Delaware, which is where the Commission's office is located. Notice of meetings was posted as required by the Freedom of Information Act.

**During 2003, the following citizens served on the Commission:**

***Arthur G. Connolly, Jr., Chair***

Commissioner Arthur G. Connolly, Jr., served the last year of his term in 2003. Commissioner Connolly was the last remaining member who was appointed to the Commission when it was initially created in 1991 as the State Ethics Commissioner. That initial appointment was made by then-Governor Michael Castle on April 2, 1991. Commissioner Connolly's five-year term expired on April 2, 1996.

As the result of legislation passed in 1994, he, like other initial members, was permitted to be reappointed for a seven-year term. His reappointment by then-Governor Thomas Carper, occurred on June 11, 1996. Subsequently, the Commission members elected him as Vice-Chair in 1998, and he served in that position until July 22, 2002. Commissioner Connolly completed his final term of office on June 11, 2003.

Mr. Connolly, a partner in the law firm of Connolly, Bove, Lodge and Hutz, in Wilmington, Delaware, has always been an active participant in the legal community. Among his activities, he has served as President of the Delaware State Bar Association; Chairman of the Board of Bar Examiners, and as an Adjunct Professor of Trial Practice at Delaware Law School, now known as Widener University School of Law. He currently serves on the *Delaware Law Review's* Editorial Board, as its copyright editor. His particular experience in the area of Ethics was particularly critical to the Commission in its beginning phases. While there was an ethics statute for the Executive Branch since 1974, there were few interpretations of that law by the Courts and/or the Attorney General's office. Commissioner Connolly's service as a member of the Delaware Code of Judicial Conduct Committee of the Delaware Supreme Court and as a member of the Board of Professional Responsibility of the Delaware Supreme Court, gave him an invaluable understanding

and insight that was of tremendous assistance to the entire Commission. Aided by fellow Commissioner and lawyer, Kimber E. Vought, Commissioners Connolly and Vought ensured that the early interpretations of the law created the bedrock needed for fair and balanced decisions that were the basis of consistency in subsequent Commission opinions, as required by statute. 29 Del. C. § 5809(5). Not only did Commissioner Connolly give of his time and legal expertise, he insured a timely responsiveness in the Commission's opinions through the use of his lawyer office's administrative staff during the first four years of the Commission when it had no dedicated staff. Once the Commission was permitted to hire staff, his corporate memory of prior opinions contributed greatly to the continuing consistency in Commission opinions.

His activities in non-legal areas include having served on the Board of Trustees for Friends' School and Archmere Academy. In the past, he was active as a basketball coach for the Catholic Youth Organization, the American Junior League, and summer high school teams. He currently is a Fellow of the American College of Trial Lawyers.

### ***Mary Jane Willis***

The Commission members elected Commissioner Mary Jane Willis as the new Chair after the departure of Commissioner Connolly. She had been serving as Vice-Chair since July 22, 2002.

Ms. Willis was initially appointed to the Commission on June 30, 1996 to complete the term of C. Ann Nellius, which expired on April 2, 1997. Ms. Willis then began to serve her own term, which expires on April 2, 2004.

At present, Ms. Willis holds a number of other public service positions, including: United Way, Board of Directors; Delaware State Chair, United States Olympic Committee; Trustee, University of Delaware, Children's Beach House; and the Delaware Children's Fire Safety Foundation; Director, Schwartz Center for the Arts and KidsPeace National Council for Kids; Board

Member, Washington College Parents' Council; and member of Delaware Court on the Judiciary's Preliminary Investigatory Committee, West Virginia Wesleyan College National President's Advisory Council, and Smyrna High School Wellness Advisory Board.

Other community and public service activities included: Delaware Community Foundation Board; University of Delaware Parent's Association Board; Dartmouth College Parent Board; Delaware Environmental Appeals Board; Kent General Hospital Board; Kent General Hospital Foundation Board; American Cancer Society-Delaware Division Board; Kent County Unit Board; the Mayor's Blue Ribbon Panel for Strategic Library Planning; and many others.

Her wide range of interests also are reflected by her completion of a National Security Seminar at the U.S. Army War College, Carlisle Barracks, PA, in 2002. The seminar gives attendees a "civilian viewpoint" on defense matters.

She obtained her Bachelor of Science Degree from West Virginia Wesleyan College, and her Master's Degree in counseling and guidance from West Virginia University. She has more than 60 post-graduate hours toward her doctorate. As an educator, she has 14 years experience in public education, serving as a guidance counselor for 11 years, a Diversified Cooperative Coordinator for two years, and a teacher of the gifted and talented for one year.

### ***Arthur V. Episcopo***

Commissioner Arthur V. Episcopo was appointed, in 1998, to a seven-year term which expires on July 8, 2005. In July 2002, he was elected by the Commission members to be the new Vice-Chair of the Commission.

Mr. Episcopo has had dual careers in the private sector and the military. For 32 years, he worked for E.I. Du Pont De Nemours and Company, Inc., with varied assignments, principally in line management and subsequently in staff positions. His responsibilities included supervisory

positions in Personnel, Employee Relations, Site Safety Occupational Health and Fire Protection, Site Engineering Maintenance, Laboratory Maintenance, Site Electrical, and Planning and Scheduling. While pursuing a career at Du Pont, he also pursued a career in the Army National Guard. He served in the Army National Guard for more than 42 years, rising through the enlisted ranks to become the Adjutant General of the State of Delaware. He served in that Cabinet position from February 1989 to April 1993.

After completion of that service, he was appointed to serve on the Industrial Accident Board, which deals with such matters as Workers' Compensation issues. He left that Board when he accepted his appointment to the Public Integrity Commission.

In line with his new duties as Vice-Chair, which include writing performance evaluations for the Commission Counsel, and reviewing the performance evaluations of the Commission's Administrative Specialist, he completed a State offered course on performance review and evaluation in November 2003. Other educational endeavors included the completion of an accredited course of three hours on Research Protection for Human Services through the University of Medicine and Dentistry of New Jersey, in 2002.

### ***Paul E. Ellis***

In 1998, Commissioner Paul E. Ellis was appointed to a seven-year term which expires on July 8, 2005. Before his appointment to the Commission, he had dedicated many years of service to the public sector by serving as Attorney for the State Senate, Assistant Solicitor of Sussex County, Deputy Attorney General, and in 1973 was appointed as a Judge in the Sussex County Court of Common Pleas until his retirement in 1996.

Mr. Ellis, a resident of Seaford, Delaware, has been actively involved in the community, where he has served as President of the Seaford Lions Club, the Seaford Democratic Club, and the

Seaford District Library. He also has been an active member of the English-Speaking Union (Delaware Branch); St. Luke's Episcopal Church (Senior Warden of Vestry); and various Masonic organizations. His interest in the Masons resulted in his service as a Grand Master of Masons in Delaware and First Vice President of the George Washington Masonic National Memorial in Alexandria, Virginia. He also has served as a member, Past Master and Secretary of Gethsemane Lodge No. 28 A.F. & A.M. For 20 years, he has been a trustee of the Episcopal Diocese of Delaware.

### ***Clifton H. Hubbard***

Commissioner Hubbard was appointed to complete the term of Christopher E. Bullock, who resigned from the Commission after accepting the pastorate of a church in Chicago, Illinois. Commissioner Hubbard's appointment to complete Reverend Bullock's term expired on August 29, 2002. The statute provides that he could continue to serve until a successor is appointed. Governor Ruth Ann Minner appointed Commissioner Hubbard to serve his own seven-year term, beginning in January 2003.

Mr. Hubbard, a resident of Dover, Delaware, previously chaired the Environmental Appeals Board (EAP). The EAP hears appeals of decisions of the Secretary of the Department of Natural Resources and Environmental Control (DNREC) pertaining to enforcement of pollution standards. He served on that Board for approximately 20 years. He also served, for six years, on the Metropolitan Planning Organization (MPO), which approves certain Department of Transportation projects.

After receiving his Bachelor of Science in both Chemistry and Biology, he was a Chemistry Instructor at his Alma Mater, Claflin College, Orangeburg, South Carolina, before accepting a position as a chemical analyst at Rohm-Haas Chemical Company. Subsequently, he accepted employment with International Playtex, Inc., as a chemical analyst. That position resulted in his

move to Delaware, where he also attended the University of Delaware for advanced chemistry studies. In 1971, he had a patent approved on the “Method of Making Foraminous Forming Conveyors.” He was Manager of the Elastomers Department when he retired from Playtex.

Mr. Hubbard is a member of Gideons’ International, Alpha Phi Alpha Fraternity, Kent-Sussex Afro-American Committee on Education, and is a trustee for Mt. Zion African Methodist Episcopal Church in Dover. Other interests include computer programming, numismatics, model railroading, and karaoke.

***Foster (Terry) J. Massie***

Foster J. (Terry) Massie was appointed for a seven-year term on June 25, 2002. He lives with his family in Hockessin, Delaware. He works in Pennsylvania at Wells Fargo as a credit analyst. Mr. Massie has worked in management positions dealing with such things as customer complaints, credit information, training and counseling associates in performance or conduct problems, etc., in Delaware. He also worked as Operations Manager for Eastern Waste Industries in Maryland, where he dealt with such issues as dealing with government, commercial and residential clients regarding service.

Mr. Massie graduated from Henry C. Conrad High School and completed his Associates Degree in Accounting at Goldey Beacom College, Wilmington, Delaware. He attended Neumann College, Aston, Pennsylvania and a Management Training Institute course. His community service includes such positions as President, Mendenhall Village Homeowners Association; Board Member, and First Vice President, Greater Hockessin Area Development Association; and Chair, Upper Limestone Road Focus Group.

***Barbara A. Remus***

Barbara Remus is a resident of Camden, Delaware in Kent County. She was appointed to

the Commission on June 25, 2002 for a seven-year term.

She is a Senior Consultant in the Dover office of Brokerage Concepts, Inc. (BCI) of Delaware. BCI is part of the **largest privately held group and individual insurance brokerage company in the United States**. Her employment requires continuing education and ethics classes to maintain insurance licenses. Her professional associations are in the Delaware and National Association of Insurance and Financial Advisors, and the International Foundation of Certified Employee Benefit Specialists.

A graduate of Dover High School, she obtained her Bachelor of Science Degree in Business Administration from Wilmington College.

Her community service includes: Board member and Vice President, Camden Wyoming Sewer and Water Authority; former appointee to the State Small Employers Reinsurance Board; and member, Delaware State and Central Delaware Chambers of Commerce. She served as Secretary, Dover Century Club; Vice President, Kent County Democrat Committee; and member, 34<sup>th</sup> District Democrat Committee. She is a member of the Dover Art League and the Dover Century Club.

### ***Marla L. Tocker***

Upon the vacancy created by the departure of Commissioner Connolly, Governor Ruth Ann Minner appointed Marla L. Tocker to a seven-year term, beginning on June 18, 2003.

Commissioner Tocker, who resides in Wilmington, is a graduate of Temple University School of Law. Her legal experience includes litigating a full range of personal injury cases in both State and Federal Courts. She also has handled medical malpractice cases in the Delaware Superior Court, as well as numerous arbitration hearings. Her work in those areas was with both Delaware and Pennsylvania law firms. Specifically, she worked as a Senior Associate in the Wilmington, Delaware firms of Marshall, Dennehey, Warner, Coleman & Goggin, P.C., and Elzufon & Austin,

P.A. She also worked for the firm of Comeau & Casey, which has offices in both Wilmington, DE and Conshohocken, P.A. More recently, her legal work focused on assisting with patent prosecutions in biotechnology and chemical inventions. She also was involved in intellectual property litigation in Federal Courts. That work was as an Associate in the Philadelphia firm of Volpe & Koenig, P.C.

Her legal experience in biotechnology triggered a desire to acquire an advanced degree from Johns Hopkins University, Baltimore, MD. In 2003, she completed her Master of Science Degree in Biotechnology. The course work included advanced biochemistry, advanced cell molecular biology, molecular pharmacology, biology, virology, and legal aspects of biotechnology. That same year, she passed the examination for admission to practice before the United States Patent and Trademark Office.

She presently consults for a pharmaceutical company dealing with issues of federal laws, administrative agency laws, and public policies that effect research, development, marketing and distribution of biotechnology and pharmaceutical products.

### ***Commission Staff***

#### **Commission Counsel**

As an independent agency, the Commission appoints its own legal counsel. *29 Del. C. § 5809(12)*. The Commission appointed Janet A. Wright in 1995. A 1989 graduate of Widener University School of Law (cum laude), she was admitted to practice in Delaware that same year. After graduation, Ms. Wright was a judicial clerk for the Honorable Richard S. Gebelein, Delaware Superior Court. She also is admitted to practice in the U.S. District Court in Delaware, and the U.S. Third Circuit Court of Appeals. After her clerkship, she was an Assistant City Solicitor for the City of Wilmington. Initially, she prosecuted violators of the Building, Housing and Fire Codes,

animal protection laws, and periodically prosecuted criminal matters in Municipal Court. She later was a civil litigator, defending the City and its employees in civil rights and personal injury actions. She holds an American Jurisprudence Award in Professional Responsibility, and completed the National Institute for Trial Advocacy's skills course. She was the Chair, and is still a member of, the Northeastern Regional Conference on Lobbying (NORCOL). Its members are government representatives who regulate lobbying from Washington, D.C. to New England. She is a member of the Council on Government Ethics Laws (COGEL). Members are government employees and appointees in ethics, lobbying, financial disclosure, and campaign finance offices from all fifty (50) states, the U.S. government and the Canadian government. Ms. Wright has served on COGEL's Site Selection Committee. She also was selected to serve as a moderation on a COGEL Session on lobbying, and in 2003, was asked to conduct a breakfast session on Dual Government employment. Her review of Alan Rosenthal's Drawing the Line: Legislative Ethics in the States, was published in the "COGEL Guardian." She has presented several Government Ethics sessions as part of the Delaware Bar Association's Continuing Legal Education Classes. In 2003, she was asked by the National Business Institute to serve as a faculty member and present a session on Delaware ethics laws to members of the Delaware Bar.

### **Administrative Assistant**

Aimee Baysinger has been the Commission's Administrative Assistant since October 15, 2001. Prior to working for the Commission, she worked for CorpAmerica, Inc., as a Specialist, preparing and filing incorporation documents with the office of the Secretary of State. Ms. Baysinger moved to Delaware from Dallas, Texas in 2000. While in Texas, she worked for Rockwell International as an Administrative Assistant and as a Meeting Planner and Customer Service representative. Following her Rockwell employment, she was a paralegal for Locke Liddell

& Sapp, LLP and Martin, Farr, Miller & Grau, LLP, in the areas of civil and commercial litigation. She received her paralegal certificate from the Professional Development Institute at North Texas University, Denton, Texas.

### ***III. Commission Accomplishments in 2004***

The Commission's goals for 2004 were to continue emphasizing training in all areas of the law. Additionally, it sought to increase access to services to lobbyists and public officers through its Internet site. Beyond those goals, the Commission worked to continue meeting the performance measures identified in its budget request, which was to increase the number of participants and resolve requests for advisory opinions in 45 days or less. The details of the accomplishments in those areas and others are given below.

#### ***A. Training***

**Statutory Mandate:** The Commission's Counsel is to "assist the Commission in" [its] activities, such as seminars and workshops, educating individuals covered by the law about its requirements and purposes." 29 *Del. C.* § 5808A(a)(1).

While the statute obligates the Commission to provide training, there is no statutory requirement for State employees, officials or lobbyists to attend the sessions. Thus, the number of training sessions and number of attendees is based on the Commission's staff ability to generate interest in the courses.

In 2003, the Commission's Counsel conducted fifteen (15) training seminars. While this was seven (7) seminars less than in 2002, the number of attendees was 377, which exceeded the Commission's projected budget goal of 350 attendees. Thirteen (13) classes were on the State Code of Conduct; one was on Financial Disclosure Reporting; and one was on the Lobbying Law. Two

(2) seminars were canceled due to weather.

To publicize and generate interest in the seminars and workshops, Commission Counsel has developed an on-going working relationship with a number of State agencies to aid State employees, officers and officials in compliance with the laws.

### **(1) Coordination of Training Efforts with the State Personnel Office**

Since 1995, the Commission's Counsel has coordinated its training efforts on both the Code of Conduct training and Financial Disclosure Training through the State Personnel Office's (SPO) Training Unit. The Code of Conduct training has been, and continues to be, an annual part of the course curricula in SPO's Career Enrichment Program (CEP), for rank-and-file State employees. Training on the Code of Conduct and Financial Disclosure are annually offered to senior level employees and officials through SPO Management Development Institute (MDI).

As noted in the 2002 Annual Report, SPO Director Lisa Blunt-Bradley asked Commission Counsel to provide an "Ethics in Government" breakout session at the annual State Personnel conference. As a result of a favorable response to the program, Commission Counsel and the SPO Director met to see if there were additional ways that the two agencies could work together. The result of that meeting resulted in substantial dividends in 2003.

The meeting with SPO's Director resulted in a presentation to Human Resources (HR) Representatives for all State agencies. In discussing the State Code of Conduct, the HR representatives were information about the overlap between some State Personnel laws and rules with some provisions of the Code of Conduct. The group discussed approaches that could lead to a coordinated education effort, with the result that Commission Counsel designed and published a brochure that covered the Code of Conduct, and reference to the overlapping Merit Rules on outside employment, dual government employment, gift acceptance, etc.

In 2003, SPO set up a distribution system to insure Statewide distribution of the brochure. The brochures were sent to the HR Representatives of each State agency. Through the HRs, and by distribution at other training classes, almost 10,000 brochures were distributed Statewide. Response to the brochure was very favorable. For example, one agency requested an additional 200 brochures for its employees so that it could insert a brochure in the payroll envelop of each of its employees.

