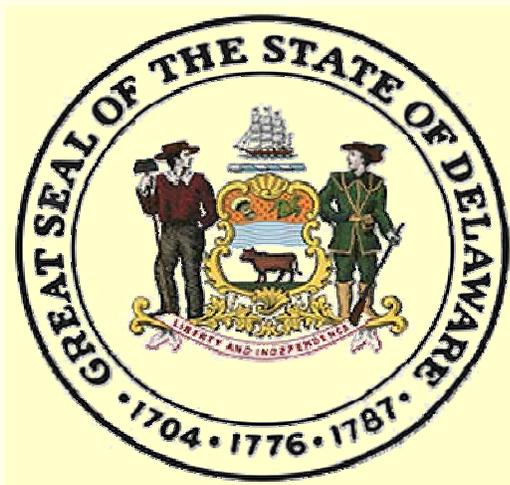


*State of Delaware*

*State Public Integrity Commission*



**ANNUAL REPORT**

**March 1, 2009**

*Terry J. Massie, Chair*

*Barbara H. Green and Bernadette Winston, Vice Chairs*

*Commissioners*

*Barbara A. Remus*

*Dennis L. Schrader, Esq.*

*William D. Dailey, Jr.*

*Wayne T. Stultz*

# STATE PUBLIC INTEGRITY COMMISSION

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## I. *History & Mission*

**M**ission: An independent agency, the Public Integrity Commission administers, interprets and enforces four State laws: Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbyists' Registration. *29 Del. C., Chapter 58.*

### *Public Integrity Commission Jurisdiction History*

- ☑ *1991 - State Ethics:* all Executive Branch officers and employees, including casual/seasonal; (over 48,000); all non-legislative elected officials; and all State Board and Commission appointees (In 2008, over 300 Boards and Commissions).
- ☑ *1993 - Local Ethics:* all 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2008, only 7 have submitted a Code, leaving PIC with 51 jurisdictions).
- ☑ *1994 - Dual Compensation:* all State and local employees and officials with a second elected or paid appointed position with State or local government.
- ☑ *1995 - Financial Disclosure:* all elected officials (legislators and non-legislators); candidates for State office; Cabinet Secretaries, Division Directors and equivalents. (In 2008, 345 officers, and 84 candidates).
- ☑ *1996 - Lobbying:* all State lobbyists register, submit authorization from entities they represent, and file quarterly expense reports (In 2008, 378 lobbyists; 736 organizations; 2,944 expense reports).
- ☑ *2000 - Ethics:* School Districts and Boards of Education
- ☑ *2001 - Ethics:* Charter School Boards of Education



# DELAWARE PUBLIC INTEGRITY COMMISSION

410 Federal St., Suite 3; Dover, Delaware 19901  
Phone (302) 739-2399 Fax (302) 739-2398

## *Commission Structure*

### *Appointments, Qualifications and Compensation*

- 7 Citizens are the "Public Eye" on Government Ethics*
- Nominated by the Governor; Confirmed by the Senate*
- Elect their Own Chair*
- Cannot be:*
  - Elected or Appointed Official - State or Federal*
  - Holder of Political Party Office*
  - An officer in a political campaign*
- Generally are Appointed from all three Counties*
- Terms - one full 7 year terms; may serve until successor is appointed and confirmed*
- Vacancies filled just as Original Appointments*
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses*

## ***II. Structure and Biographies of Commissioners and Staff***

### ***Chairman Terry J. Massie***

Foster J. (Terry) Massie was appointed for a seven-year term on July 23, 2002. The Commissioners twice elected him as Vice-Chair for Personnel, and in 2007 elected him as Chairman. His term expires June 30, 2009.

Mr. Massie is employed by Wells Fargo's Auto Finance as a Regulatory and Operational Risk Consultant. He has worked in Risk Management for four years.

A graduate of Henry C. Conrad High School, he completed his Associate's Degree in Accounting at Goldey Beacom College, Wilmington, Delaware. He attended Neumann College, Aston, Pennsylvania, and Wilmington College.

His commitment to his community is evidenced by his community service through such positions as current President, Mendenhall Village Homeowners Association; former Board Member and First Vice President, Greater Hockessin Area Development Association; and former Chair, Upper Limestone Road Focus Group.

The Chairman resides in Hockessin, New Castle County.

### ***Vice Chair Barbara H. Green***

Vice Chair Green was appointed in June 25, 2004 to complete the term of Paul E. Ellis, with the term expiring July 8, 2005. She was reappointed to serve her own 7-year term, which expires November 8, 2012. Her fellow members

have elected her four times as one of the Commission's two Vice-Chairs. In addition to being a back-up for the Commission Chair, she is responsible for the Procedures and Orientation Committee, which designs and implements procedures for the Commission and its staff.

Ms. Green has a bachelor's degree in Medical Technology with a minor in Biology from the University of Delaware. She is presently retired, but previously worked for Dade Behring (now Siemens), a global diagnostic products company, the DuPont Company, and the Wilmington Medical Center.

In her early career, she spent several years in hospital laboratory supervision before moving to the corporate world. While with the DuPont Company, she worked in research and development and developed new medical diagnostic tests for DuPont chemistry analyzers. The bulk of her career was in management, mainly in the diagnostic products manufacturing environment. More recently, she was with Dade Behring as the Director of Manufacturing for a 500 person medical diagnostics manufacturing organization. She was also responsible for global implementation of corporate level quality and efficiency processes for that organization.

Ms. Green is a resident of Rehoboth Beach, in Sussex County.

***Vice Chair  
Bernadette P. Winston***

Bernadette P. Winston was one of four Commissioners appointed in 2004. Her term expires May 12, 2011. In 2006, her fellow Commissioners elected her as the Vice Chair of Personnel.

Ms. Winston is the Executive Director, Kingswood Community Center, Inc., in Wilmington, Delaware. In that position, she is responsible for the day-to-day operations of the Center's three sites.

She has had over 35 years of experience in government and non-profit programs. Among her past activities, she was Board President, West Center City Early-Learning Center; Vice Chair, Interfaith House; Board Member of the Food Bank of Delaware; Advisory Board Member for Girls Scouts and YMCA; Second Vice President, NAACP; Treasurer of Monday Majors; and President of Thursday Women's Major League.

She currently chairs the Wilmington Housing Authority Board of Commissioners; is a member of Community and Schools Boards; is active with the Junior Board of Christiana Care; and is a member of the Order of the Eastern Star and the Illustrious Commandress of the Daughters of Isis.

Ms. Winston resides in Wilmington, with her husband, George. She has two grown daughters and four grandchildren.

***Commissioner  
Barbara A. Remus***

Barbara Remus was appointed to the Commission on July 23, 2002 for a 7-year term. It expires June 30, 2009.

She is a Senior consultant for Brokerage Concepts, Inc. (BCI). BCI is part of the largest privately held group and individual insurance brokerage company in the United States. Her job requires continuing education and ethics classes to maintain insurance licenses.

Professional associations are: Delaware and National Association of Insurance and Financial Advisors, and the International Foundation of Certified Employee Benefits Specialists.

A graduate of Dover High, her Bachelor of Science Degree is in Business Administration from Wilmington University. She received a professional designation as a Certified Employee Benefits Specialist from the Wharton School of Business, and the International Foundation of Employee Benefit Specialists, where she is a fellow.

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

She lives in Camden, Kent County.

**Commissioner**  
**Dennis L. Schrader, Esq.**

Commissioner Schrader was appointed on June 24, 2004 to complete 6 years of Marla L. Tucker's term after she relocated out of State. His term expires June 30, 2010.

Mr. Schrader has a law degree from the West Virginia University College of Law. He is admitted to the bar in West Virginia, Delaware State and Federal Courts, and the U.S. Supreme Court. He presently practices with the firm of Wilson, Halbrook & Bayard, P.A., in Georgetown, Delaware. In his practice, he has been the Town Attorney for towns in Southern Delaware, and was County Attorney for Sussex County.