Later in 2003, it decided that the Merit Rules would be revised. In another coordinated effort, Commission's Counsel assisted SPO by not only covering the overlap in some of the Code of Conduct and Merit Rules during training session. but also by alerting attendees that the Merit Rules were being revised. At public hearings on the proposed Merit Rules on November 6, 2003, Commission Counsel asked the members of the Merit Employee Relations Board ( MERB) to consider annotating the revised Merit Rules with references to the overlapping Code of Conduct laws. This proposal was consistent with SPO Director Lisa Blunt-Bradley's remarks on SPO's ongoing efforts to design a manual containing various interpretations and policies concerning the Merit Rules. The MERB, in its findings and conclusions, decided that the manual should be published as reference to the Rule and to relevant related statutes, such as those in the State Code of Conduct. *See, Delaware Register of Regulations, Vol. 7, Issue 6, pp. 799-803 (December 1, 2003).* The manual is presently a "work in progress." *Id. at p. 800.* The Commission will continue to coordinate with SPO on such issues.

Also in 2003, SPO started a new mandatory class for all new supervisors. The course, "Supervisory Development Certificate," has a short session on ethics. SPO's trainers do not try to teach the ethics course, as such training is the statutory duty of the Commission; however, SPO's trainers distribute the Commission's brochure; advise attendees that the Commission issues advisory opinions and offers a separate course on ethics. SPO's trainers also advise the attendees how to

contact the Commission. In 2003, three classes were given to new supervisors, with approximately 30-50 people at each session. This coordinated effort with SPO serves as an additional means to alert State employees to the Code of Conduct.

The coordination with SPO fills a critical gap for the Commission. While its Counsel is charged with providing training to all persons subject to the law, there are more than 46,600 employees on the State payroll who are subject to the Code of Conduct. Further, appointees to State Boards and Commissions are also subject to the State Code. There are more than 200 State Boards and Commissions, with an average of 5-7 members for an estimated total of 1,000 to 1,400 people. That means that within the State there are at least 48,000 people who are subject to the State Code. Additionally, all local government employees and officials are subject to the State Code unless they adopt their own Code, which must be found by the Commission to be at least as stringent as the State Code. As only six (6) local governments have done so, all other local governments fall within the Commission's jurisdiction for training. The numbers of employees and officials of local governments are unknown. It would be impossible for the Commission's lone trainer to provide training to all of those who are subject to the Code, especially when the turnover rates must also be considered. SPO's coordination with the Commission greatly broadens the number of State employees and officials who are exposed to the Code.

## **(2) Training for DHSS Employees Continued**

Since 1995, Commission Counsel has coordinated training with the Department of Health and Social Services (DHSS). For the convenience of as many DHSS employees as possible, Commission Counsel travels to various DHSS locations throughout the State to give the training. This continuous DHSS training was re-emphasized in 1998 by the recommendation in the State Legislative and Citizens Investigative Panel of Nursing Homes in the "Marshall Report." The report recommended that ethics training be given to DHSS employees that worked in areas related to long-term care. The training is coordinated with DHSS's Training Staff and Commission Counsel, and

usually is given at least once each quarter. In 2003, four (4) classes were given to DHSS agencies, not only to the employees who work in long-term care programs, but other programs under DHSS. The continuing training given to DHSS employees benefits both the Commission and DHSS employees in at least two ways: (1) it gives visibility to the program within the agency, even for those who have not yet had a chance to attend; and (2) those who have attended the training have alerted fellow employees to some of the Code requirements. On many occasions

### **(3) Annual Training for Professional Regulations Boards and Commissions**

Like State employees and officers, appointees to State Boards and Commissions are also subject to the Code of Conduct. 29 *Del. C.* § 5804(6) and § 5804(12). There are more than 200 State Boards, Commissions, Councils and Committees. See, State Telephone Directory, “Boards, Councils, Committees and Commissions.” On average, there are between 5 and 7 appointees to each of these entities. Many Boards and Commissions are established by statute under Delaware Code, Titles 23 and 24. They administer the laws and regulations associated with various occupations and professions. Those Boards fall under the Division of Professional Regulation. For the past several years, the Division’s Director, Valerie Watson, has coordinated with Commission Counsel to insure the annual orientation includes a presentation on the State Code of Conduct. In 2003, sixty (60) people attended.

### **(4) Development of DeIDOT Training Courses**

In 2003, at the request of the Delaware Department of Transportation (DeIDOT), Commission Counsel presented an overview of the Code of Conduct to DeIDOT’s Secretary, Nathan Hayward III, and approximately 60 members of his senior staff. Following up on a recommendation of the Federal Highway Authority, DeIDOT has decided to make ethics training mandatory for all of its employees and officials. A coordinated effort is being made between

DelDOT's Training Section and the Commission's Counsel to tailor a training program geared to the types of issues that are likely to arise within the Department. In November 2003, a training schedule was created for DelDOT employees for 2004. Ten (10) sessions are scheduled, with more expected to be included during the year.

#### **(5) Training for State and Local Government Accountants**

By law, the State Auditor's Office is charged with auditing the time-records of State employees or officials who hold dual government positions, and report any discrepancies to the Commission to be handled as a complaint. 29 *Del. C.* § 5823. For the past two years, the Auditor has provided the Commission with a report on discrepancies regarding complying with anti-“double-dipping law.”

As a result of the discrepancies, Commission Counsel has been placing additional emphases on the double-dipping restrictions in the training sessions. Additionally, in 2003, a separate booklet on Dual Compensation opinions, the statute, etc., was added to the published training materials. The booklet was distributed to all members of the General Assembly, all elected State official in the Executive Branch, and all Cabinet Secretaries and other agency heads. Further, the booklet was provided to the Governor's legal counsel and the topic of Dual Compensation was covered in a Cabinet meeting.

Aside from the working relationship with the Auditor's office to better educate auditors and State officials about the Dual Compensation law, the Auditor's office also reports to the Commission instances where State employees are also privately contracting with the State. A number of Code of Conduct provisions apply to situations where a State employee seeks to contract with the State. *See, Appendix A.* Among the provisions is the requirement that State employees file a full disclosure with the Commission when they engage in a private contract with the State. 29 *Del. C.* § 5806(d). Such disclosure is a condition of commencing and continuing employment with the State. *Id.* The

State Auditor's ability to identify situations where a State employee or official is receiving a State check both as a State employee and as a private vendor to the State, helps insure that the State employee complies with the full disclosure requirement. More importantly, the purpose of the full disclosure is to insure that there is no conflict of interest. By alerting the Commission to the double payments in the private contract situation, the Commission can assist State employees in avoiding a violation of restrictions such as the prohibition on contracting with their own agency. 29 *Del. C.* § 5805(b)(1). Thus, the training for auditors indirectly as a training tool for compliance by State employees on private contracting.

In 2003, the working relationship with the State Auditor's office was expanded by training given to the Association of Government Accountants, which is comprised of both State and local government employees. Commission Counsel served as a speaker at an Association's luncheon. Approximately 40 government accountants attended. As the State Code of Conduct applies not only to State employees, officers and officials, but to employees and officers of local governments, the session extended the reach of training to the local level. After response to the luncheon presentation was favorable, the State Auditor's office began working with the Commission's Counsel to set up more detailed training for the State Auditor's staff and other government accountants. It is expected that the training will occur in the first quarter of 2004.

#### **(6) Training at Other State Agencies**

Aside from all of the continuing relations with SPO, DHSS, and the Division of Professional Regulation, in 2003, training was also given to appointees of the Delaware Association of Professional Engineers (DAPE), another Title 24 board, and its assigned Deputy Attorney General (DAG). Training also was given to Developmental Disabilities Council appointees and employees of the. The Council is a federally created State agency, and is governed by both the Federal Ethics

Law and the State Code of Conduct. The training includes reference to the Council members' federal obligations.

#### **(7) Financial Disclosure Training**

There was limited attendance at the Financial Disclosure Training sessions in 2003. Although the training was offered in both Wilmington and Dover for the convenience of the public officers subject to the laws, only five (5) public officers attended. The low number is not particularly unusual for two reasons. First, there are only approximately 300 public officers in the three branches of government, and many have already attended the training. Second, within the group of 300, there is not a high-level of turnover in the public officer positions (e.g., Judges, General Assembly Members, Cabinet Secretaries, etc.). Those reasons combined mean that after several years of offering the training, there are fewer people who have not been exposed to the law. However, the Commission continues to offer the training and also assists public officers in complying through mailings to each and every public officer of the Commission's Financial Disclosure synopses of opinions.

#### **(7) Lobbyist Training**

The Human Rights Coalition, which is comprised of various entities who have a common interest in lobbying matters, asked for a presentation on the State's Lobbying Law. The Coalition membership includes persons who are already registered with the Commission, such as representatives from the American Civil Liberties Union (ACLU), and **Stand up For What Is Right & Just**. **The training sought to reinforce existing knowledge of the lobbying law for those who already lobby, to impart that information to Coalition members who will be lobbying, and to discuss whether the Coalition should have its own registered lobbyists or whether the registration of lobbyists from each entity creating the Coalition would be more consistent with**

**the law. This led to a discussion of possible conflicts if the lobbyist for a particular entity was not in agreement with the other entities that comprise the Coalition.**

At all classes, attendees were given copies of the pertinent statute, synopses of opinions interpreting the particular law, pertinent forms (e.g., financial disclosure form; lobbyist forms, etc.).

### **(8) Government Lawyer Training**

During the past few years, the Commission’s Counsel has developed a relationship with the Delaware State Bar Association (DSBA), participating in Continuing Legal Education seminars for attorneys. In 2003, Dennis Schrader, former president of the DSBA recommended to the National Business Institute (NBI) that it ask Commission Counsel to be part of its “faculty” for a continuing legal education seminar on December 5, 2003, covering “Legal Issues Involving Delaware Local Government.” This would be an opportunity to talk with local government attorneys about Code of Conduct issues that arise on the local level. However, the session was canceled due to bad weather. It is anticipated that it will be rescheduled in 2004.

## ***B. Advisory Opinions, Waivers, Complaints, and Referrals***

**(1) Advisory Opinions and Waivers Statutory Mandate: Powers and duties of the Commission:** “To issue written advisory opinions upon the request of any State employee, officer, honorary official, or State agency, as to the applicability of this chapter to any particular fact situation.” 29 *Del. C.* § 5809(2). The Commission “may grant a waiver to the specific [Code] prohibitions if the Commission determines that the literal application of the law is not necessary to achieve the public purposes of the chapter or would result in an undue hardship on any employee, officer, official or State agency.” 29 *Del. C.* § 5807(a). **Powers and duties of Commission Counsel:** “To provide legal counsel to the Commission concerning any matter arising in connection with the exercise of its official powers or duties, 29 *Del. C.* § 5808A(a)(2), and “assist the

Commission in drafting waiver decisions and advisory opinions. 29 Del. C. § 5808A(a)(5).

In 2003, forty-nine (49) matters were submitted to the Commission. Of these, thirty-four (34) requests were for advisory opinions and four (4) were requests for waivers.

### ***(1) Advisory Opinions***

Any State employee, officer, honorary official or State agency may, in writing, seek an advisory opinion on any particular fact situation. 29 Del. C. § 5807(c). In 2003, most requests (12) sought an interpretation of the restriction on holding “other employment” under 29 Del. C. § 5806(b). Where the “other employment” was in the private sector, and the private enterprise for which the individual would work also did business with or was regulated by the State, the Commission also had to decide if the individual had complied with the requirement to file a “full disclosure,” as required by 29 Del. C. § 5806(d). Such disclosures are a condition of commencing and continuing employment with the State. *Id.* Where the “other employment” was in the public sector, the Commission had to decide if the individual was also complying with the anti-double dipping provisions of 29 Del. C. § 5822. In addition to those decisions dealing with concurrent employment issues, the Commission also was asked for four (4) interpretations of the restrictions on post-employment issues. Those questions dealt with the two-year restriction on certain private employment activities after terminating State employment. 29 Del. C. § 5805(d). The other requests sought advice on situations where the State employee or official had a “personal or private interest” in an official decision. Those interests included familial relationships, financial investments, and serving as Board members of private organizations. Two requests were for interpretations of the gift restrictions

In situations, where the Commission found that the proposed conduct would violate the Code, the conflict was generally avoided by having the individual recuse themselves from

participating in the State decision where they had a personal or private interest, and by having them limit their employment activities, whether concurrent or post employment, to insure compliance with the Code.

## **(2) Waivers**

Waivers are given if the literal application of the law is not necessary to serve the public purpose, or there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a). Such waivers permit the individual to act in violation of the statute, but the proceedings become a matter of public record so that the public is knowledgeable of why the violation was permitted to occur. 29 Del. C. § 5807(b)(4).

Three persons requested waivers in 2003. The Commission denied a waiver requested by a local government employee who asked if, in his official capacity, he could render decisions about the private company which had offered employment to a close relative, when that company did business with his office. The Commission found that it would violate the Code if he had oversight over the company's projects for the local government if the company employed his relative. *See, e.g., Prison Health Services, Inc. v. State, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993)(improper for government employee to participate even indirectly and unsubstantially when his close relative worked for firm seeking contract).*

The Commission found no "undue hardship" because his close relative was being offered jobs by other companies that did not do business with the local government. Moreover, even if his close relative accepted employment with the firm that did business with the local government, the local government employee's decisions making authority could be delegated to an individual who was not within the local government employee's chain of command. As the conflict could be avoided by one of those two means, there was no reason to violate the restriction on reviewing or

disposing of matters where there is a “personal or private interest.” *Commission Op. No. 03-06.*

In another instance, a State employee asked for a waiver concerning a private contract with the State. However, at the point of the request, his conduct relative to that employment was not in violation of the Code so no waiver was required at the time. *Commission Op. No. 03-45.*

In the third instance, the Commission granted a waiver so that a State employee could contract with her former agency as a private vendor to perform work for which she had been directly and materially responsible for while employed by that agency. As such conduct would violate the post-employment provision, the Commission, upon reviewing the facts, concluded that there was an “undue hardship” on the State agency. It had tried different approaches to handle the problem without violating the Code without success; had made efforts to reduce any appearance that the former State employee would experience a financial windfall as a private contractor as compared to her State position; and limited the number of hours she would work as a contractor. *See, Commission Op. No. 03-08. [Appendix B.](#)*

### ***(3) Complaints***

**Statutory Mandate: Commission Counsel’s Duties:** To investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of the Code of Conduct; to provide legal counsel to the Commission concerning matters arising in connection with its official duties; to make recommendations regarding referral for prosecution; and to prosecute disciplinary proceedings, if a Commission majority finds probable cause to believe a violation may have occurred. 29 *Del. C.* § 5808(A)(a)(2), (3) and (4). **Commission Duties:** To recommend such disciplinary action as it may deem appropriate that is authorized by 29 *Del. C.* § 5810(d) (*administrative sanctions*) or other provisions of the Code, or to dismiss any complaint that it determines is frivolous or fails to state a violation. 29 *Del. C.* § 5809 (3).

**(a) Failure to State A Violation of the Code of Conduct**

Two (2) complaints were filed, but dismissed because the Commission ruled that it no jurisdiction. One complaint was against a local government official, but that local government had adopted its own Code of Conduct. Therefore, the Commission had no personal jurisdiction over the local government official. *Commission Op. No. 03-16*. The other complaint was filed by a Pennsylvania prisoner against an unidentified State employee in the Court system. It was unclear if the State employee was an employee of the Courts of Delaware or the Courts of Pennsylvania. The complaint alleged: bribery; alternating of documents; filing false information; kidnapping, etc. The Commission had previously held that it had no subject matter jurisdiction over such issues. Thus, even assuming that the complaint was against an employee of the Delaware Courts, the complaint had to be dismissed for failure to state a violation of the State Code of Conduct pursuant to 29 Del. C. § 5809(3).

A third complaint alleged that a former Department of Transportation employee was engaging in conduct in violation of the post-employment law. The former State employee cooperated with the Commission's investigation and appeared before the Commission waiving his statutory rights to counsel, right to cross examine witnesses, etc., as provided by 29 Del. C. § 5810(a). Based on the totality of the circumstances, the Commission concluded that his conduct, at a minimum, created the appearance of a violation. The former State employee cooperated in the Commission's investigation and waived his statutory rights to legal counsel, right to cross-examine, etc. Where a violation is found, the proceedings become a public record. 29 Del. C. § 5810(h)(1). The Commission's decision, Commission Op. No. 03-41 is attached as [Appendix C](#). In addition to the conduct becoming a matter of public record, the former employee was required to cease all work on the project that raised the appearance of a violation. The complainant and his former agency

were notified of the Commission's finding and the action taken.

A fourth complaint was filed with the Commission in December 2003. That matter has been carried over to be resolved in 2004.

#### ***(4) Referrals to the Attorney General***

**Statutory Mandate: Commission Counsel Duties:** Commission Counsel is to investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of the statute, and may recommend that possible violations be referred to the Attorney General, if appropriate. *29 Del. C. § 5808A.* **Commission Duties:** The Commission may refer any suspected violation of the Financial Disclosure law to the Attorney General for investigation and prosecution. *29 Del. C. § 5815(c).*

Under the Financial Disclosure Law, any public officer who willfully fails to file a disclosure report shall be guilty of a class B misdemeanor. *29 Del. C. § 5815(a).* In 2003, three (3) public officers failed to file a disclosure report after being sent notice by Commission Counsel by both regular mail and certified mail. The notice informed them of the requirement to file and that failure to file may constitute a violation of *29 Del. C. § 5815(a).* When no response was received from the three public officers, Commission Counsel brought the matters to the Commission's attention. Pursuant to statute, a determination was made by at least a majority of the Commission that there were reasonable grounds to suspect that a violation may have occurred. *29 Del. C. § 5808(a)(4).* The suspected violations of the Financial Disclosure law were then referred to the Attorney General for investigation and prosecution. One individual, for health reasons, had relocated out of state, and upon notice from the Attorney General's office, resigned her appointment. A second individual filed his report after notice from the Attorney General. The third individual, who was a candidate for State office, was not elected and her spouse requested that the Attorney General not prosecute and

that she not be required to file.

#### ***(4) Referrals from the State Auditor's Office***

**Statutory Mandate: State Auditor's Duties:** The State Auditor is to conduct annual audits of the time records of State employees who hold dual government positions to determine if an employee was paid from more than one tax-funded source for working coincident hours of the day. *29 Del. C. § 5823(a)*. Any discrepancy found by the Auditor is to be reported to the Commission for investigation as a complaint. *29 Del. C. § 5823(b)*. If there is evidence that a false statement or false information was filed, with intent to defraud the State, the State Auditor may refer the matter to the Attorney General for possible prosecution under Title 11, Section 876 (tampering with public records) and any other appropriate section of Title 11. **Commission Counsel's Duties:** To review and investigate information coming to the attention of the Commission relating to potential violations of the Code, and make recommendations. *29 Del. C. § 5808(A)(3) and (4)*. **Commission Duties:** To determine if the complaint states a violation and determine any appropriate disciplinary action as authorized by the Code, or dismiss frivolous claims or complaints that fail to state a violation. *29 Del. C. § 5809(3)*.

In 2003, the Auditor's reported discrepancies in the following areas to the Commission: (1) in some instances the State employee who held the dual positions had not properly submitted their time card; (2) in other instances the supervisor had not verified the time card; and (3) in some cases the agency had not prorated the State employee's salary. The Auditor's report also stated that the individuals and agencies who had not complied were to insure that any double payments to the individual were recouped by the State. Further, the Auditor's report noted the absence of agency policies regarding the double-dipping law. Pursuant to the Commission's authority to "provide assistance to State agencies, employees and officials in administering the law," *29 Del. C. §*

5809(10), it published a booklet addressing dual compensation issues. The booklet included the statute, last year's Ethics Bulletin on the law, synopses of opinions, sample time cards, sample agency policies, etc. The booklet was distributed to all State elected officials and the heads of all State Executive Branch agencies. Further, the requirements to comply with the dual compensation law continued to receive emphasis during the Commission's training sessions, and the requirements were addressed by the Governor's legal counsel at one of her Cabinet meetings. A separate section pertaining solely to this area of the law was established on the Commission's web site.

Aside from auditing for discrepancies where a State employee holds dual government positions, the State auditor also looks for dual payments to a State employee as both a State employee and as a private vendor.

In 2003, the State Auditor noted, during routine agency audits, some situations where State employees may have a financial interest in a private enterprise that may be doing business with the State. If a State employee has such interest, they must file a full disclosure with the Commission as a condition of commencing and continuing State employment. *29 Del. C. § 5805(d)*. The records of the transactions were submitted to the Commission. An initial review of one matter revealed that there were a number of State employees similarly situated, not just the individual whose name had appeared in a random audit. The Commission advised the agency that the agency contracts with those individuals was contrary to the Code. The agency is reviewing those matters to determine if it will request waivers.

The Commission's records, like those of any State agency, are also subject to audit. In 2003, the State Auditor's Office, though a contracted auditing firm, KMPG, audited the financial disclosure reports submitted by public officers. The reports are filed annually by approximately 300 public officers to assist in insuring that there is no direct or indirect financial interest that may create

a conflict of interest. As of this annual report, KMPG has not reported any discrepancies in the annual reports to the Commission.

### ***C. Publications***

**Statutory Mandate: Commission Duties:** The Commission is to publish synopses of its advisory opinions without disclosing the identity of the applicant, and is to prescribe forms, and publish manuals and guides explaining the duties of individuals covered by the laws the Commission administers. *See, 29 Del. C. § 5807(d)(4); § 5809(8) and (9).* **Commission Counsel Duties:** Assist the Commission in preparing and publishing manuals and guides explaining the duties of individuals covered by the law; give instructions and public information materials to facilitate compliance with, and enforcement of the law. *29 Del. C. § 5808(A)(1).*

**In 2003, the Delaware State Bar Association’s Government Law Section sponsored a continuing legal education seminar which included a segment on the “Role of the Lobbyists and Overview of the Current Legislative Session,” by attorney/lobbyist W. Laird Stabler. Commission’s Counsel attended and coordinated with Mr. Stable and Mike McTaggart, Government Law Section’s Chair, to distribute the Commission’s lobbying synopses and its recent ethics bulletin on gift reporting by lobbyists.**

As noted under the training section, above, publications of the Commission’s opinions, Ethics Bulletins, brochure and other materials are distributed to each attendee at the training sessions offered by the Commission. The evaluation’s completed by the attendees continue to reflect that the most valuable part of the training are the handouts. Accordingly, these are still distributed in hard copy to the attendees.

The Commission’s publications are also on its web site. As noted above, a separate section was added to the web site on the Dual Compensation law. This was done to highlight this particular

area of the law as a result of the discrepancies in compliance found by the State Auditor.

The web site also was updated to include a new pamphlet on various State gift laws, so of which are administered by the Commission and some which are administered by other agencies, such as the provisions in the criminal law, Delaware Code, Title 11, which prohibit acceptance of illegal gratuities. [Appendix D](#). This provides State employees and officials with a consolidated source of those laws.

To better serve the lobbyists who are registered with the Commission, the Commission added information of interest to lobbyists which are administered by other entities. Specifically, the site now has the House of Representatives' Resolution No. 3, Rules 54 and 56 which apply to lobbyists; House Bill 302, which prohibits those who are given grants-in-aid from using grant funds to hire lobbyists; the Delaware Lawyers' Rules of Professional Conduct, with reference to Rule 7.6 (DLRPC) which restricts lawyer's campaign contributions under certain circumstances; and a link to the Department of Elections' web site, to provide easy access to the Department's campaign finance reports. This latter link is provided because many inquiries are made by lobbyists to the Public Integrity Commission regarding campaign finance reporting. Unlike many States where both the campaign finance and lobbying laws are administered by the same agency, Delaware's lobbying statute specifically excludes campaign contributions from the lobbying report. 29 *Del. C.* § 5835(b)(6).

The use of the web site to access Commission publications and for lobbyists to complete their registration, authorization and expense reporting forms continued to increase in 2003. A record monthly high of 18,690 hits was made on the Commission's original web site in July 2003. On the new portion of the site, which has the list of lobbyists, and the lobbying registration and reporting system, there were a record number of 9,059 hits in July 2003.

#### ***D. Local Government Codes of Conduct***

**Statutory Mandate: Local Government Duties:** Employees and officials of local governments are subject to the State Code of Conduct unless they adopt their own Code of Conduct. *68 Del. Laws, c. 433 § 1.* **Commission Duties:** Any local government Code and subsequent amendments must be approved by the Commission as being as stringent as the State Code. *Id.* The Commission has approved Codes of Conduct for six local governments—Dover, Lewes, Millsboro, New Castle County, Newark, and Wilmington.

During 2003, the Town of South Bethany Code of Conduct submitted its draft Code of Conduct to the Commission. The Commission found that it was not as stringent as the State Code because it lacked: (1) a provision requiring local employees and officials who have a financial interest in a business that is doing business with, or regulated by, the Town, to file a full disclosure of such dealings; and (2) the Town Code lacked procedural provisions for obtaining advisory opinions, due process procedures relative to complaints, etc. The Town was referred to the pertinent State Code sections on these matters. Wayne Stacey, the Town Manager, contacted the Commission's Counsel on what was need and he said he would look at approved Codes for other towns like Lewes and Millsboro, and work on the matter with the Town's attorney, Terry Jaywork, so they can submit a final version.

#### ***E. Legislative Matters***

**Statutory mandate: Commission Duties:** The Commission is to recommend to the General Assembly from time to time such rules of conduct for public employees and officials as it shall deem appropriate. *29 Del. C. § 5809(1).*

A number of pieces of legislation of interest to the Commission were introduced during the

first session of the 142th General Assembly, which began in January 2003. Where appropriate the Commission provided the General Assembly with its recommendations regarding the legislation, or determined what other action it should take.

**(A) Senate Bill 79** - Permits State Service Centers, Department of Health and Social Services (DHSS) to solicit and accept contributions, grants, gifts and bequests from organizations, agencies, institutions and businesses. The legislation was basically in response to three Commission opinions that held that DHSS had no statutory authority to solicit gifts, as the Delaware Code gives only certain agencies that authority; even if DHSS had authority, the particular conduct would still violate the Code. *Commission Op. Nos. 00-37, 98-31; & 01-31*. This Bill was introduced in 2002 as H.B. 423. It passed the House, but did not get out of the Senate. In 2002 and 2003, the Commission notified the General Assembly of the substance of its prior rulings so that the General Assembly would have that information in making its decision about the legislation. Subsequently, the legislation was amended to provide that DHSS could solicit, but that even with that authority, its conduct would have to comply with the Code of Conduct. The amended legislation was signed into law on June 30, 2003.

**(B) Senate Bill 27** - Amends the Town of South Bethany Beach's Charter. Among other things, it permits the Town to adopt an ethics code. The Commission notified the Bill's sponsors and Town officials that existing law permits local governments to adopt their own Code of Conduct, and requires that the Commission approve local government codes as being as stringent as State law.

The Town subsequently submitted its Code for review. The Commission determined that the proposed ordinance lacked provisions that were necessary to make it as stringent as State law. The Town is reviewing the Commission's advice. *See, Commission Op. No. 03-14*. Senate Bill 27 passed the House on June 26, 2003, with several amendments. As the law currently permits the

Town to adopt a Code, the outcome of Senate Bill 27 will not impact on any further review of the Town's ordinance if it is revised.

**(C) House Resolution 3 - House Rules** - Each legislative session, the House adopts rules for its members. On January 14, 2003, the House adopted its rules for the 142d Session. Rule 54 requires lobbyists to register with PIC, and gives the correct citation--Title 29, Chapter 58. Rule 57 refers to registered lobbyists taking the House floor, but cites to the old law, Chapter 16. Sponsors of H.R. 3 were notified of the discrepancy in the citation.

**(D) House Bill 88** - Excludes Professional Standards Board members from the "anti-double dipping" law, administered by PIC. The bill was introduced March 27; passed the House and Senate within 15 minutes of each other; and signed into law the next business day. Although specifically excluded from the anti-double dipping law administered by the Commission, the bill also provides that any Standards Board member employed by a public school district will receive their normal salary, and does not reflect that they also would be paid by the Standards Board. The legislation was signed into law on April 1, 2003.

**(E) Senate Bill 97 - Privacy Disclosure Policy** - Requires State agencies web sites to have a policy on how personal information is obtained on users; what is done with the info; etc. "Personal information" includes names or other identifying information. By law, the Commission must collect data on lobbyists. See, 29 *Del. C.* §§ 5832, 5833 and 5835. The bill does not prohibit disclosing the information if it is needed to perform the agency's statutory functions, rather, a disclosure policy must be on the web site. The bill also directs the Department of Technology and Information to develop a model policy for State agencies. The bill was signed into law on June 7, 2003.

**House Bill 165** - In 2002, the Commission, after finding a violation of the Code, granted a waiver to two Senior Level officials that allowed that to finish out the school year as Board members

of Charter Schools. H.B. 165 was introduced in May 2003, with a hearing by the House Administrative Committee on June 4, 2003. The Commission provide the House Committee members with copies of its 2002 opinions, and the case law on which it based its opinions. The legislation was reported out of the Committee that same. However, according to news media reports, Governor Ruth Ann Minner said she would veto the bill if it should pass. No further action was taken by the General Assembly.

**Senate Bill 129** - The Commission continued to work with the Department of Technology and Information (DTI) regarding whether the legislation passed in 2001 that eliminated application of the post-employment law for employees of the Office of Information Services (OIS), and the Department of Technology and Information (DTI) should be revised. *See, S.B. 215*. The reason for eliminating the post-employment law for those State employees was because the restructure of OIS could result in those employees taking jobs in the private sector if the State cannot place them in State jobs with either DTI or another State agency. The legislation was apparently intended to cover those employees during the transition period from OIS to DTI. However, as written, it eliminates application of the post-employment law for all time for all OIS and DIT employees. The Commission worked with the drafters of the legislation to see if a time limit to cover the transition period would be feasible. After that point, the post-employment law would then apply to DTI employees, just as it applies to all other State employees. In 2003, the exemption from post-employment restrictions for OIS and DTI employees was eliminated when S.B. 129 was signed into law on June 11, 2003. The Commission will continue to monitor the legislation through the end of the second session which ends on June 30, 2004. A chart of the legislation introduced and followed by the Commission in 2003, is at [Appendix E](#).

## ***F. Administrative Issues***

### ***(1) Financial Disclosure Reports***

Public officers are to file annual Financial Disclosure reports by February 15 of each year. Annually, the Commission sends its Financial Disclosure synopses, the disclosure form and instructions to more than 300 public officers notifying them of the annual requirement. In 2003, eight (8) public officers did not file their annual report by the February 15. After a second notice, all but two of public officers filed their reports. After those two matters were referred to the Attorney General for suspected violations, further notice was sent to the individuals. One subsequently filed, the other, due to illness and moving out of State resigned her appointment.

During the year, one candidate for State office failed to file a disclosure report after several notices. The matter was referred to the Attorney General. Subsequently, the candidate did not win the elected position. The Attorney General's office worked with the candidates spouse and reached an agreement that the former candidate would not be prosecuted and would not be required to file.

In 2003, the Commission's staff was able to use its new computerized system to compare lobbyists' reports of gifts to public officers if the gift exceeded \$50 per day. Previously, the Commission's staff compared, by hand, more than 900 lobbying expenditure reports to the more than 300 financial disclosure reports to insure that any gift of more than \$250 to a public officer from a lobbyist was reported. Then new computer system now generates a report of the gifts from lobbyists and automatically notifies public officers of the gifts reported by lobbyists. That way, if there are discrepancies, the matter can be quickly resolved. Where necessary, the public officers amended their financial disclosure reports for accuracy. The new computerized system not only insures proper reporting, but reduces staff time and costs normally associated with sending out regular mail.

### ***(2) Lobbyists' Expenditure Reports***

Registered lobbyists are required to file expenditure reports on a quarterly basis, identifying the total amount of expenditures made on members of the General Assembly or State employees for such items as food, entertainment, travel, gifts, etc. As of the end of 2003, 232 lobbyists, representing 378 companies or organizations, were registered with the Commission.

The filing for the last quarter of 2002 was due on January 20, 2003. Fifty-seven (57) lobbyists did not submit their report by the deadline. Letters notifying them that failure to file serves as a voluntary cancellation of their registration were sent. Twelve (12) responded. A second notice, by certified mail, was sent to the remaining 45 non-filers. Seven (7) lobbyists failed to respond. Pursuant to *29 Del. C. § 5837(c)*, their failure to file served as a cancellation. They are not permitted to act as lobbyists until all delinquent reports are filed.

Reports for the 1<sup>st</sup> Quarter of 2003 were due by April 20, 2003. As of April 30, 2003, forty-nine (49) lobbyists had not filed their report. A reminder notice was sent to each, giving them 10 days to respond. Thirty-six (36) lobbyists were e-mailed through PIC's new computerized reporting system. The remaining 13 were sent regular mail as they did not have e-mail. By e-mailing 36, PIC saved \$13.32 in postage, plus the costs associated with envelopes, paper, etc. As of May 6, 2003, eighteen (18) had filed. Twelve (12) of the 13 who have no e-mail address had not responded. This indicates that those with e-mail addresses are responding better than those who are sent U.S. mail. Subsequently, all lobbyists filed their reports.

The filing date for the second quarter was July 20, 2003. Forty-four (44) failed to file their quarterly expense report by that date. Thirty-one (31) filed after the first notice. After a second notice was sent, eight (8) lobbyists did not respond. After a final notice to the lobbyists, all responded.

On October 20, 2003, reports for the third quarter were due. A first notice of failure to file

was sent to forty-one (41) lobbyists. All but 18 responded. They were sent a second, certified mail, notice. A third notice was sent to the lobbyists and the organizations they represent.

The filing for the last quarter of 2003 was due on January 20, 2004. On January 29, 2004, notice was sent to forty-four lobbyists who had not filed. As of February 6, 2004, twenty-five had not responded, and were sent a second notice. The annual report went to press shortly after that date, so the final data is available from the Commission's office, and will be in next year's annual report.

### ***(3) Lobbying Badges & Homeland Security***

To aid in the homeland security measures, badges are being issued by the Division of Motor Vehicles in conjunction with the Capitol Police, once the individuals have registered with the Commission. The Commission's web site is continuously updated so the agencies can verify that the lobbyists have registered. Further, the Commission's staff notifies the Capitol Police when a lobbyist's registration is canceled, so that the cancellations are current.

## ***IV. Funding***

For Fiscal Year 2004, the General Assembly appropriated a total of \$164,400 for the Commission's budget. This was the same as for FY 2003. Like all State agencies, the Commission was asked to cut 2.5% from its operating budget for FY 2004. For FY 2005, the Commission requested the same appropriations as in FY 2004. As of early January 2003, Governor Ruth Ann Minner's proposed budget to the General Assembly, included the Commission's proposed budget of \$164,400.

The Commission's staff continues to work to effect cost savings. As noted last year, a savings of approximately \$800 was made when overcharges for the copier were discovered. In 2003, an overcharge of \$219 on a publication was founded and recovered. Additional savings

resulted from the Commission's use of a new computerized system for lobbyist registration and reporting. Those savings were in the area of paper, envelopes, and postage.

## ***V. Future Goals***

In the coming year, the Commission intends to continue emphasizing its responsibility to educate State employees, officers, officials and local officials covered by the State Code of Conduct and Financial Disclosure Laws. It has already scheduled training with a number of agencies.

To provide additional services to the public officers and lobbyists who must file reports with the Commission, it will look into the feasibility of making electronic filing available. This will require a cost analysis, and possibly a change in legislation to provide for electronic signatures, rather than original signatures.



## **VI. Appendices**

### **Appendix A**

#### **State Contracts and the State Code of Conduct**

The Procurement law states: "in addition to any other procedures" the remedies and penalties in the procurement law are not exclusive and shall be in addition to, among other things, "the provisions and penalties defined in Chapter 58 of this title [Title 29]." 29 *Del. C.* § 6903(g). Title 29, Chapter 58, is the State Code of Conduct. The following overview of some Code of Conduct provisions, as they relate to State contracts, is to help those involved with State contracts to familiarize themselves with the Code of Conduct.

##### **I. To Whom does the Code of Conduct Apply?**

(A) State employees (includes all rank & file employees, including temporary, casual, seasonal, part-time, etc.), and appointees to Boards and Commissions who make more than \$5,000 per year;

(B) State officers (elected Executive Branch officials, Cabinet Secretaries, Division Directors and their equivalents); and

(C) Honorary State officials (appointees to Boards and Commissions who make less than \$5,000 per year). 29 *Del. C.* § 5804(11), (12) and (13).