Mr. Schrader has been active in the legal community for many years: President of the Delaware State Bar Association, and an officer/representative of such organizations as the Sussex County Bar Association, Mid-Atlantic Conference of Bar Presidents, National Conference of Bar Presidents, American Bar Association, etc. He currently serves on the Board of Bar Examiners.

Former Chief Justice Norman Veasey selected him to Chair the Delaware Supreme Court Committee that rewrote the Lawyer's Professional Conduct Rules. He has been highly active in studies of the Delaware Court system, and received the Delaware State Bar Association President's Citation for public service for his work for the Professional Guidance Committee. He also received the Andrew D. Christie *Pro Bono Publico* Award for work furthering the administration of justice.

**Commissioner**  
**William W. Dailey, Jr.**

In 2007, William W. Dailey, Jr., was appointed to serve until November 8, 2012.

He has an extensive engineering and surveying background, through his education and service in the U.S. Army's Engineer Corps. After an honorable discharge, he continued his education. He was also certified in Reduction and Flood Hazards, Inshore and Coastal Hydrographic Surveying. He is a licensed Land Surveyor in Delaware, Maryland, New Jersey and Pennsylvania.

Prior to retiring, he worked for VanDemark & Lynch, Inc., gaining experience in all phases of surveying and land development. He supervised field operations including property, topographic, construction, hydrographic, and geodetic surveys; supervised field crews in those areas; compiled and reviewed field data; conducted legal research where necessary; and was recognized by Courts as an expert in the field, and has given expert testimony.

His projects included small tracts to areas exceeding 5,000 acres, gaining extensive experience in horizontal and vertical controls for aerial mapping and hydrographic surveys. His Delaware work included supervising field surveys for the Delaware Army and Air National Guard at the Greater Wilmington Airport; Dover Air Force Base; and Georgetown Airport. His work for the military focused on runway and taxiway improvements and extensions. He also was responsible for field surveys on major shopping centers: Christiana Mall, Concord Mall and Brandywine Town Center.

He has taught seminars and classes in surveying aspects, Title Insurance, Boundary Law, Surveying Basics, Surveying Issues, Metes and Bounds Descriptions, etc. For 15 years, he was an instructor at Delaware Technical and Community College, Stanton Campus.

He has served on and been a member of numerous Surveyor Societies, including Chair of the State of Delaware Board of Land Surveyors (1981-1990). In 1993, he was named Surveyor of the Year by the Delaware Association of Surveyors.

Aside from his service on many boards and committees related to surveyors, he was Youth Chairman, President and Vice President of the Red Clay Kiwanis Club. Although retired, he remains involved with VanDemark & Lynch as a consultant. He also is active in the Gull Point Condominium Council in Millsboro, Delaware.

He is a Sussex County resident with his spouse in Millsboro.

## **Commissioner Wayne R. Stultz**

The State Senate confirmed Mr. Stultz's appointment as a Commissioner in January 2007.

Mr. Stultz retired from the State of Delaware as a project manager for advanced electronic card systems. He is a principal with the Stultz Group, an electronic card consulting company.

Mr. Stultz holds degrees of Bachelor of Science for Business Administration and Master of Business Administration.

His community service includes current Director and past Treasurer of the Dover Rotary Club; Board member and Operations and Finance Officer for the Volunteer Ambulatory Surgical Access Program; Business Administrator for Operation We Care Overseas Medical Missions; Member of the Asset Liability Management Committee; Del-One Federal Credit Union past Vice Chair; and Assistant Director for the Maryland Interstate Senior Golf Association.

Mr. Stultz resides in Dover.

## **Staff**

### **Commission Counsel Janet A. Wright**

As an independent agency, the Commission appoints its own attorney. 29 *Del. C.* § 5809(12). Janet Wright was appointed in 1995.

A Widener University School of Law graduate (cum laude), she was admitted to the Delaware bar in 1989. She also is admitted to the Delaware U.S. District Court, and the U.S. Third Circuit Court of Appeals. Ms. Wright clerked in the Superior Court for the Honorable Richard S. Gebelein. She then was a City of Wilmington Assistant Solicitor. She prosecuted Fire, Building and Housing Codes, and animal protection laws violations. She also prosecuted criminal matters in Municipal Court. Later, as a litigator, she defended the City and its employees, primarily in federal court, against alleged civil rights violations.