##### **II. Restrictions on Conduct when Acting in an Official Capacity**

State employees, officers, and honorary officials may not review or dispose of matters involving the State if they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). For State contracts, a public servant could not, for example, write, review, draft, award, etc., an RFP if they have a "personal or private interest" in the contract. A personal or private interest would be, among other things, if the public servant, a relative or friend, or a private business which the public servant, a relative, or friend owns, operates, or is an employee of, seeks the contract.

##### **Examples:**

(1) A State honorary official was on a State Board that gave a Division Director advice on whether private companies would receive certain certificates. One company seeking a certificate was in the process of entering a business alliance with the company that the honorary official worked for in his private capacity. The official said at the beginning that he "might" have a conflict, but participated in the discussions. When it was time to vote, he recused himself. After the Board issued the certificate, another company which was denied a certificate took the matter to court saying that the State official's business relationship with the other applicant violated the Code of Conduct, and he should not have participated. The Court noted that the official's comments were "neutral and unbiased," and the official recused himself just before the vote. However, it said that because of the conflict, he should have recused himself "from the outset." *Beebe Medical*

Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304 (January 29, 1996). In Beebe, the applicant sought a certificate. However, the same law applies to a contract situation.

(2) Administrative Services asked a Department of Corrections (DOC) employee to give a list of DOC's employees to a contract selection Committee so it could select a DOC employee to serve on the Committee to award the contract. He provided the list. Later, the Committee met and the State employee participated. He was not on the Committee, so he could not, and did not vote on who would get the contract. The Committee awarded ARA the contract. When Prison Health Services did not get the contract, it asked for a court injunction against the contract on the basis that the State employee violated the Code of Conduct because his wife worked for ARA. The Court said that while the State employee's participation was "indirect" and "unsubstantial" and his wife was a "low-level employee" at ARA, his participation was "undoubtedly improper." Prison Health Services, Inc. v. State, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993).

(3) A Department of Public Instruction (now Department of Education) employee issued agency contracts. She issued some contracts to her boyfriend, whom she later married. As a result of the conflict of interest, she lost her job after 18 years. The State could have prosecuted her under the Code of Conduct, but it prosecuted her under the "Misconduct in Office" criminal law. She received a seven-year sentence. Ford v. Dep't. of Public Instruction, Del. Super., C.A.# 96A-01-009-RSG, Gebelein, J. (November 24, 1997); Ford v. Dep't. of Pub. Instruction, 720 A.2d 559 (S. Ct. 1998).

(4) Where local government officials participated in a decision, it was alleged they had a conflict because their relatives had an interest in their decision. The Court found no actual conflict, but said it would "be prudent" to recuse themselves. Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C. A. No. 00A-04-007 CG, Goldstein, J. (Nov. 27, 2000).<sup>5</sup>

#### **Lessons from these situations:**

(1) public servants need to stay as far away from any official participation (even neutral, unbiased, indirect and insubstantial) as they can when they, their employer, a close relative, friend, etc., have an interest in the contract; and

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<sup>5</sup>In Harvey, the Court said local government officials were not subject to the State Code of Conduct, but it used the State Code as persuasive law. Contrary to the Court's comment, the State Code applies to all local governments unless they adopt their own Code which the Public Integrity Commission must approve as being at least as stringent as the State Code. 68 Del. Laws, c.433 § 1.

(2) generally, public servants need to recuse themselves from the outset if they think they have a conflict because if they *think* it themselves, it is likely their conduct will, at a minimum, appear improper, even if there is no actual violation; and

(3) public servants need not be the final decision makers. As seen in Beebe and Prison Health, if they “review” the matter when they have a conflict it can be improper; and

(4) if there is any question on whether they should be involved, the individual or the State agency can ask the Public Integrity Commission for an advisory opinion. If they follow the Commission's advice, they are protected against disciplinary action. 29 Del. C. § 5807(a) and (c). If an issue arises at the last minute, with no time to come to the Commission, the public servant should consider following the general rule in (2).

### **III. Restrictions on Conduct when acting in a Private Capacity**

State employees, officers and honorary officials may not represent or otherwise assist a private enterprise before the agency with which they are associated by employment or appointment. 29 Del. C. § 5805(b)(1). State officers are not only prohibited from representing or otherwise assisting a private enterprise before their own agency, they may not represent or otherwise assist a private enterprise before any State agency. 29 Del. C. § 5805(b)(2).

#### **Example:**

A State employee was reprimanded because his private enterprise contracted with the agency that employed him. He could have been prosecuted for violating that provision, but the Commission recommended a reprimand because, among other things, it was his first offense, and the agency also contributed to the problem. *Commission Op. No. 00-40*. Besides the reprimand, he was precluded from being paid from his agency, so he did not profit from violating the provision against business dealings with his own agency. The opinion addresses a number of mistakes by the State employee and the agency. First, the agency's policy on contracting with its own employees was not as stringent as the Code of Conduct. A State policy cannot be less stringent than State Law. Second, the procurement procedure required a purchase order; but none was issued. Third, there was a mandatory State contract for the particular services he offered, but the agency apparently did not even consider using the mandatory State contract. Fourth, under the Code of Conduct if a State employee or officer has a financial interest in a private enterprise that does business with, or is regulated by the State, they must file a full disclosure with the Public Integrity Commission. 29 Del. C. § 5806(d). That is a condition of commencing and continuing employment or appointment with the State. *Id.* He did not file. Fifth, his company did business with other State agencies. Again, he did not file a full disclosure. Sixth, if a State employee or officer, or a private enterprise in which they have a financial interest, seeks to contract with the State, under the Code of Conduct if the contract is for more than \$2,000 it must be publicly noticed and bid. 29 Del. C. § 5805(c). His company had some State contracts for more than \$2,000. They were not publicly noticed and bid. If the contract is for less than \$2,000, the contract must reflect “arms' length negotiations.” *Id.* Public notice and bidding and/or arms' length negotiations are to insure contracts are not awarded out of favoritism, undue influence, preferential treatment, and the like. To help prevent such favoritism, etc., the Code of Conduct, among other things, prevent: (1) self-

dealing (e.g., cannot award the contract to yourself or your own business); (2) using public office to obtain the contract for yourself, relatives, friends, etc., (3) representing or assisting before one's own agency (co-workers, colleagues, etc., who make decisions will not be unduly influenced); and (4) State officers from representing or assisting before any State agency as there is a legal presumption that they have influence throughout all State agencies. There must also be a fair market price either through public notice and bidding or arms' length negotiations. Agencies can help insure fair market prices by getting quotes from sources other than the public servant's business, when the contract is for less than \$2,000.

If public servants seek contracts with a public school district and/or the State Board of Education for transporting school children, they must comply with the Procurement law in 29 Del. C. § 6923, *except* transportation supervisors may not seek such contracts. 29 Del. C. § 5805(c).

#### **Lessons from this situation:**

(1) Multiple Code of Conduct provisions restrict public servants in seeking State contracts. Because many provisions may apply, there must be "full disclosure" to the Commission when the State employee, officer or honorary official has a financial interest in doing business with the State. That enables the Commission to decide if the conduct violates any Code of Conduct provisions, including any appearance of impropriety. By filing the full disclosure, required by law, the public servant receives advice on how to proceed without violating the Code of Conduct. Again, if the advice is followed, they are protected against disciplinary action.

(2) As compared to the Code of Conduct, the procurement laws and rules have a different dollar amount for when contracts must, by law, be publicly noticed and bid. For example, my understanding is that if a professional contract is bid for more than \$50,000, it must be publicly noticed and bid. Bob James and Sandra Skelly can direct you to the best information on the procurement law and procedures, so agencies should seek advice from them on that issue. However, assuming that amount is correct, the point is that the agency is not required to bid the contract until it reaches that amount. The result when combining the procurement law with the Code of Conduct is: for example, if an agency wants to contract for professional services for less than \$50,000, under the procurement law it would not be legally required to publicly notice and bid the contract. If the agency chooses not to publicly notice and bid the contract and it is for less than \$50,000, but more than \$2,000, then under the Code of Conduct, no public servant nor their private enterprise can seek the contract. Even if the contract is publicly noticed and bid, if the public servant seeking the contract is employed by or appointed to the agency offering the contract, then they cannot represent or otherwise assist the private enterprise in obtaining the contract with their own agency. (Again, for State officers, they can not represent or otherwise assist on a contract with any agency). Even if the contract is publicly noticed and bid, and if the public servant is not employed or appointed to the agency offering the contract (e.g., DHSS publicly notices a contract for \$49,000 and the State employee or honorary official works for DNREC, then the State employee or honorary official could represent or otherwise assist the private enterprise (e.g., write the response to the RFP, etc.)). But they still must, by law,

file a "full disclosure" with the Commission as a condition of commencing and continuing State employment or appointment, so the Commission can decide if any Code of Conduct provisions would be violated by the transaction. As far as State officers, if they have a financial interest in the private enterprise that wants to seek that same DHSS contract, and they work for DNREC, they still cannot in any manner represent or otherwise assist the private enterprise in obtaining that contract (e.g., cannot help write the company's response to the RFP; cannot review the RFP before it goes to the agency; cannot work on the contract for the private enterprise if it is awarded to their company, etc.). If their private business is awarded the contract, they, too, must still file a "full disclosure" with the Commission because the private enterprise, in which they have a financial interest, would be doing business with the State.

#### **IV. Restrictions after Terminating State Employment**

Under the post-employment law, for two years after public servants leave State employment they cannot represent or otherwise assist a private enterprise on State matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. *29 Del. C. § 5805(d)*. In the context of contracts, the Commission looks at the contract process to see if while employed by the State the public servant was in any manner responsible for drafting the contract; reviewing the contract; administering the contract; assessing if the contractor is complying with the contract terms; etc. If the former employee was involved in the contract process, they could be prohibited from working on that contract for the private enterprise. Beyond looking at the contract process, the Commission looks to the substance of the contract to see if there is a "substantial overlap" between the work done for the State and the work the former employee will perform on the contract for the private company. *Commission Op. No. 96-75*. Some agencies include the post-employment restriction as boiler plate language in their contracts.

#### **Lessons:**

The post-employment law does not apply if the former employee: (1) works for a government agency, not a private enterprise; (2) works for a private enterprise, that is not involved in any State matters; (3) works for a private enterprise that is involved in State matters, but do not work on State matters in the three discrete areas listed in the statute – areas where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. If it is unclear if their work falls within those three areas, the former employee or the State agency can seek an advisory opinion.

#### **V. Restrictions on Improper Use and/or Disclosure of Confidential Information**

The Code prohibits State employees, officers and honorary State officials from improperly using or disclosing confidential information gained from their public employment while employed by the State, and after leaving State employment. *29 Del. C. § 5806(f) and (g)* applies to public servants who are working for the State and *29 Del. C. § 5805(d)* applies to public servants after terminating State employment. Note: Improper use or

disclosure of confidential information after terminating State employment does not have a 2-year limit. That is because confidential information may remain confidential for more than 2 years. So the first question is whether the information is confidential. For example, if the procurement law provides that the amount bid for a contract is not "public information" until negotiations are completed, then a State employee could be prohibited from improperly disclosing to the public and/or any contract competitors the amounts being bid. If you are not sure if information related to the contract is "non-public," talk to Bob James, Sandra Skelly, or the assigned Deputy Attorney General to learn if the information is "non-public" under the procurement law. Also, if it is non-public under the Freedom of Information Act, it generally cannot be disclosed. The Attorney General's office administers the Freedom of Information Act.

## **VI. Penalties for Violating the Code of Conduct**

The public servant who violates the Code of Conduct may be subject to the following penalties:

### **(A) Administrative Penalties:**

State employees, officers and honorary officials may be given a written reprimand or censure of conduct;

State employees and State officers, other than elected officials, may be subject to removal, suspension, demotion, or other appropriate disciplinary action, without regard to any limits imposed by the State Personnel Law;

Honorary State Officials are subject to a recommendation that they be removed from office. *29 Del. C. § 5810(d)*.

### **(B) Criminal Penalties:**

Any person who knowingly and willfully violates *29 Del. C. § 5805(a)* (reviewing or disposing of matters when they have a personal or private interest); *29 Del. C. § 5805 (b)* (representing or otherwise assisting a private enterprise); *29 Del. C. § 5805(c)* (contracting for more than \$2,000 when the State contract was not publicly notice and bid, or contracting for less than \$2,000 when there was no arms' length negotiations); *29 Del. C. § 5805 (d)* (post-employment law); and/or *29 Del. C. § 5805 (e)* (improperly using or disclosing confidential information), is guilty of a misdemeanor punishable for each violation by imprisonment of not more than one (1) year and by a fine not to exceed \$10,000. *29 Del. C. § 5805(f)*.

### **(C) Voiding Contracts**

In addition to any other penalty provided by law, any contract entered into by the State agency in violation of Title 29, Subchapter I (Code of Conduct), shall be voidable by the agency; provided that in deciding if court action will be taken to void the contract, the agency considers the interests of innocent 3rd parties who may be damaged thereby. Court action to void the contract must be initiated within 30 days after the agency has, or should have, knowledge of the violation. *29 Del. C. § 5805(g)*.

For more information on the Code of Conduct, see our web site at [www.state.de.us/pic](http://www.state.de.us/pic) . It has the statute, the Commission's opinions, etc. If you need additional assistance, or want to schedule an Ethics Training class for your agency, contact:

**Janet A. Wright, Esq.**  
**Public Integrity Commission, Legal Counsel**  
**410 Federal St., Suite 3**  
**Margaret O'Neill Bldg.**  
**Dover, DE 19904**  
**Phone: 302-739-2399**



## **Appendix B**

**October 31, 2002**

The Honorable Sandra R. Johnson  
Delaware State Housing Authority  
18 The Green  
Dover, DE 19901 D460

**Limited Waiver Granted**

### **Advisory Op. No. 02-22 - Conflict of Interest**

*Hearing and Decision by: Arthur G. Connolly, Jr., Chairman; Mary Jane Willis, Vice Chair; Commissioners Paul E. Ellis; Arthur V. Episcopo; Clifton H. Hubbard, Foster Massie and Barbara Remus*

Dear Ms. Johnson:

The Public Integrity Commission, for the reasons below, found that your dual positions as Director, Delaware State Housing Authority (DSHA), a Cabinet position, and Chair of East Side Charter School (ESCS), which leases property from the Wilmington Housing Authority (WHA), create conflicts that recusal cannot resolve. However, we grant a waiver for the remaining school year to allow ESCS to find a substitute to accomplish your ESCS duties as Chair/Board member.

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

We are to be consistent in our opinions. 29 Del. C. § 5809(5). We have twice found conflicts, or the appearance thereof, when a Cabinet level official also holds a Board position on a Charter School. *Commission Op. Nos. 01-47 & 02-23. (Tab 1)*. We refer to the applicable law in those opinions. Just as in those cases, we see conflicts, or the appearance thereof.

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

##### **(1) DSHA Duties**

You are DSHA's Director. Among other duties, DSHA is to harmonize its activities with similar activities of other agencies or instrumentalities of the federal, state, county or municipal governments, and with nonprofit and limited profit housing sponsors. 29 Del. C. § 8602. Accordingly, you are to "harmonize" DSHA's activities with WHA. You are also the State Housing Director and the Chair and issuing officer of DSHA. 29 Del. C. § 8603.

Delaware Courts have said that WHA has a broad grant of power, but "[d]espite this broad grant of power to local Authorities, however, they remain under the supervision of the State Board of Housing to a certain extent by reason of 31 Del. C. § 4314, 4315 and 4316." *Wilmington Hous. Auth. v. Williamson*, 228 A.2d 782 (Del. Super., 1967). Thus, you have supervisory authority over WHA, when it also leases and maintains ESCS's property.

With that supervisory power you can: order them to undertake or operate a project to make such repairs and improvements as will preserve or promote the health and safety of the occupants of buildings and structures owned or operated by the agency; order them to comply with the law, rules and regulations as approved by you as the Housing Director; examine the agencies and keep informed as to their general condition, their capitalization and the manner in which the property is constructed, leased, operated or managed; send your authorized agents to inspect the property, equipment, buildings, plants, offices, etc., at your discretion; prescribe uniform methods and forms of keeping accounts, records and books to be observed by such agencies; etc. 31 Del. C. § 4315. You also have the duty to administer the “Housing Development Fund.” 31 Del. C. § 4030.

## **(2) ESCS Duties**

As an ESCS Board member, you have a fiduciary duty to act in the best interest of ESCS. Further, as Chair you are ESCS’s Chief officer and consult with the Executive Director in achieving ESCS’s mission; provide leadership to the Board in policy-making matters; guide and mediate Board actions on governance and organization; monitor financial planning and financial reports; communicate with and review with the Executive Director any issues of concern to the Board; play a leading role in fund raising activities; evaluate the Executive Director’s performance and informally evaluate the effectiveness of Board members; etc. *ESCS By-laws Section 5.6*. Further, the acts by a corporate body are attributable to a corporate director. *Florida Ethics Commission CEO 97-7 (Tab 3)*.

### **(C) Is the Charter School a “State Agency” or a “Private Enterprise”?**

Charter Schools are corporations. 14 Del. C. §504(a). Generally, corporations are “private enterprises” under the Code of Conduct. However, Charter Board members are “public agents” with the same standing and authority as a School District Board of Education. 14 Del. C. § 504(b) and § 503. If we decided CCS is a “State agency,” it could raise other issues. One example is that CCS’s by-laws provide Board members will decide if other Board members have a conflict. (*By-laws, p. 15 & 16*). However, if CCS is the same as a School District Board of Education, CCS’s Board would be subject to the State Code of Conduct, as are local School Board members. 29 Del. C. § 5804(11)(a)(3). That means this Commission would decide if Board members had a conflict. *See, e.g., Florida Ethics Commission Op. No. CEO 99-2 (Tab 3)(Charter School Advisory Board members were Public officers and therefore subject to State ethics law)*. Conversely, if CCS is a “private enterprise” under the Code of Conduct, that could conflict with the law that says treat Charters the same as a “public school.” The complexity of these issues is seen in *Florida Ethics Commission Ops. No. CEO 99-10; 99-2; and 97-7 (Tab 3)*. Rather than rule on the issue, we address the conflicts that arise whether CCS is a “private enterprise” or a “State agency.”

### **(D) Application of the Law and Facts Assuming ESCS is a “Private Enterprise”**

#### **(1) “Personal or Private Interest”**

Your request for an opinion said you do not have a “personal or private interest” in ESCS. However, being a board member of a “private enterprise” creates a “personal or private interest.” *Commission Op. Nos. 95-24; 96-64 and 02-23*. That interest is the Board members’ fiduciary duty to act in the best interest of the private enterprise, which can conflict with their duty to their State job. *Id.* Delaware Courts have held that the State office must command precedence over personal and private interests. *In re: Ridgely*, 106 A.2d 527 (Del., 1954).

Whether the interest is enough to **tend** to impair your judgment in performing official duties is an issue of fact. 29 *Del. C. § 5805(a)(1)* (*actual impaired judgment is not required*); *Prison Health Services, Inc. v. State*, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993)(Tab 2).

You said that as head of DSHA, you do not make decisions about ESCS. However, there is an indirect, but strong connection between your DSHA decisions and ESCS. Under the Code of Conduct, an official need not make a direct decision about a private enterprise with which he is connected; an indirect connection can be sufficient to violate 29 *Del. C. § 5805(a)(1)*. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, Terry, J. (Del. Super., June 30, 1995), *aff’d*, Del. Supr., No. 304 (January 29, 1996)(Tab 2)(*improper for State official to discuss State decision about Nanticoke Hospital when it had a business arrangement with Milford Hospital where he was the administrative head*).

Your situation is similar. In your DSHA capacity, you recently issued a \$2 million loan from the Housing Development Fund to WHA for its Eastlake properties, which is the location of ESCS. WHA has a business arrangement (landlord-tenant) with ESCS to lease and maintain the School’s property. The Charter renewal application reflects that: WHA is responsible for the major maintenance of the property; ESCS negotiated a lease renewal with WHA; ESCS discussed buying the property with WHA; and ESCS engaged an architect “with the blessing of WHA” in hopes of starting renovations. Thus, ESCS routinely deals with WHA on issues such as maintenance, leasing/purchasing the property, etc. In your DSHA capacity, you have supervisory authority for WHA matters dealing with maintenance, leasing/purchasing, etc.

Thus, in your DSHA capacity, if ESCS has a problem with the maintenance, lease, etc., since it rents from WHA, you could be investigating ESCS’s landlord. The maintenance issues or lease/purchase negotiations could result in your participation as an ESCS Board member. That could leave you in a dilemma. For example, in trying to serve the “best interest” of ESCS, you would want to obtain the lowest price on the property, but as DSHA Director you have a duty to insure WHA properly capitalizes on the property its leases, operates or manages. 31 *Del. C. § 4315*. As head of DSHA, to insure proper capitalization on the property, etc., you could have a duty to see that WHA’s property goes at a higher price whether through lease or purchase, which would directly conflict with your ESCS obligation. Moreover, in effect, you would be negotiating with yourself.

Also, as part of your DSHA duties, you are obligated to tenants of low-income

housing. Again, that includes oversight of how the property is constructed, leased, operated or managed. More than 50% of ESCS's students live in low-income housing. As a consequence, tenants of such property who attend ESCS could approach you if they have difficulties with WHA's management, maintenance, etc. That could place you in the position where your Board obligations to ESCS's students and parents could drive your decisions on how to deal with the complaints. For example, in signing ESCS's Charter Renewal on behalf of ESCS's Board, you obligated ESCS to having: (1) at least the number of students allowed by the charter; (2) a waiting list of students seeking admission; (3) at least 85% of parents indicate overall satisfaction with ESCS's administration and education program. *ESCS First Five-Year Renewal, Charter School Performance Agreement.*

As you are committed to keeping ESCS students enrolled and to obtain a significant satisfaction rate with their parents, if they have problems with their low-income housing and come to you, your ESCS duty to keep the students and parents satisfied may drive your DSHA decisions on how to deal with their complaints about housing.

We refer you to the discussion on why delegating Cabinet level duties to agency subordinates is not the solution in *Commission Op. No. 02-23, p. 4, ¶(2) (Tab 1).*

## **(2) "Representing or Otherwise Assisting"**

You also may not represent or otherwise assist that private enterprise before your own or any other State agency. *29 Del. C. § 5805(b)(1) and (2).* You signed ESCS's charter renewal application submitted to the Department of Education (DOE). That application reflects significant interaction between ESCS and various State agencies. The application says the "Board of Directors of this charter school assures that the school will do the following:" have the application approved by the Secretary of Education and the State Board of Education; obtain DOE's consent before the Board implements additional modifications to the Charter School program or operation; participate in the State Assessment Program, which involves DOE; comply with the provisions for a Performance Agreement as required by the Secretary of Education. The renewal also gives the Board's assurances on other matters involving the Secretary of Education, including making reports to DOE, etc. ESCS also sent a formal request to the State Budget Office to initiate a Memorandum of Understanding regarding ESCS's administrative and financial system; and ESCS's finances are audited by the State auditor's. By signing the assurances, you represented ESCS, and it is hard to see how you can perform Board duties without "otherwise assisting" ESCS before State agencies.

"Otherwise assist," in the context of Ethics laws is broadly defined to include "passive action" as "mere presence can possibly influence government colleagues." *See, Commission Op. No. 02-23, p. 5-6, ¶(3)(Tab 1).*

## **(E) Assuming the Charter School is a "State agency"**

No State officer may incur **any obligation of any nature** that substantially conflicts with properly performing his duties in the public interest. *29 Del. C. § 5806(b).* Holding two public offices can create conflicts in performing the duties of the dual offices.

*Commission Op. Nos. 99-35 and 02-23; Office of the Attorney General of the State of Delaware, No. 93-1007, 1993 Del. AG LEXIS 51, February 24, 1993 (Tab 2)(Cabinet Secretary could not serve on State Board).*

Whether an entity is a “private enterprise” or a “State agency” the purpose is to insure the public is not deprived of your “independence of judgment” in performing your duties, and to insure you do not use your influence on others or create the appearance thereof. United States v. Schaltebrand, 11<sup>th</sup> Cir., 922 F.2d 1565 (1991); United States v. Coleman, 3<sup>rd</sup> Cir., 805 F.2d 474 (1986))(purpose for restricting officials from representing or otherwise assisting a private enterprise); Belleville v. Fornarotto, 549 A.2d 1267, 1273 (N.J. Super., 1988); O’Connor v. Calandrillo, 285 A.2d 275 (N.J. Super., Law Div., 1971), aff’d., 296 A.2d 326 (N.J. Super., App. Div., 1972) ( purpose of restricting dual government positions).

Just as indirect decisions about a private enterprise may tend to impair judgment, subordination of one office to another is “clear evidence of incompatibility” and the subordination need not be direct to create a conflict. Belleville, 549 A.2d at 1272.

As the public purpose is the same, the concerns identified in discussing ESCS as a private enterprise are the same concerns that create a conflict if ESCS is considered a State agency.

#### **(E) Other Issues**

Aside from the above conflicts, other concerns apply.

**(1) Overlap of duty hours.** See, *Op. No. 02-23, pp. 7-8, ¶ 4 et. seq.* During normal work hours in one job, the official can be asked to perform functions of the other job. Belleville v. Fornarotto, 549 A.2d 1267 (N.J. Super., 1988). The Court said: “This duality of roles could cause confusion and concern within the public eye.” *Id.* at 1274.

**(2) Controversial Nature of Education Issues.** See *Op. No. 02-23, p. 9, ¶ 4 (Tab 1)*.

**(3) Influence of a Cabinet Secretary.** See *Op. Nos. 02-23, p. 7, ¶ 1, and 01-47 (Tab 1)*.

**(4) WHA employees mentoring ESCS students.** AS your DSHA duties give you supervisory powers over WHA, that could mean DSHA could be looking at the work of WHA’s employees in areas such as maintenance, and those same employees could be mentoring at ESCS. Courts have noted that where the official has supervisory control in one government position over the employees in another government position, it can raise concerns that if the employees do not properly perform their work there may be retaliation or conversely, there may be preferential treatment with respect to working conditions, hours of employment or otherwise relaxed enforcement of the rules. Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988).

**(5) Governor’s Knowledge of the Dual Jobs.** Your request and the one in *Op.*

No. 02-23 pointed out that the Governor knew of your Charter School positions when making the Cabinet appointments. Courts have noted that:

“Although the appointment may suggest that the governor believes the offices to be compatible, it does not follow that this belief must necessarily be correct in the absence of an independent legal basis.” State of Illinois v. Claar, 687 N.E. 2d 557, 562 (Ill. App., 1997).

**(6) Desire to Serve.** We know your service is driven by your interest in education and ESCS. The willingness to provide services in dual capacities has been held commendable. Reilly v. New Jersey, 166 A.2d 360 (N.J., 1960); *Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999 Del. Super. LEXIS 449, April 22, 1999(Tab 2); Commission Op. No. 02-23(Tab 1); Florida Ethics Commission Op. No. 01-9 (Tab 3)*. However, as in those cases, the “clash of duties” in the dual roles is not solved by recusal. Yet, this does not place a complete ban on your ESCS involvement. *Commission Op. No. 02-23 (Tab 1) and Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999 Del. Super. LEXIS 449, April 22, 1999(officials not totally barred from School involvement)(Tab 2)*.

#### **(F) Conclusion and Waiver**

Based on all of the above facts, we find the two positions create a substantial conflict. However, as in Commission Op. No. 02-23, we note the significant role you have undertaken with ESCS and grant a limited waiver, through the remainder of the School year.

Sincerely,

*Signed*

Arthur G. Connolly, Jr., Chair

cc: Thomas P. McGonigle

October 31, 2002

The Honorable Gloria W. Homer  
Secretary, Department of Administration  
410 Federal Street  
Dover, DE 19901

**Limited Waiver Granted**

**Advisory Op. No. 02-23 - Conflict of Interest**

*Hearing and Decision by: Arthur G. Connolly, Jr., Chairman; Mary Jane Willis, Vice Chair; Commissioners Paul E. Ellis; Clifton H. Hubbard, Foster Massie and Barbara Remus*

*Recusal: Arthur V. Episcopo*

Dear Ms. Homer:

The Public Integrity Commission, for the reasons below, found that the dual positions of Cabinet Secretary, Department of Administrative Services (DAS) and President, Campus Community School (CCS), a Charter School, create conflicts that cannot be resolved by recusal. However, a waiver is granted for the remaining School year to allow time to find a substitute means to accomplish your CCS duties as President/Board member.

**(A) Applicable Law:** Under the State Code of Conduct, State Officers may not:

(1) review or dispose of State matters if they have a personal or private interest in a matter that tends to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1).

(2) represent or otherwise assist a private enterprise before any State agency. 29 Del. C. § 5805(b)(2).

(3) incur any obligation of any nature that substantially conflicts with the proper performance of their duties in the public interest. 29 Del. C. 5806(b).

(4) pursue a course of conduct that may raise suspicion they are acting in violation of the public trust, and in conduct that will not reflect favorably upon the State. 29 Del. C. § 5806(a). This is basically an appearance of impropriety standard. *Commission Op. No. 92-11.*

**(B) Facts**

**(1) DAS Responsibilities**

As DAS's Secretary, your statutory duties include responsibilities to: (1) supervise, direct and account for the administration and operation of the Department, its divisions, subdivisions, office, functions and employees; (2) make and enter into all contracts, agreements, etc., (3) maintain facilities throughout the State; (4) select and appoint the Division Directors, who advise you on such things as facilities, energy management, central contracting, surplus distribution, transportation services, etc. See, 29 Del. C. § 8802 (*Secretarial duties*); § 8806 (*Facilities Management Division duties*); § 8810 (*Purchasing Division duties*); § 8811 (*Support Operations Division duties*); § 8812 (*Office*

of Fleet Services duties); See also, e.g., 29 Del. C. § 6906(a) and (c) (rental & purchase of vehicles for Schools). Central contracting involves creating State contracts for mandatory use by certain agencies. 29 Del. C. § 6911(d). Schools are generally exempt from mandatory contracts, but there is discretion to allow them to participate. You also Chair the Contracting and Purchasing Advisory Council, which recommends changes to State procurement laws, policies and practices. 29 Del. C. § 6908.

You are on **the** State Surplus Real Property Commission, which reports to the Governor and the General Assembly. 29 Del. C. § 9404. Also, in consultation with the Department of Education (DOE), DAS publishes lists of vacant and unused building space owned by the State or school districts that may be suitable for charter schools, and makes the list available to charter applicants and existing charter schools. 14 Del. C. § 509 (h).

The State facilities energy management plan is developed by DNREC in conjunction with the Facilities Management, and must be approved by you as DAS Secretary, and by DNREC's Secretary. 29 Del. C. § 8003(b). That plan involves developing and maintaining energy standards in design, construction, renovation and maintenance of facilities owned by State agencies or local school districts; energy audits of State agency and local school districts; developing guidelines, recommendations and giving technical assistance to facilities owned by State agencies or local school districts, etc.

Also, the Delaware Center for Education Technology, which coordinates the use of technology by Delaware's schools must consult and coordinate with DAS's Support Services. 14 Del. C. § 4203(5).

Obviously, this list is not exhaustive of the DAS responsibilities.

### **(2) CCS Responsibilities**

As CCS President, you are "chief executive officer of the Corporation." You are responsible for: the general management and control of business affairs; all duties and powers incident to the office of chief executive; signing all contracts and other corporate instructions; and general supervision and direction of all of the other corporate officers, employees and agents (*Charter School By-laws, p.6*). You Chair the Executive Committee, with power to vote. Between Board meetings, that Committee supervises administration and property of CCS (*By-laws, p. 12*). Board members must establish overall policy and work toward financial stability. (*By-laws, p. 1*). Your fiduciary duty as Board member, President, and Executive Committee Chair, requires you to act in the "best interest of the corporation." (*By-laws, p. 3*). You also said your work in the personnel and financial areas for CCS is critical.

Again, this list is not exhaustive of CCS responsibilities.

### **(3) Parental Duties**

Your son attends CCS. As a parent you are obligated to his educational needs.

To decide if these duties conflict we first address the nature of Charter Schools.

### **(C) Is the Charter School a State agency or a Private Enterprise?**

Whether the Charter School is a "State agency" or a "private enterprise," conflicts can arise. Thus, we need not decide the status of the School. See, Commission Op. No. 02-22,

¶(C)(Tab 1).

**(D) Application of the Law and Facts if the School is a “Private Enterprise”**

**(1) Reviewing or Disposing of Matters if there is a “Personal or Private Interest”**

Assuming CCS is a “private enterprise,” as DAS Secretary, you cannot participate in State matters if there is a “personal or private interest” which may tend to impair judgment in performing official duties. Board members have a “personal or private interest” in a corporation. *Commission Op. No. 95-24 and 96-64*. They have a fiduciary duty to act in its “best interest.” Based on the following, we find that your CCS interest may tend to impair your judgment in performing DAS duties, or at least raise an appearance that your judgment could be impaired.

Following are illustrations of some of the conflicts between the two positions.

As DAS Secretary you have decisional authority over all State contracts. In your CCS capacity you have the power to approve all contracts. You are obligated to act in CCS’s best interest in such actions. CCS could and **does** contract with DAS. For example, CCS: (1) leases vehicles from the Office of Fleet Services; (2) obtains printing and publishing from Support Operations; and (3) obtains mail service from Support Operations. Thus, your DAS duties require you to decide if CCS will be a party to a State contract, and as CCS’s Chair, you have the power to approve those same contracts. DAS would also monitor CCS for contract compliance. Your DAS duties would require you to, in effect, evaluate your own CCS performance. “It would offend propriety for a man to sit in judgment of his own cause.” *Reilly v. Ozzard*, 166 A.2d 360 (N.J. Supr., 1960)(*finding dual positions conflicted*). We agree, and have held that such conduct is improper. We are to be consistent in our opinions. 29 *Del. C.* § 5809(5).

Delaware Courts found an official’s participation on matters related to a private enterprise improper where the interest was even more remote. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, Terry, J. (*Del. Super.*, June 30, 1995), *aff’d*, *Del. Supr.*, No. 304 (January 29, 1996)(*Tab 2*). In interpreting 29 *Del. C.* § 5805(a)(1), the Court noted that the official did not participate in the final vote, but said he should not have made even “neutral” and “unbiased” comments, when the applicant before him was from a private enterprise that had a business arrangement with his private employer. Your situation is more of a conflict as the contract applicant (CCS) is directly connected to you. *See also*, *Florida Ethics Commission Op. CEO 97-7*(*Tab 3*) (*conflict for State employee in “high level position of responsibility to be Charter School Board member when Charter School dealt with her full-time agency*).

There are other possible conflicts. As DAS’s Secretary you have authority over surplus property and vacant buildings that may be used by Charter Schools. While you were tasked with duties related to buildings that Charter Schools could use, CCS looked for and obtained a second location. We do not say you improperly used information from your DAS position to obtain property for CCS. The problem is your DAS position gives you first knowledge of available property. You are also duty bound to act in CCS’s best interest. This may raise suspicions that you could use knowledge gained by public office to secure the best property for CCS. The Code prohibits such use of public office, or the appearance thereof. 29 *Del. C.* §5806(e) and §5806(a).

You are placed in a dilemma. Your legal duty to CCS is to act in its “best

interest.” If CCS were interested in a property or a contract, and you acted in its “best interest” to secure a property or a contract, when you control the information in your DAS capacity, the public could well suspect you used your public office to secure preferential treatment or unfair advantage for CCS. Conversely, if you do not act in CCS’s “best interest” to avoid such suspicions, you could violate your fiduciary duty.

That analysis applies to your authority to contract for such matters as fleet services, mail, professional services such as architects, public accountants, etc. CCS uses those services.

## **(2) Why Recusal of DAS Duties is not the Resolution to the Conflicts**

You proposed that your DAS duties, which conflicted with CCS, be delegated to DAS Division Directors so you could continue your CCS position. You noted that we previously allowed a State officer to delegate responsibilities on a contract to a Division Director. *Commission Op. No. 01-33*. That situation involved one contract and one Division Director.