She received an American Jurisprudence Award in Professional Responsibility, and completed the National Institute for Trial Advocacy's course. She is a Northeastern Regional Conference on Lobbying (NORCOL) and Council on Government Ethics Laws (COGEL) member. NORCOL members from Washington, D.C. to New England enforce lobbying laws COGEL members enforce ethics, lobbying, financial disclosure, and campaign laws in all States, local, federal, Canada, and Mexico governments.

Ms. Wright served on COGEL's Site Selection Committee; moderated a Lobbying seminar; conducted a Dual Government employment session; and served on its Model Lobbying Law

Committee. The "COGEL Guardian" published her review of Alan Rosenthal's *Drawing the Line: Legislative Ethics in the States.*

She has given Government Ethics sessions for the Delaware Bar Association's Continuing Legal Education classes and more recently CLE training to paralegals, both government and private. The National Business Institute (NBI) selected her "Land Use Planning and Eminent Domain in Delaware" class for its on-line training. She also gave training on "Managing Ethical Issues in Your Day-to-Day Practice."

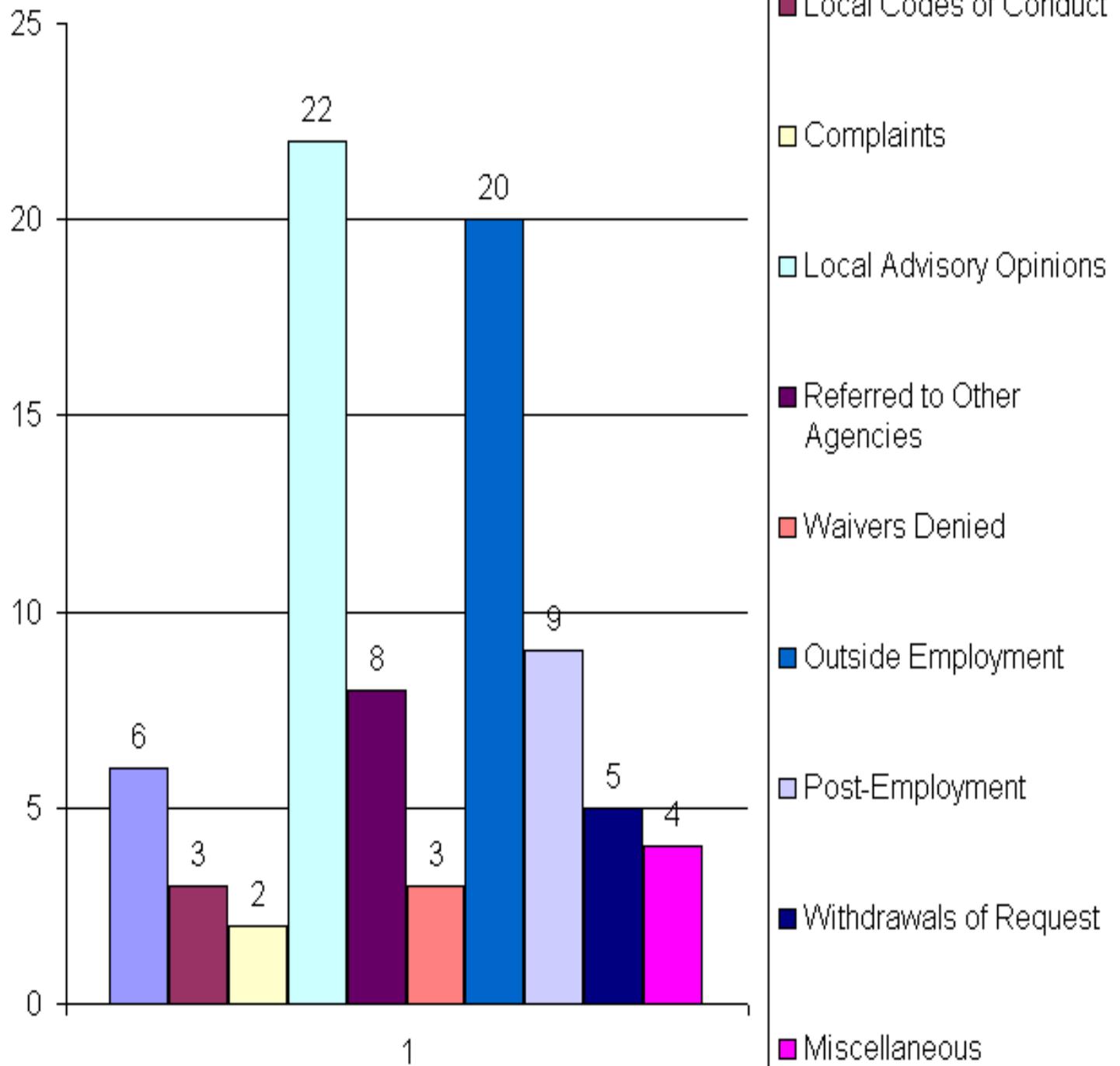
### **Administrative Assistant Jeanette Longshore**