Here, the three existing contracts involve Fleet Services and Support Operations. But that is not necessarily the end of the recusals required. For example, the discretionary authority for schools to participate in State contracts may have to be delegated; the number of contracts in which CCS could be involved could grow, requiring recusal from those contracts, etc. Also, issues could arise where your duties may have to be delegated to the Division of Facilities Management because of the responsibilities on building design, construction and operations for state agencies, including school districts; implementing the facilities energy management plan for state agencies or local school districts, etc. Also, Purchasing distributes surplus property to school systems and schools within the State; it also distributes food commodities to schools, etc. 29 *Del. C.* § 8810. Fleet Services also recommends to the Budget office appropriate funding levels for all agency/school districts for in-state travel requirements. 29 *Del. C.* § 8810. Any difficulties in implementing those programs could logically come to you, but if CCS were involved, you could be prohibited from participating. Further, the records show that one of your Division Directors is a Community Member of the Board. This means she could have to recuse herself if CCS matters came before the Division of Administrative Services. She could not refer the matters to you, but would have to delegate to yet another individual.

Thus, there are a wide range of DAS duties that at present, and in the future, would have to be delegated throughout DAS. This would mean several Division Directors, whom you hire, fire, and write their performance reports, can at present, or could in the future find themselves overseeing CCS matters. There could be a multitude of matters for a multitude of years. That means their official duties for the present and foreseeable future would require them to oversee their own boss or the entity over which their boss presides.

This situation certainly did not arise in the other opinion where we granted permission to delegate to a Division Director.

Delaware Courts have held that as between a “personal and private interest,” the State job must command precedence. *In re: Ridgely*, 106 A.2d 527 (Del., 1954). If you must consistently delegate your DAS authority, it is difficult to see how your State job is “commanding precedence” over the “personal or private interest.” *See, “Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee,” JEAC 1999-1, Super. Ct., 1999 April 22, 1999 (Tab 2)( public officer (judge) advised that if*

*the council he served on considered matters which would ordinarily come before him, he must resign. Otherwise, he would be required to constantly recuse himself); See also, Florida Ethics Op. CEO 97-7; 01-9; and 99-10 (Tab 3) (discussing recurring and continuing conflicts).*

### **(3) Restriction on Representing or Otherwise Assisting a Private Enterprise**

State officers may not “represent or otherwise assist” a private enterprise before **any** State agency. 29 Del. C. § 5805(b)(2). “State officers” includes Division Directors and Cabinet Secretaries. 29 Del. C. § 5804 (12) and § 5812( a) (13) and (14). Here, while you were a Division Director and now as Cabinet Secretary, the record reflects CCS’s dealings with: your own agency (*contracts*); DOE (*signature on 5 year renewal application on behalf of the Board; correspondence from DOE to you dated December 4, 2001, re: charter renewal*); and the State Auditor’s office (*CCS’s budget shows payments to State Auditor*). “Represent or otherwise assist” means more than just soliciting or lobbying State agencies. *Commission Op. No. 00-40*.

The Code of Conduct is to instill the public’s confidence in its government officials by setting specific standards. 29 Del. C. § 5802. Here, the specific standard is that State officers shall not “represent or otherwise assist” a private enterprise before their own agency. Delaware Courts have noted that when a State official deals with their own agency on contracts, the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748, 752 (1971).<sup>6</sup> In Heller, the Court noted that no facts showed improper conduct in the contract dealings, but it still held the official could not engage in such dealings. In your situation, the restriction is meant to insure the public does not suspect such conduct in contracting with CCS. Your DAS duties are to administer State contracts. By law, that requires administering contracts in a fair and equitable manner. 29 Del. C. § 6901(2). That is to instill the public’s confidence that contracts are not awarded out of favoritism, undue influence, conflict or the like.

You said the CCS Board plans to adopt a by-law to preclude Board members who are State officials from “lobbying, advocating or otherwise attempting to influence any State employee or official, including elected officials, on behalf of the school.” That provision appears to be less stringent than the State Code. It prohibits not only representing, but “otherwise assisting.” 29 Del. C. § 5805(b)(1) and (2). Your duties as CCS’s CEO and Board member require your involvement in the School’s budget; its contracts; its facilities, etc. You acknowledge that you have assisted with its budget, and that budget is audited by the State Auditor.

In interpreting a similar federal provision, Courts noted that when the purpose is to instill public confidence in the government, “otherwise assist” is broadly defined to include even what may be considered “passive action.” United States v.

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<sup>6</sup>Heller was based on an agency policy. In Heller, the Court noted the absence of a statute on such conflicts. When the General Assembly later passed the Code of Conduct it included restrictions on State employees and officials dealing with their own agency. For “State officers,” they may not deal with **any** State agency.

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

Delaware’s Code recognizes that Senior level officials carry more influence across a broader base than lower level employees and officials. That is evidenced by comparing the restriction on all State employees, officers and officials from “representing or otherwise assisting a private enterprise” before their **own agency**, 29 Del. C. § 5805(b)(1), while a more stringent provision applies to “State officers.” They cannot represent or otherwise assist a private enterprise before **any** State agency. 29 Del. C. § 5805(b)(2).

A wide range of CEO/Board duties could and do involve your representation or assistance before State agencies. In fact, it is difficult to see how you could fulfill your fiduciary duties as CEO, Board member, and Chair, Executive Committee, without “otherwise assisting” CCS, or creating the appearance of such conduct. Further, the actions of the corporate board can be attributed to the corporate directors. *Florida Ethics Op. CEO 97-7 (Tab 3)*.

#### **(E) Application of the Law and Facts if the School is a “State Agency”**

Assuming CCS is a “State agency,” you would be a State official as the School’s CEO and Board President. As such, you cannot review or dispose of matters where you have a personal or private interest which tends to impair judgment in performing official duties. Here, you have a child in the school. The Code of Conduct imputes a “personal or private interest which tends to impair judgment” when a “close relative” can be affected by the official decision. 29 Del. C. § 5805(a)(2). *See also, Jones v. Board of Educ. of Indian River Sch. Dist., Del. Super., C.A. No. 93A-06-003, J. Graves (January 19, 1994)(court imputed bias to School Board member in decision to terminate teacher because Board member’s children had bad experience with that teacher)*.

Here, it would tend to impair your judgment to review or dispose of State (School) matters where a “close relative” (your son), would benefit more than others similarly situated. 29 Del. C. § 5805(a)(2). The “others similarly situated” would be students at his and other Charter Schools. As head of CCS, it could appear that your decisions could be biased because of your son’s attendance. Moreover, because of your Cabinet position, it could at least raise the appearance that you could use your public position to obtain things for his school that other Charter Schools could not obtain because they do not have a Cabinet Secretary who also heads the Charter School.

While 29 Del. C. § 5805(a)(2) refers to a “financial benefit” for close relatives,

Delaware Courts have consistently **not** limited their decisions to just those criteria. For example, where a State employee was not even a voting member in awarding a State contract to a private enterprise where his spouse was employed, the Court did not look to whether his “close relative” received a “financial benefit,” nor discuss other groups that were “similarly situated.” *Prison Health Services, Inc. v. State, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993)(Tab 3)*. Rather, the Court held that even though his involvement was “indirect” and “unsubstantial,” it was “undoubtedly improper” for him to provide a list of employees from his agency who could participate in selecting the contractor, and to attend a meeting with the contract committee members and make comments. *See also, Jones, supra (no financial interest involved)*.

Also, in *Harvey v. Zoning Board of Adj. of Odessa, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000)(Tab 3)*, the Court found that the “close relatives” had no “financial interest” in a local Board’s decision, but said it would be “prudent” for the officials to recuse themselves.<sup>7</sup> Thus, there are likely to be times you would have to recuse yourself to avoid a conflict, or the appearance of a conflict, where your son would be involved.

Aside from that situation which could require recusal, other conflicts arise from holding dual government positions.

State officers may not have **any** obligation in substantial conflict with performing their State duties. *29 Del. C. § 5806(b)*. One issue we look at is if the secondary duties can be performed during hours other than when the official is obligated to perform the primary State duties. CCS could have issues arise during hours when you are performing your Cabinet duties. CCS’s hours overlap with your DAS work hours. As Executive Committee Chair, it is hard to see how you could ignore calls from CCS during those same hours, as that Committee has a duty to supervise the administration and property between Board meetings. Similarly, if the need arises to deal with Budget issues or DOE issues, the hours again overlap with your DAS work hours.

Even if the “time” problem were resolved, other conflicts still exist.

Delaware Courts, other courts, and the Delaware Attorney General have recognized that holding dual government offices can present conflicts that cannot always be cured by recusal. *See, e.g., Office of The Attorney General of The State of Delaware, No. 93-1007, 1993 Del. AG LEXIS 51, February 24, 1993 (Tab 2); Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC*

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<sup>7</sup>In *Harvey*, the Court said the local officials were **not** subject to the State Code of Conduct. That misstates the law. Local governments which do not adopt their own Codes of Conduct are subject to the State Code. *68 Del. Laws, c. 433*. Despite that statement, the Court used the Code as the legal measure of their conduct. Further, the Court’s decision that it would be “prudent” to recuse because their relatives were involved, even though there was no violation of *29 Del. C. § 5805(a)(2)*, is consistent with our prior decisions where a close relative was involved and there was no technical violation, but recusal may be required to avoid an appearance of impropriety.

1999-1, *Super. Ct., 1999 Del. Super. LEXIS 449, April 22, 1999 (Tab 2)*; See, Commission Op. No. 99-35 and cases, ALRs, etc., cited therein(Tab 1).

In the AG opinion, the General Assembly wanted the Secretary of the Department of Natural Resources and Environmental Control (DNREC) to serve on the Delaware Solid Waste Authority. The AG noted that: “The Secretary's responsibilities as the regulator of solid waste practices in the State of Delaware and the fiduciary duty owed by a member of the board of directors to the corporation are directly at odds. Thus, there exists an irreconcilable conflict of interest.... In other words, it would be impossible for the Secretary to act properly in both his role as regulator of solid waste practices in Delaware and concurrently exercise his duty to act in the best interest of the Authority as a member of its board of directors.”

Like Charter Schools, the Solid Waste Authority is created by statute. 7 Del. C. § 6401, et. seq. It is a “body politic and corporate” and is considered a “public body.” Delaware Solid Waste Auth. v. News-Journal Co., Del. Supr. 480 A.2d 628 (1984). Also, like DNREC’s Secretary, your DAS duties require oversight of CCS activities, such as contracts.

The AG, in interpreting the State Code of Conduct went on to say:<sup>8</sup>

“Additionally, the State Employees', Officers' and Officials' Code of Conduct sec. 5806(a) provides that "a state officer. . . shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government." At a minimum, the Secretary's service as a director of the Authority could be determined to reflect unfavorably upon the State given his responsibility to enforce the solid waste laws in a fair and evenhanded fashion.”

Similarly, as DAS Secretary you are to fairly enforce contracts. The public could question your fairness when you have a competing fiduciary duty to CCS, and want to give your Cabinet duties to subordinates to perform your duties in evaluating CCS’s compliance.

In an advisory opinion interpreting the Judicial Code of Conduct, a judge was advised not to serve on an Ethics Review Committee for a local School District. *Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999 Del. Super. LEXIS 449, April 22, 1999(Tab 2)*. The appointment would involve the judge's participation in a governmental or quasi-governmental entity. He was a parent of present and former children in the School District. Under the Judges Code of Conduct, judges are to uphold the integrity and independence of their office; avoid impropriety and the appearance of impropriety in all activities; respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary [office]; regulate extra-judicial activities to minimize the risk of conflict with judicial [official] duties; not serve if it is likely

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<sup>8</sup>The AG’s office was responsible for issuing advisory opinions interpreting the State Code of Conduct from 1974 until 1991, when this Commission was created.

that the organization will be engaged in proceedings that would ordinarily come before the judge [official] or will be regularly engaged in adversary proceedings in any court.

While your letter indicated that the standards for judges' may not necessarily be the same standards that apply to Executive Branch officials, we note that both Codes impose duties to:

- (1) uphold the integrity of the office;
- (2) avoid impropriety and the appearance thereof;
- (3) perform official duties impartially and diligently; and
- (4) attempt to avoid activities that risk a conflict with official duties.

Interpretations of one statute can be used in interpreting another statute if language of one is incorporated in another or both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr.* § 45.15, Vol. 2A (5<sup>th</sup> ed. 1992). Here, both persons are public officers and subject to Codes of Conduct with similar purposes and obligations. *See, Harvey, supra*, p. 4(Tab 2)(using judge's recusal standard for government officials)

In the judge's case, it was unlikely issues dealt with by the Committee would come before him as a judge. It was noted that he could recuse himself if that happened. But the opinion went on to say it would be difficult for the public to ascertain the distinction. The opinion also noted another situation where a Judge was involved with school matters. In that case, it was decided that if the council considered matters which would ordinarily come before the judges, the judge must resign as a council member. Otherwise, the judge would have to constantly recuse himself when these matters came before his court. Here, there are already matters that come before your agency. More are possible. We have noted why recusal is not the solution.

The Advisory Committee in the judge's case said it had "observed from its own experience that matters associated with public education can become extremely controversial ...." We too recognize that education matters can become extremely controversial. Aside from the issues identified in the judge's opinion, (alleged misuse of government funds, conflicts of interest, etc.), there has been controversy surrounding Charters, e.g., the amount they pay teachers and bus drivers as compared to public schools; the controversy surrounding Georgetown Charter School's failure, the conduct of its board, etc. We also note that in correspondence to DOE your Charter School did not agree with some DOE's interpretations of laws and rules. While the issue was not pressed beyond CCS disagreeing, and then complying, issues could arise that would be in "the best interest" of CCS to challenge. As a Board member, you would have a fiduciary duty to pursue that "best interest." That could result in the unseemly appearance of two Cabinet Secretaries doing battle in a public arena, as the DOE Secretary and the State Board of Education have a concurrent obligation to approve charter school applications or renewals; her Department provides technical assistance and other assistance to Charters; etc. *See, e.g., 14 Del. C. §510(c) and §511(c).*

In other cases, Courts have recognized that the statutory functions and duties of

one office conflict with those of another when one office is subordinate to the other, one is subject to the control of another, or the officer is required to choose one obligation over another; or the duties “invite” the officer to prefer one obligation over the other. Reilly v. Ozzard, N.J. Supr., 166 A.2d 360 (1960); Dunn v. Froehlich, N.J. Super., 382 A.2d 686 (1978). When there is a clash of duties, even if the occasions may be rare, the consequence will be the nonperformance (or the questionable performance) of one or the other of the prescribed duties. Id. Here, your duties as Cabinet Secretary so significantly overlap with your CCS duties that there is a “clash of duties.” If the duties of office clash in their demands with the result that the incumbent must choose between them, “the public interest is violated.” Township of Belleville v. Fornarotto, 549 A.2d 1267,1273 (N.J. Super., 1988).

You said you would recuse yourself from your DAS duties, and delegate them to the various Division Directors. That indicates a preference for your CCS obligations. We have noted why it would not serve the public purpose for you to choose that path. As noted in another Court case: The dual positions could “break down the statutory supervisory scheme with respect to the [contract] process, and would put [you] in a position to unduly influence [your Division Directors] who would be charged with monitoring” your activities and the activities of the School over which you preside. People Ex. Rel. Fitzsimmons v. Swailes, 463 N.E. 2d 431 (Ill. Supr., 1984).

State officers must not only discharge their responsibilities faithfully, but must also enjoy public confidence that they are doing so. Reilly, supra. Public officials should avoid not only real conflicts of interest, but the appearance of conflicts as well. Id. “Where public confidence is at issue, what people think is true may be as important as what is true.” Id. When a statutory conflict of duties exists, it is not enough for the office holder to disqualify himself when the conflict arises or to decline to act in the areas of conflict. Dunn, supra.

#### **(F) Waiver Request**

The Commission may grant a waiver if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an undue hardship on the State employee or State agency. 29 Del. C. § 5807(a). We have discussed at length why the conduct does not serve the public purpose of the statute, which is to instill the public’s confidence in the integrity of its State officials. Thus, we cannot grant a waiver on that basis.

Regarding an “undue hardship,” you indicated that your CCS services in the areas of personnel and budget matters are critical. First, we note that CCS has hired an employee with experience in the budgeting matters. Thus, there is someone with experience to take over your role in that area. However, we acknowledge the difficulties you may encounter in bringing that person up to speed on all the activities you have been involved in and finding others to replace your skills. Accordingly, we grant a limited waiver for the remainder of the school year for you to find a substitute method to have your CCS duties performed.

We agree with the Advisory Opinion in the judge’s situation. First, like him, your willingness to participate in CCS is commendable. Second, like him, you are not precluded from being involved with CCS as a citizen and parent, but nevertheless under the circumstances and given the public concerns that are raised and could be raised in the future, there must be limits to your CCS role because of your Cabinet responsibilities

which, as indicated herein, conflict with your duties as President and Board member for the reasons expressed herein.

**(G) Conclusion**

Based on the foregoing facts and law, we conclude that your dual positions create conflicts that cannot be resolved by recusal. We grant a limited waiver for the remainder of the School year for you to obtain someone to fulfill your Board responsibilities.

Sincerely,

***Signed***

Arthur G. Connolly, Jr., Chair

cc: Christine P. Schiltz, Esq.  
David S. Swayze, Esq.

September 20, 2002

**CONFIDENTIAL**

Mr. Richard Kapolka  
24 Rivers End Drive  
Seaford, DE 19973

**Advisory Op. No. 02-33 - Representing Private Enterprise - Waiver Request**

*Hearing and Decision by: Arthur G. Connolly, Jr., Chair; Mary Jane Willis, Vice Chair;  
Commissioners: Paul E. Ellis; Arthur V. Episcopo, Clifton H. Hubbard, Barbara Remus,  
and Foster Massie*

Dear Mr. Kapolka:

The State Public Integrity Commission reviewed the waiver request for you to continue, as Program Director, Western Sussex Boys & Girls Club, to represent and assist the Club on its grant from the Delaware Community Service Commission (DCSC) when you are an appointee and Chair of DCSC. Based on the following, we grant a limited waiver through January 1, 2003, to permit time for: (1) the Club to find someone else to be the Program Manager for the grant, or (2) DCSC time to find another appointee.

**(A) Applicable Law**

As an appointee to a State Commission, you are an "Honorary State Official." 29 Del. C. § 5804(13). You must comply with the following disclosure requirements and restrictions.

(1) As a condition of commencing and continuing employment/appointment with the State you must file a "full disclosure" of your financial interest in a private enterprise that does business with your agency. 29 Del. C. § 5806(d). "Financial interest" includes employment in a private enterprise. 29 Del. C. § 5804(5). "Full disclosure" means sufficient information to decide if there is a conflict. *Commission Op. 98-23*.

(2) You may not review or dispose of State matters if you have a personal or private interest. 29 Del. C. § 5805(a)(1). A personal or private interest is one which tends to impair judgment in performing official duties. *Id.* Such interests can include outside employment and the "financial interest" in that employment. 29 Del. C. § 5805(a)(2); *In re: Ridgely*, 106 A.2d 527 (Del., 1954).

(3) You may not represent or assist a private enterprise on matters before your own agency. 29 Del. C. § 5805(b)(1).

(4) You may not improperly use or disclose confidential information gained from your public position. 29 Del. C. § 5806 (f) and (g).

(5) You may not hold outside employment if it may substantially conflict with performing your State duties and/or if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the

integrity of its government. *29 Del. C. § 5806 (b)*. The fourth criteria is basically an appearance of impropriety test. *Commission Op. 98-23*.

### **(B) Facts**

DCSC is a State agency created by federal law. *42 U.S.C. § 12638*. It administers grants for national service programs for AmeriCorps, to support volunteer and service efforts of individuals, organizations, and communities. Grants are in two phases: (1) establishment grant; and (2) operating grant. During Phase 1, a one year program, grant recipients learn to implement AmeriCorps requirements before becoming operational. During that year, grant recipients have no members and perform no services. After Phase I, if the recipient is on sound systematic grounds, they can seek the operational grant. DCSC reviews applications for both phases. If DCSC recommends a grant, it is forwarded to the Corporation for National and Community Services (CNCS) for federal approval. Subsequently, DCSC monitors the recipient's administration and application of the grant.

The Western Sussex Boys & Girls Club applied for and received a Phase I grant. You did not represent or otherwise assist the Club in that application. The grant provides funds for a Program Manager. After Phase I was approved, the Club made you the Program Manager for the grant. You then represented the Club before DCSC at meetings, events and site visits, and at pre-bid meetings for applicants. For the Phase II grant, you assisted in preparing the grant request along with Directors from Clubs in Kent and Sussex County, some State agencies, institutions of higher learning, and other private organizations, which will benefit from the grant. As Program Manager of the grant, you would continue to represent the Club before the DCSC for as long as six years.

In November 2001, when the Club selected you as Program Manager, you told DCSC of the conflict. It was decided you would recuse yourself from voting on any applications for the grant. CNCS said that if you recused yourself from participating in **any** applications for grants under the same funding category, your conduct was acceptable under its conflict provision. It also advised you to check for compliance with State conflicts law.

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

Although no "full disclosure" was immediately filed upon having knowledge that your employer, the Club, was doing business with your State agency, you have now complied with the "full disclosure" requirement of *29 Del. C. § 5806(d)*. No penalty will be imposed for the late filing.

Since November 2001, you have avoided violating the restriction on reviewing or disposing of matters where there is a personal or private interest. *29 Del. C. § 5805(a)(1)*. That was accomplished by not participating as a DSCS member on any grants in the same funding category.

Regarding confidential information, all DSCS members are on notice by the agency that they may not improperly use or disclose confidential information. We wish to reinforce that you also have a statutory duty under the Code of Conduct not to improperly use or disclose confidential information. *29 Del. C. § 5806(f) and (g)*.

Despite complying with the above provisions, your conduct will continue to violate the restriction on representing or otherwise assisting a private enterprise before your own agency. *29 Del. C. § 5805(a)(1)*. In passing these laws, the General Assembly found that

some standards of conduct are “so vital to government that violation thereof should subject the violator to criminal penalties.” 29 Del. C. § 5802(2). This standard carries a criminal penalty of up to one year in jail and/or a \$10,000 fine. 29 Del. C. § 5805(f). A waiver of that violation was sought.

**(D ) Should a Waiver be Granted?**

Waivers may be granted if: (1) a literal application of the law is not necessary to serve the public purpose; or (2) there is an undue hardship on the State agency or official. 29 Del. C. § 5807(a).

**(1) The Public Purpose**

The restriction on representing or otherwise assisting a private enterprise before one’s own agency is to insure officials do not use their influence with their agency to affect decisions of their colleagues or employees or use their access to information or influence within their agency to obtain preferential treatment, unfair advantage, unwarranted privileges, private advantage or gain. *Commission Op. No. 00-32; See, Van EE v. Environmental Protection Agency, D.C. Dist. Ct. of Appeals, 202 F.3d 296(2000)(noting same purpose for federal restriction on employees and officials representing or assisting a private enterprise before federal agency).*

Delaware Courts have said that when State officials contract with their own agency the concern is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” *Commission Op. No. 00-32 (citing W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748,752 (1971)).*

DSCS viewed your situation as similar to one where we granted a waiver because, among other things, the agency worked to diminish appearances that the grant was awarded out of favoritism, undue influence, and the like. *Commission Op. No. 01-22.* We recognize that in your case similar actions were taken, e.g., public notice and bidding; workshops for any persons interested in the grant, etc. However, we must balance that against these facts:

◆ Compliance with the law is possible. You said at our meeting that you could stay on DSCS and a person other than you could be the Club’s Program Manager; or you could resign from DSCS and remain Program Manager. In *Op. No. 01-22*, the agency had no persons, other than Commissioners, to perform the service.<sup>9</sup>

◆ Compliance is necessary to serve the public purpose. After the initial grant was issued, the Club made you, the Chair of DSCS, its Program Manager. This could well “raise suspicion” among the public that you parlayed a substantial grant request into a private job; or your State position drove the Club’s decision to give you a full-time job as Program Manager. Also, your colleagues and staff will monitor your work. The public may suspect that: the Club is trying to curry favor with DSCS; the Club will receive preferential treatment because of your position; or because you are on the DSCS you could make

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<sup>9</sup>We note these two possible ways to resolve the conflict. You and DSCS are not prohibited from finding other ways to comply. You and DSCS are in the position to know of operational aspects that might lend themselves to other possible resolutions.

official decisions outside official channels. This is not to say that those reasons motivated the Club, DSCS or you. However, at a minimum, it may raise the appearance of such conduct, especially if you continue in the dual positions on a long term basis in violation of a criminal provision when the matter could be resolved without violating that law. Those facts are dissimilar to *Op. No. 01-22*. There, the waiver was requested for a limited time (one semester of classes); the Commissioners would not gain a full-time job; the violation would be resolved during that time because they would teach others to provide the service; the money involved was insubstantial.

## **(2) Undue Hardship**

“Undue” hardship means “more than is required” or is “excessive.”  
*Commission Op. No. 97-18.*

In the written request for a waiver, it was indicated that DSCS could not issue the grant if you were not the Program Manager. However, as noted above, we later learned there were at least two ways to comply with the law and its purpose, without losing the grant.

What the law requires is that State officials not do business with their own agency. This provision is “so vital to government” that it carries a criminal penalty for failure to comply. Here, where the law can be complied with, and where the conduct raises several concerns about the appearance of impropriety, we do not believe complying with the law is “more than required” or “excessive.”

However, because you have been involved on behalf of the Club more than 10 months, we understand that it will may take time to find and hire another Program Manager or find another appointee for DSCS. Because of those facts, we grant a limited waiver through January 1, 2003, so there is time to resolve the matter and comply with the Code.

## **(E) Conclusion**

Based on the above law and facts, we grant a limited waiver of only the restriction against representing or otherwise assisting the Club before the DSCS through January 1, 2003. We do not grant a waiver of any other restrictions. Accordingly, you need to continue following the restrictions on not reviewing or disposing of any grants in this same category, by recusing yourself; not improperly using confidential information, etc.

Sincerely,

*Signed*

Arthur G. Connolly, Jr., Chair



## **Appendix C**

August 26, 2002

Christopher A. Coons, Council President  
New Castle County Council  
Louis L. Redding City County Building  
P.O. Box 8811  
Wilmington, DE 19899

Dear Council President Coons:

The State Public Integrity Commission met on August 20, 2002. On the agenda was your August 13, 2002 letter requesting certain information and suggestions on whether the New Castle County Ethics Commission should be reinstated or whether its responsibilities should be moved to the State Public Integrity Commission.

The State Public Integrity Commission is of the opinion that, as a matter of law, it has no legal authority to return New Castle County to its jurisdiction. The question is not one properly for negotiation between the State Public Integrity Commission and New Castle County. The reason for this is that the State Code of Conduct specifically provides that:

“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.....” 68 Del. Laws, c. 433 § 1(Senate Bill 406).

The stated purpose of the law was to give “local governments a greater incentive to enact their own Code of Conduct...” S.B. 406, *synopsis*. Local governments that “fail[ed] to enact their own Code” would be subject to the State law. Id. New Castle County decided to “opt out” of State control in 1990, pursuant to the General Assembly’s earlier expression of its

“desire...that all local government units adopt Code of Conduct legislation similar to [the State act] to apply to their public officials.” 67 Del. Laws, c. 417 § 2.

Thus, the General Assembly **twice** expressed its intent that local governments adopt their own Code, and provided a way to “opt out” of State control. It was silent on any authority for this Commission to allow local governments to return to State control. Where the legislature is silent, language will not be grafted onto the statute as such action would be creating law. Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January

7, 1991)(citing *State v. Rose*, 132 A. 864, 876 (Del. Super., 1926)). Relt would take an act by the General Assembly to return New Castle County to this Commission's jurisdiction.

We also point out the following legal and practical problems if New Castle County abandons enforcement and/or the existence of its own Code of Conduct after 12 years:

1. It would violate the Delaware legislative intent mentioned above;

2. Any "change" in New Castle County's Code must be approved by the State Public Integrity Commission, 68 *Del. Laws*, c. 433 § 1;

3. It would be contrary to the public purpose of the ethics laws--to instill public confidence in its officials. 29 *Del. C.* § 5801; *NCC Code Sec. 2-81*. After "long-term study, numerous meetings, and proactive work by members of Council, the Commission, the Executive branch and members of the public" the County passed a more stringent law to "ensure its citizens" that their officials would "possess strong ethical guidelines." *NCC Ord. No. 00-\_\_\_, (unnumbered), May 9, 2000*. After such efforts, it is unclear how the County's citizens would be better served when returning to State control would result in a less stringent Code for the County because:

(A) Senior level County Officials would no longer have to file financial disclosure reports, as local officials are exempt from the State financial disclosure law. 29 *Del. C.* § 5812(a);

(B) The amendment recently introduced by New Castle County, Ord. No. 02-061, prohibiting senior level officials from representing or otherwise assisting a private enterprise before any County, State or municipal government also would not be enforceable under the State Code of Conduct. (*Compare, NCC Ord. No. 02-061 § 1 with 29 Del. C. § 5805(b)(1)*);

(C) Existing complaints, requests for opinions, etc., are based on the County Code which is not identical to State law. This Commission has no authority to interpret the County Code. A return to State control could mean those complaints, etc., may never be investigated and addressed.

4. The State Public Integrity Commission already has jurisdiction over 46,688 State employees;<sup>10</sup> all paid and non-paid State Board and Commission appointees; all local School Board members and all but six local government units. The Commission has subjection matter jurisdiction to issue advisory opinions, waivers and act on complaints; over Financial Disclosure requirements; over registration of lobbyists and to conduct extensive State-wide training programs. (*Tab 2*).

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<sup>10</sup>*Human Resources Employee Count of paid State Employees, Tab 1.*

5. There has been some talk that New Castle County might provide some funding to the State Public Integrity Commission if the State would take over enforcement of New Castle County ethics issues. It should be noted, however, that by statute the General Assembly is solely responsible for the Commission's budget.

Conversely, these legal and practical issues would not occur if County officials use their existing authority to reappoint an Ethics Commission or change the ordinance to institute new appointing authorities, as was discussed at the County Council's workshop. Such action could be a speedier resolution than trying to change State law, and would also reflect legislative intent.

I hope the above answers the questions in your letter. Please contact me if you need additional information from the Commission.

Sincerely,

***Signed***

Arthur G. Connolly, Jr.  
Chair, State Public Integrity Commission

cc: Public Integrity Commissioners  
Janet A. Wright, Commission Counsel



**Appendix D**

<b>SENATE LEGISLATION</b>			
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
<b>25</b>	When agencies adopt a regulation, the regulation and the order adopting it, must be filed with the Registrar of Regulations and becomes the official regulation.	Applies to PIC's regulations.	<b>Signed into law - 6/18/01.</b>
<b>36</b>	Creates a Reapportionment Commission to draw legislative districts. Commissioners cannot be or cannot have been a lobbyist for 2 years preceding the Act; and cannot register as a lobbyist while on the Commission or within 2 years of the effective date of the reapportionment plan. <i>Similar Senate Bills No. 301 w/ S.A. 1 &amp; Similar House Bill No. 105</i>	If requested, PIC would give the appointing authority info on whether appointees are or have been lobbyists, and would monitor future registrations for compliance.	<b>Referred to Senate Exec. Committee - 1/25/01.</b>
<b>141 Senate Sub. No. 1</b>	Delaware Uniform Athlete Agents Act. Creates the Board of Athlete Agency Examiners. Provides that Board members and its agents, appointed or otherwise, are subject to the State Code of Conduct, as it applies to State "employees." Provides that Board members cannot be a "close relative" as defined by the State Code of Conduct, of an athlete agent, or have been employed as an athlete agent.  <i>- See Similar Senate Bill No. 241 --</i>	Creates another Board whose members are subject to the State Code of Conduct. Code presently applies to more than 200 Boards & Commissions.	<b>Referred to Senate Exec. Committee. Subsequently stricken. S.B. 241 was passed instead.</b>
<b>144 - amend. S.A. No. 2</b>	Renames the Division of Mental Retardation as the Division of Developmental Disabilities Services.	PIC will make administrative changes to its list of titles of public officers who must file financial disclosure reports.	<b>Signed into law - 7/30/01.</b>
<b>150</b>	Amends Title 24, Chapter 5 for the Board of Cosmetology and Barbering based on Sunset Committee recommendations. One change is that the prior language provided that the Board members were to be treated as "employees" under the State Code of Conduct. The amendment eliminates the term "employee" because under the State Code of Conduct members of Boards such as this are not defined as "State employees," but as "Honorary State Officials."	PIC previously notified the Sunset Committee of the distinction between "Honorary State Officials," and "State employees." This amendment to the Board's statute makes it consistent with how these board members, and other similarly situated board members, are treated under the Code of Conduct.	<b>Signed into law 7/10/01.</b>

	Under the State Code of Conduct, two provisions apply differently to those defined as "State employees" and those defined as "Honorary State Officials." <u>See, 29 Del. C. § 5805(c) and 29 Del. C. § 5806(d).</u>		
<b>204</b>	Creates a reapportionment committee for the City of Wilmington. Prohibits appointees from being lobbyists while a member and for two years after the effective date of the plan.	PIC would give appointing authority info on registered lobbyists, and monitor future registrations for the 2 year period.	<b>Reported out of the Senate Judiciary Committee - 6/14/01</b>
<b>215</b>	Establishes new Department of Technology and Information to replace the Office of Information Services (OIS) and defines the Chief Information Officer's position as a Cabinet level position.  Senate Substitute to S.B. 25 exempts OIS and DTI State employees from the State Code of Conduct's post-employment law.	Changes the financial disclosure reporting list..  PIC understood that the amendment was to assist OIS employees during transition from OIS to DTI if they could not retain a job in DTI or a similar job in another agency. However, the amendment forever exempts all OIS & DTI employees from the post-employment law. PIC is working with the drafters to see if a transition time is feasible, after which DTI employees would be subject to the post employment law as are all other State and local government employees.	<b>Signed into law - 7/01/01</b>
<b>230</b>	Creates new Division of Support Operations in Department of Administrative Services by combining the Divisions of Purchasing and Support Operations.	Will change list of who must file financial disclosure report.	<b>Signed into law - 7/9/01.</b>
<b>241</b>	Delaware Uniform Athlete Agents Act. See information under S.B. 4.	See information under 4.	<b>Signed into law - 7/9/01.</b>
<b>290</b>	Governor's Proposed Budget for FY 03 - Proposes \$64.4 for PIC	PIC budget same as FY 02.	<b>Senate Finance Comm. - 01/24/02. See S.B. 434</b>
<b>301</b>	Reapportionment. Amendment has language similar to S.B. 36 on lobbyists.	See Comments on S.B. 36	<b>Passed Senate - 1/17/02. Referred to House Admin. Comm. -01/23/02</b>
<b>434</b>	Appropriations for FY ending June 30, 2003.	Appropriates \$64,000 for PIC; same as last year; has a 2% or \$600 pay raise, whichever is greater for State employees (Commission Staff). Baseline appropriation does not have additional money for the	<b>Signed into law - 6/25/02.</b>