Jeanette Longshore was hired in 2006 as a temporary employee when the Commission's full-time State administrative specialist was absent. She was hired full-time in June 2007.

Ms. Longshore worked at Delaware Technical Community College, Hewlett-Packard, and Agilent Technologies. She has experience in Microsoft Word, Excel, Access, and other computer skills. She performs day-to-day administrative functions, updates the Commission's website calendar with agendas and minutes, and attends and takes minutes at the meetings, etc. Recently, she attended an advanced class in MS Access. She has trained in various systems, such as Mobius, and attended Managing Records Created on Personal Computers/Electronic Mail, a 3-day Budget course, an aid in managing PIC's Budget.

**III. Actions Before the Commission in 2008 Chart**

**Actions Before the Commission in 2008**



## ***IV. Laws Administered by the Commission***

### ***A. Code of Conduct for the Executive Branch and Local Governments***

**Subchapter I, Code of Conduct – Ethical Standards for the Executive Branch and 51 local governments**

**Subchapter I, Code of Conduct**—Ethics Rules to Avoid Conflicts of Interest for the Executive Branch and 51 local government ethics, and procedures for advisory opinions, waivers and complaints for the entire Chapter.

**Purpose:** Instill the public's respect and confidence that public servants will base their actions on fairness, rather than bias, prejudice, favoritism, etc., arising from a conflict of interest.

**Jurisdiction:** All Executive Branch employees (rank and file, including part-time), officers (elected and appointed Senior Level Executive Branch officials), and honorary State officials (Board and Commission appointees). Approximately 48,000 persons are in those categories. It also applies to 51 local governments, with the number unknown.

#### ***The 12 Rules of Executive Branch and Local Government Ethics***

**(1) State Position:** Public servants may not make official decisions if they have a personal or private interest in the decision. Personal or private interests require recusal from official dealings with relatives, personal friends, other employers, etc. This is to avoid self-dealing and/or bias (positive or negative) due to a personal conflict.

**(2) Bar on Private Activities:** They cannot go before their own agency to represent or otherwise assist a private enterprise, whether paid or not by a for profit or non-profit entity. Private entity also includes any personal private contracts with their agency. In effect, they may not lobby their own agency to award grants-in-aids, contracts, or other government services to a private enterprise. Aside from barring any

formal representation, the law bars “otherwise assisting” the private enterprise, e.g., drafting a response to requests for proposals, etc. This does not mean the private enterprise cannot seek such services, only that the government employee must avoid any matters on the organization’s behalf. This prevents colleagues and co-workers from biased decisions, and prevents a “leg-up” for the private entity over competitors. .

### **(3) Bar on Concurrent Private Activities for Rank and File Employees**

**(a)** As rank and file employees are only barred from dealing with their own agency, they may deal with other agencies in their private capacity. However, if they are seeking a contract from another agency, it must be publicly noticed and bid if for more than \$2,000. This is a much lower threshold for public notice and bidding if public servants seek the contract than for non-public servants. Under the procurement law, public notice and bidding is required for non-government bidder on professional contracts of more than \$50,000. The agency decides if contracts for small amounts are publicly noticed and bid. If they do not have public notice and bidding down to the \$2,000 threshold, State employees are barred from that contract. This adds another layer to the restriction on dealing with one’s own agency. Removal from dealing with the individual’s agency lowers the chance for favoritism, and the public notice and bidding requirement publicly exposes dealings with other agencies to avoid even the appearance that public servants are awarded contracts out of favoritism, undue influence or conflicts of interest. Contracts for less than \$2,000 must show arms’ length negotiations--that means distance from self-dealing (Rule 1); from own agency (Rule 2), and a fair market value price.

**(b)** If the public servant has a financial interest in a private enterprise that is doing business with, or is regulated by the State, they must file a full disclosure with the Commission as a condition of commencing and continuing employment with the

State. Full disclosure is to insure that a direct connection between the private enterprise and the public servant's government are more closely monitored for any potential conflicts.

**(4) Bar on Concurrent Private Activities – Non-Legislative Elected and Senior Level Officials.** These officials are not only barred from representing or assisting a private enterprise before their own agency, but are barred from dealings with any agency in their own government. This is because the influence carried at that level may effect decisions by persons from any agency.

**(5) Acquiring Financial Interests:** While a public servant can continue to hold financial interests acquired before they had decision making authority over a private enterprise, as long as they recuse, they cannot acquire it when they know they will be directly involved in making official decisions over that private enterprise.

**(6) Accepting anything of monetary value:** Whether it is other employment, a gift, compensation, payment of expenses, or other things of monetary value, it cannot be accepted if acceptance may result in:

**(a) impaired judgment in performing official duties.** The Commission looks for compliance with Rule 1.

**(b) preferential treatment to any person either the giver or the public servant to whom it is offered.** The Commission looks to the purpose of each of the 12 rules to insure a lack of favoritism at either end, to avoid the appearance that the giver is trying currying favor with the public servant, or the public servant wants to privately benefit;

**(c) official decisions outside official channels:** This is to avoid public servants doing through the “back door” that which they could not do through the “front door.” For example, if they are required to recuse (Rule 1), but unofficially try to

influence the decision makers, or unofficially promise they can get preferential treatment to the giver, that would fall within this category.

**(d) any adverse effect on the public's confidence in its government.**

This is basically an appearance of impropriety test. Even if there is no actual violation, the Commission determines if knowledge of all the relevant facts would create “public suspicion” of a violation. This goes a step beyond an actual violation, so that the public's confidence is further instilled by knowing that even appearances of a conflict can be a bar to a public servant acting on government matters.

**(7) Restrictions applying to any Interest:** Public servants may not have any obligation or interest substantially conflicting with their public duties. Public duties must command precedence over any private duty, or it may follow that the public duty is violated.

**(8) Post-Employment Restrictions:** For 2 years after ending public service, former employees have limits on their private sector activities. They are not completely barred from dealing with their government. Rather, to encourage citizens to enter public service, the rule is not so stringent that they would turn down public service because of concerns of difficulty in going back to the private section because of post-employment restrictions.

The bar applies if a former employee, paid or not, is asked by a private entity to work on matters where they: (a) gave an opinion—(final or not); (b) conducted an investigation; or (c) were otherwise directly and materially responsible for the matter while in the government. This is to avoid a “windfall” in a private job based and to insure the private entity does not get a “leg-up” on competitors.

**(9) Misuse of Public Office:** This is essentially the theme of any situation where the individual acts in the face of a conflict.

**(10) Improper Disclosure of Confidential Information:** The government may acquire personal information on those receiving services, or acquire confidential personnel information on its employees, or investigations, etc. Barring improper use or disclosure is

to insure that even the most modest norms of privacy are protected.

**(11) Sex for Favorable Treatment:** It cannot be explicitly stated or implied that a person seeking government services will receive favorable treatment in return for sex. This is meant to protect the public from such harm.

**(12) Suspicion of Violating the Public Trust:** Like the test on creating an adverse effect on the public's confidence, this is basically an appearance issue: if a reasonable person, knowledgeable of all relevant facts would believe it appears to violate the rules. It is applied in conjunction with one of the other rules. It cannot stand alone because of concerns of "ad hoc" decisions, or use for tactical reasons to get officials to recuse.