	Makes Controller General position equivalent to Cabinet post.	pay raise.  Financial Disclosure law requires Cabinet Secretaries and "their equivalents" to file financial disclosure reports. It already specifies that the Controller General is to file the report.	
435	Appropriations for Grants-in-Aid. Provides that no recipient of funds in this act may use these funds to hire lobbyists.	All legislation pertaining to lobbyists is monitored. No change to the lobbying statute.	<b>Signed into law - 7/01/02.</b>
439	Permits State retirees to be hired as temporary/casual/seasonal, etc., without incurring a pension offset.	Will eliminate some requests for waivers of the post-employment law.	<b>Signed into law - 8/2/02</b>
	<b>HOUSE LEGISLATION</b>		
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
7	Allows School Districts to re-hire retired teachers one year after retirement to teach in areas where there are teacher shortages without an impact on their pensions.	If a former State employee privately contracts with the State within 2 years after terminating, to perform the same job they had as a State employee, it could violate the post-employment law. However, if the former employee is re-hired as a State employee, the post-employment law would not apply as such persons are not former employees, but current employees. <i>Ethics Bulletin 007</i> . When a retired former employee is re-hired, they have a pension off-set. <u>See, 29 Del. C. § 5502</u> . This bill permits retired teachers to be re-hired without violating the post-employment law or having the off-set.	<b>House Passed 01 /25/01</b> <b>Referred to Senate Education Committee - 3/13/01.</b>
10	2 <sup>nd</sup> leg of Constitutional amendment. Creates position of Senior Judge in State's Court system. Will be filled by any retired judge of a court established by the Constitution or the General Assembly. Qualifications, manner of appointment, term of office, compensation, duties, and all other matters relating to the office of the Senior Judge shall be specified by statute.	This position may result in the requirement for the Senior Judge to file a financial disclosure report, as do all other Judges. PIC will monitor the statute creating the responsibilities of that office.	<b>Passed - 7/01/00 and 5/8/01. Governor's signature not required on Constitutional amendments.</b>
17	Permits retired teachers to be re-hired as substitute teachers without affecting their pension benefits.	See Comments to H.B. 7.	<b>Signed into law - 4/10/01.</b>

23	1st leg of Constitutional amendment. Provides that persons currently holding an elected State office shall be deemed to have resigned from that office when they become a candidate for a different elected State office, if they become a candidate more than 30 days prior to the natural expiration of their present term of office. Resulting vacancies shall be filled by the same general election where the office is filled for which said vacancy was created, as long as the vacancy occurs after June 30 of the general election year.	May require administrative monitoring of status of officials as financial disclosure report filing dates for those holding elected State office and those who are candidates for State office are based on their status.	<b>Referred to House Admin. Committee 01/10/01.</b>
48	Eliminates \$3 fee to commission a public officer appointed to State's various boards and commissions.	Applies to PIC appointees.	<b>Passed House - 01 /22/02. Referred to Senate Finance Comm. - 01/23/02.</b>
50	Governor's Recommended Budget for FY02.	Recommended \$64.4 for PIC.	<b>See H.B. 350, final FY02 budget bill.</b>
54	Adds elected School Board members to those who are subject to the State Code of Conduct.	Last year's proposed bill had unique exceptions to the Code of Conduct for School Board members. PIC notified the legislature of concerns. This bill treats School Board members the same as other local officials who are subject to the Code.	<b>Signed into law - 4/10/01.</b>
64	Provides that officers and employees of Kent County government shall not hold more than one position of county office or employment from which he or she derives compensation.	As Kent County has not adopted its own Code of Conduct, it is subject to the State Code of Conduct, that restricts holding "other employment," including dual government employment. This legislation is more stringent, creating a total ban on dual employment by County personnel. Thus, the less stringent Code of Conduct restriction on dual employment would not apply to Kent County employees/officers.	<b>Signed into law - 5/8/01.</b>
75	Requires any employer, including the State, who monitors any telephone calls, e-mails, or Internet access of or by employees, to give notice of such monitoring activities to the employees prior to doing so or at the time of hiring.	As PIC's two computers are connected, it is possible for one user to see the use of the other user, revealing such things as Internet use. While this is not deliberate monitoring, PIC employees will be alerted that their usage can be observed.	<b>Signed into law - 7/10/01.</b>
96	Would establish a new County in Delaware: Appoquinimink.	The Code of Conduct applies to local governments, unless they adopt their own Code of Conduct, approved by PIC to be as stringent as the State Code. If the bill passes, PIC will notify employees	<b>Referred out of the House Land Use/ Infrastructure Committee - 6/21/01.</b>

		and officers of the new County of that law.	
<b>105</b>	Creates independent, bipartisan reapportionment commission. Appointees to the Commission cannot have been a lobbyist within two years prior to the appointment; appointees and employees of the Commission cannot hold or campaign for public office while serving; cannot run for the House or Senate for two years after the effective date of the plan; and cannot register as a lobbyist while a Commission member or within two years of the date of the effective plan.  <i>-- See Similar Senate Bill No. 36 --</i>	Regarding the restrictions on lobbying, see Comments to S.B. 36. Because this bill also restricts campaigning for or holding public office, if passed, PIC will monitor financial disclosure filings of candidates and public officers to aid in insuring compliance.	<b>Referred to House Admin. Committee - 3/14/01.</b>
<b>110</b>	Permits "close relatives" of the Commissioners for Thoroughbred Racing to have a legal or beneficial interest in a firm, association, or corporation licensed or regulated by the Commission or which participates in pari-mutual meetings. "Close relative" in this statute would have the same meaning as that term in the State Code of Conduct.  <i>-- See Similar House Bills No. 36 &amp; 405--</i>	Code of Conduct restricts appointees to Commissions and Boards from participating in decisions re: close relatives. PIC had noted this with General Assembly members. This bill specifically notes that Racing Commissioners remain subject to the Code of Conduct.	Referred to House Game/Parmtl Committee - <b>3/20/01</b> ; <b>Stricken - 3/12/02</b>
<b>152</b>	Renames Division of Alcoholism, Drug Abuse & Mental Health as Division of Substance Abuse & Mental Health.	Requires administrative change to list of Division titles as Directors file financial disclosure report.	<b>Signed into law - 6/11/01.</b>
<b>311</b>	Dual Government Employment. Amends Title 29, Chapter 58, administered by PIC. Presently, State employees holding a second position as an elected official, or paid appointee, with State or local government, who leave their State job to go to the second job, have their full-time pay prorated for overlapping hours--unless they take leave. This bill allows use of compensatory time. It also defines "workday" to include flex-time. It still requires that if the workday hours at the full-time job overlap with hours at the second job, supervisors must keep time records of the employee's status. The records are subject to an annual audit to insure individuals is not "double-dipping."	In issuing advisory opinions to persons holding such dual positions, the Commission will now consider that compensatory time may be used to go to the second position.	<b>Signed into law - 7/17/01.</b>
<b>344</b>	Reapportionment of General Assembly. Among other things, increases seats in the House from 41 to 45.	If seats increases, PIC will insure candidates for new districts file financial disclosure report within 14	<b>Referred to House Admin. Committee - 11/01/01.</b>

	-- See Similar House Bill No. 345 --	days of filing as a candidate, and if elected, each year thereafter.	
<b>345</b>	General Assembly Reapportionment. Among other things, increases House seats from 41 to 45. -- See Similar House Bill No. 344 --	See comments on H.B. 344 above.	<b>House passed - 11/01/01 - Referred to Senate Judiciary Committee</b>
<b>350</b>	Budget Bill for Fiscal Year 2002. Appropriates \$64,400 for PIC. - Provides 2% or \$600 pay increase, whichever is higher, to all State employees.	PIC's appropriation is the same as last year's. Pay raise of 2% for both PIC employees. It will require recalculation of PIC's salary line for the next FY.	<b>Signed into law - 6/28/01.</b>
<b>361</b>	Permits "close relatives" of the Commissioners for Thoroughbred Racing to have a legal or beneficial interest in a firm, association, or corporation licensed or regulated by the Commission or which participates in pari-mutual meetings. "Close relative" in this statute would have the same meaning as that term in the State Code of Conduct.  -- See Similar House Bills No. 110 & 405 --  This bill adds several sections that are not in H.B. No.110. Those provisions address the limits on the financial interest a Racing Commissioner may have; requires Commissioners to have racing experience; and limits the terms of Commissioners.	Code of Conduct restricts appointees to Commissions and Boards from participating in decisions re: close relatives. PIC had noted this with General Assembly members. This bill specifically notes that Racing Commissioners remain subject to the Code of Conduct.	<b>Referred to House Game/Parmtl Committee - 1/09/02</b>
<b>389</b>	Amends the Misconduct in Office statute to include Public Servants who may be suspended from their positions, which recognizes that they may still do harm by virtue of their position or access to government resources. Prohibits unauthorized acts done specifically as an official function, but also those abuses facilitated by the Public Servant's position. Unauthorized acts includes any unauthorized use of public money.	The Code of Conduct also prohibits misuse of public office, and the Commission may refer suspected violations of a criminal law, e.g., Misconduct in Office law, to the Attorney General.	<b>Referred to House Judiciary Committee. Reported out of Committee - 3/13/02.</b>
<b>405</b>	Amends Delaware Code of Thoroughbred Racing. Similar to House Bills No.110 & 36. See Comments on those bills	See Comments on House Bills 110 & 36.	<b>Referred to House Game/Parmtl Comm. - 2/20/02 - Stricken 6/4/02</b>

499	<p>Amends 24 Del. C. Chapter 59, Real Estate Council, and provides Council members are subject to the State Code of Conduct.</p> <p style="text-align: center;">– See H.B. 587–</p>	<p>Council appointees are already subject to the Code of Conduct as “honorary State officials.” This merely adds the information to the Council’s enabling act.</p>	<p><b>Referred to House Policy Analysis &amp; Gov’t Accountability Comm. - 5/15/02 - Out of Committee - 6/3/02</b></p>
518	<p>Codifies certain sections of the FY 02 Budget Act, including provisions to: (1) permit State employees to perform &amp; be compensated for additional duties by a State agency other than their principal employing agency, with the consent of the principal employing agency if the additional duties are not part of their regular duties for the principal agency and are not rendered during the time paid for by the principal employing agency.</p> <p>(2) designates staff development officer in the Personnel Office to support Statewide training programs for State managers, supervisors, and employees. The Statewide program will be supported with funds generated from assessing charges for courses on agencies participating in certain classes. The Personnel Office may set charges for courses with funds from an appropriate special fund account established by the Budget Director.</p> <p>(3) authorizes the Justice Dep’t</p>	<p>(1) Dual employment by State employees is covered by the Code of Conduct restriction on holding “other employment.” Also, dual employment in gov’t positions can be subject to the “anti-double dipping” provisions of the Code of Conduct, if the time during which a state employee performed the second job</p>	<p><b>Signed into law - 6/20/02.</b> overlapped with the time when they are to be working the principal job. As written, the “anti-double dipping” provisions would not apply.</p> <p>(2) The Commission offers Statewide training through the State Personnel MDI &amp; CEP courses. At present, there is no charge for the classes. If the legislation is passed, it needs to be decided if there will be a charge for the “Ethics in Government” and/or the “Financial Disclosure” courses.</p> <p>(3) As a State agency, the Commission would be eligible to receive the AG opinions at no costs. At present, the Commission does not have hard copies of such opinions. It accesses them through the AG’s website. . to publish and sell AG opinions. Copies will be distributed to State agencies at no cost.</p>
539	<p>Amends current notice requirement (See H.B. 75 above) that an employer is monitoring telephone, e-mail, or Internet usage by providing three means of notifying the employee.</p>	<p>See Comments to H.B. 75. See also H.B. 597</p>	<p><b>Substituted - 6/27/02</b></p>
House Sub. 1 to H.B. 539	<p>Amends H.B. 539 to limit the application of the law to only Delaware business and Delaware employees.</p>	<p>See Comments to H.B. 75</p>	<p><b>Signed into law -7/09/02</b></p>

561	Amends City of Harrington's Charter to provide that the Mayor & Council members may not have a "personal or private interest" in measures pending before the City. If so, they must disclose the interests, and not participate in the debate or vote thereof.	Code of Conduct, which applies to local governments, has this provision and more. Sponsors & committee members were notified and asked if the legislation was meant to repeal application of the Code of Conduct which has more restrictions than just the "personal or private interests" provision.	<b>Referred to House Admin. Committee - 6/13/02</b>
586	Prohibits any State employee or official from hiring or otherwise employing, then supervising their spouses.	More specific language than Code of Conduct, which says State employees may not "review or dispose" of matters if a "close relative" is involved. PIC previously ruled that State employees/officials, etc., cannot hire, supervise, etc., their spouses, under the Code.	<b>Referred to House Labor Committee - 6/20/02 - Laid on Table - 6/30/02.</b>
587	Amends 24 Del. C. Chapter 59, Real Estate Council, and provides Council members are subject to the State Code of Conduct.  – See H.B. 499–	Council appointees are already subject to the Code of Conduct as "honorary State officials." This merely adds the information to the Council's enabling act.	<b>Passed House - 6/27/02</b>
597	Changes notice requirements employers must give employees if monitoring phone, e-mail and Internet use.	See comments on H.B. 539, H.S. 1, and H.B. 75.	<b>Referred to House Telecomm. &amp; Internet &amp; Tech. Comm. - 6/21/02</b>
617	Provides that the Code of Conduct applies to Board of Pension Trustees' members as "employees."	Board members usually are subject to the Code as "honorary State Officials," rather than "employees." The Code is more stringent for "employees."	<b>House Policy Analysis &amp; Gov't Accountability Comm. - 6/27/02</b>

**Appendix E**

<i>SENATE LEGISLATION</i>			
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
<b>27</b>	Amends the Charter of the Town of South Bethany. Provides that Council may, by ordinance, adopt a Code of Ethics to govern all Town officers and employees.	Local governments that do not adopt a Code of Conduct are subject to the State Code. <i>68 Del. Laws, c. 433</i> . If they adopt their own Code, the Commission must approve it as being as stringent as State law. <i>Id.</i> The Commission reviewed the Town's Code in May 2003. It found two areas that were not as stringent as the State Code. Those areas were identified for the Town to consider in amending its Code for approval.	PIC sent letter to Legislators, Mayor and Council members to alert them to State law requirements. Passed House with amendments.
<b>79</b>	Authorizes the Division of State Service Centers to solicit and accept gifts.	The Code of Conduct restricts acceptance of certain gifts , and would still apply, even with this legislation.	PIC wrote to Senate Committee members about the gift restrictions and provided relevant opinions. Legislation was amended to require that any solicitation of gifts comply with Code of Conduct. Amended legislation signed into law - 6/30/03.
<b>83</b>	Would permit use of the Internet for publishing notice of certain State contracts and notice of public meetings by agency when considering adopting, amending, etc., the agency's rules and regulations, and certain other public meetings under the Administrative Procedures Act (APA).	(1) The Code of Conduct prohibits State employees/officials from seeking State contracts of more than \$2,000, unless there is public notice and bidding. If passed, attendees of PIC training will be advised of the Internet notice so they can avoid seeking any contract that is not on the approved Internet site. (2) PIC is subject to certain APA procedures, and also uses the APA as a guide in areas where PIC is not subject to the law. PIC would comply with Internet notice provisions regarding public meeting, and would comply with Internet notice provisions in appropriate situations.	Referred to Senate Finance Committee - 4/16/03.
<b>97</b>	Requires State agencies web sites to have a policy on how personal information is obtained on users; what is done with the info; etc. "Personal information" includes	By law, the Commission must collect data on lobbyists. <i>29 Del. C. §§ 5832, 5833 and 5835</i> . The Commission will follow the model developed by DTI.	Signed into law - 6/7/03.

	names or other identifying information. The bill does not prohibit disclosing the information if it is needed to perform the agency's statutory functions, rather, a disclosure policy must be on the web site. The bill also directs the Department of Technology and Information to develop a model policy for State agencies.		
129	Amends State law to require that former employees of Department of Technology and Information (DTI) are subject to the post-employment law.	During the reorganization of the Office of Information Services (OIS) into DTI, legislation was past exempting OIS and DTI employees from the post-employment law which applies to all other Executive Branch employees.	In 2001, the Commission notified legislators and agency representatives of the legislation exempted only certain State employees could have, when all other State employees were subject to the law. In 2003, the application of the post-employment law was reinstated for DTI. Signed into law - 6/11/03.
	<b>HOUSE LEGISLATION</b>		
<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>	<b>STATUS</b>
<b>H.R.3</b>	Contains Temporary Rules of the House and how it will operate. Includes Rule that House Members must comply with Financial Disclosure Law; that Lobbyists register as required by the Lobbying Law; and provides rules regarding lobbyists taking the House floor to speak.	To assist Public Officers who are House members, and lobbyists in complying with the Rules. Ltr. Sent to House indicating that the citation in Rule 54 and 57 regarding lobbyists should be the same, but Rule 57 gives the old statutory citation.	Resolution Passed - 1/14/03.
<b>H.B. 5</b>	Governor's Proposed Budget - FY04 (See H.B. 300 - Final Budget)	PIC Request for \$164,000 - same as prior budget years	Referred to House Appropriations Comm. 01/30/03
<b>H.B. 88</b>	Amends Title 14 to, among other things, exempt members of the Professional Standards Board from the "anti-double dipping" law administered by PIC. That law provides that State employees who are appointed to Boards or Commissions and are paid by that entity	Violations of the "anti-double dipping" law can be referred to PIC. PIC will check to see if a referral pertains to members of this Board, and dismiss based on lack of jurisdiction.	Signed into Law - 4/01/03

	cannot receive pay as a full-time State employee during hours when they are being paid to attend Board meetings. This law would permit PSB Board members to be paid by both entities for the same time.		
<b>128</b>	Amends Title 29 of the Delaware Code Relating to the Great Seal of Delaware. Changes the Dates on the State Seal from 1793, 1847 and 1907 to 1704, 1776, and 1787.	Will require change to PIC documents containing the State Seal (e.g., letterhead, annual report)	House Administration Committee 4/3/03. Out of Committee- 5/7/03.
<b>152</b>	Amends the State Constitution to end each legislative session on the last day of May, rather than June.	To assist in PIC's tracking of legislation.	Referred to <b>House Administration</b> Committee-04/29/2003
<b>165</b>	Would amend Code of Conduct to permit State employees, officers, and officials to participate or volunteer for a not-for-profit entity without violating the Code of Conduct.	Existing law places restrictions on the involvement of State employees, officers and officials with both for profit and non-profit entities. <i>29 Del. C. § 5805(a)</i> . Amendment would have effect of overruling recent commission opinions.	Referred to <b>House Administration Committee</b> . Reported out of Committee- 6/4/03. Governor indicated she would veto legislation if passed.
<b>300</b>	Budget for FY04	Provides for 164.4 for Commission's Personnel and Operating Budget. This is the same amount as in prior years.	Signed into law - 6/25/03