**Penalties:** Both criminal and/or administrative penalties may be imposed.

**(a) Criminal Prosecution:** Some standards are so "vital" they carry be criminal penalties. Four rules have penalties of up to a year in prison and/or a \$10,000 fine.

- ✚ A personal or private interest tending to impair judgment in official duties;
- ✚ Representing or assisting private entities before their agency and/or other agencies;
- ✚ Contracts without public notice and bidding or arm's length negotiations;
- ✚ 2-year bar on private work on certain matters after leaving employment.

**(b) Administrative Sanctions**

- (1) letters of reprimand/censure to any person;
- (2) removing, suspending, demoting, or other appropriate disciplinary

action, except for elected officials;

(3) recommending removal from office of an honorary official; or

(4) referring contracts violating the law to the issuing agency to decide if it will void the contract; and

(5) referring suspected violations of other laws to appropriate authorities.

### *2008 - Code of Conduct Actions*

**Litigation:** For the first time, since the 1991 law created the Commission, two officials appealed advisory opinions. They are discussed below.

**Advisory Opinions:** Most requests were on private employment, as either a concurrent job or a post-employment job—29. Most others were opinion requests on local officials' conduct and reviews of local government Codes of Conduct to decide if they were at least as stringent as State law—25.

## *Litigation*

For the first time since the Commission was created in 1991, two appeals were filed with the Superior Court. In the first case, the Court held that: (1) the Commission could accept requests for advice from persons other than the employee or official's conduct would comply with the law; (2) the Commission had followed the statute and rules in acting on the advisory request; and (3) advisory opinions cannot be appealed. The initial advice and the reconsideration opinions, PIC's motion for the Superior Court to dismiss, and the Court decisions are at this link. [Post v. Public Integrity Commission](#). A second appeal of an advisory opinion was filed after the [Post](#) decision. Advisory and reconsideration opinions are at this link: [King advisory opinions](#). This appeal was also filed in the Superior Court, except in a different County.

The allegations were that the Commission failed to follow statutory procedures on a complaint; that it had no jurisdiction over local officials; etc. The Commission filed a motion to dismiss: [PIC's Motion](#). Shortly after the motion, the appeal was voluntarily dismissed at the request of Mr. King's attorney.

## **B. *Financial Disclosure & Ethics Disclosure Requirements***

**Subchapter II, Financial Disclosure** - The reports are public records filed by public officers in the Executive, Legislative and Judicial Branches, and by State Candidates. The initial filing is made shortly after becoming a public officer (14 days), and annually thereafter. Local government officials are specifically exempt from this State law. However, some have local ordinances requiring this type of disclosure. The report is only a snapshot of the financial interests, frozen as of the date of the information.

**Reporting Requirements:** Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit; assets held with or by their spouses and children, regardless of direct benefits; and report their own creditors and creditors arising from joint debts.

**Purpose:** To allow the public to view sources of financial interest, whether assets or debts, which is meant to instill the public's confidence that officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. 29 Del. C. § 5811. Identifying the interests helps the public officer recognize a potential conflict between official duties and financial interests that may require recusal or ethical guidance. Whether recusal is or is not required would be determined under the Conflict of Interest Rules for each branch of State Government. If those financial interests, or others later incurred, raise ethical issues in day-to-day functions, the conflict issue is decided under the ethics laws for that officer--Executive Branch officers - Code of Conduct, 29 Del. C., Ch. 58;--Legislative

Branch officers - Legislative Conflicts of Interest, 29 Del. C. Ch. 10;--Judicial officers - Code of Judicial Conduct, *Delaware Rules Annotated*.

**Jurisdiction:** More than 300 “public officers” in the Executive, Legislative, and Judicial branches must file reports. They include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. As State candidates must file, the number of filers varies depending on the number of candidates in a given year.

**Penalties:** 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 to the AG for investigation and prosecution. *Id.* The penalties are:

(1) up to six months incarceration and/or a fine of up to \$1,150 for a Class B misdemeanor, 11 Del. C. § 4206(b); and

(2) up to one year incarceration 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).

### **Other Disclosures by the Executive Branch and Local Governments**

#### **Code of Conduct Disclosure:**

**Jurisdiction:** All State and local government employees, officers and appointees to Boards and Commissions must, as a condition of commencing and continuing employment file a “full disclosure” of financial interests in a private enterprise that does business with, or is regulated by, their government. 29 Del. C. § 5805(d) & 5805(d).

**Reporting Requirements:** For this disclosure, “financial interest” means: (1)

ownership or investment interests; (2) receiving \$5,000 or more as an employee, officer, director, trustee or independent contractor; or (3) a creditor of a private enterprise.

Not only does this law apply across the board, rather than just to Senior level officials, it requires more details than in reports. For example, Subchapter II, Financial Disclosure, requires only a list of the source of the financial interests, not the value, and only if it is just above the appropriate threshold amount. "Full disclosure" requires enough facts for the Commission to decide if a potential or actual conflict exists. *Commission Op. No. 98-23*. The law is rational in that once a financial interest is directly connected to the State or local government, a more immediate chance of a conflict may arise.

**Penalties:** The Commission has statutory authority to take action regarding their commencing and continuing employment with the State.

## *2008 Financial Disclosure Law Commission Actions*

**Failure to File:** Six (6) Candidates for State office failed to file a financial disclosure report. The Commission referred those matters to the Attorney General's office to prosecute at his discretion. As of the date of this publication, no action to prosecute has been taken.

Eighty-four (84) State candidates and 324 incumbent public officers were sent reminders to file, with a list of things of value if given to them by lobbyists. If the report did not meet the due date, individuals were sent additional reminders. If not filed after that the new date, the Commission referred the matters to the Attorney General. Reports are reviewed for discrepancies, and notice is sent to resolve the discrepancy..

**On-line filing:** The Commission actively assisted public officers with on-line filing to help reduce costs. Two-hundred fifteen (215) filed on line, and eighty-eight (88) filed by hard copy. On-line filing totaled 61%. This was a reduction from last year. However, one reason the numbers went down was that not all 84 State candidates chose to file on-line.

## **C. *Dual Compensation Law***

**Subchapter III, Dual Compensation Policy** - Monitoring officials holding dual government jobs to prevent “double-dipping;” and enforcement procedures.

**Jurisdiction:** Elected or paid appointed officials with a second government job in the State or local government.

**Purpose:** Bar individuals from pay by two tax-funded agencies for the same hours.

“Double-Dipping” is avoided by more stringent time card requirements. The individual must clock out with approved annual leave, approved leave without pay, or approved compensatory time from their first job to go to their second job, or have their pay pro-rated. Supervisor must verify the time the individual left the first job. The Auditor is to audit the time cards annually. A public report is issued. Link: [Auditor’s 2008](#).

**Penalties:** Discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under appropriate criminal laws. If the dual jobs raise conflicts for Executive Branch members, the Code of Conduct penalties could apply.

## *2008 Dual Compensation Actions*

The Auditor's Office published its annual Dual Compensation audit. It had obtained advisory opinions from the Attorney General. After learning of the opinions, the Commission wrote to the Auditor, AG, and Controller General that, by law, only the Commission has the duty to advise on the law. It noted that Courts have said that if officials go to the wrong agency, they cannot use an "estoppel defense." The Auditor's office has sought the Commission's advice on the law before, but this time, he responded that he would continue to go to the AG, rather than PIC. [Link: 0808](#).

## *Dual Compensation Cases*

<b>Dual Compensation Cases</b>		
<p><a href="#"><u>Reeder v. State Representative Nancy Wagner.</u></a></p> <p>A private citizen sued the Representative alleging she violated the Dual Compensation law which bars elected State officials, and others, who are also employed by a State agency or educational institution from pay by both entities for overlapping hours. <a href="#"><u>29 Del. C. § 5822.</u></a> She worked for a school district and used her “duty free planning period” to perform her paid legislative duties without adjustment to her teachers’ salary.</p> <p>Complainant sought injunctive relief to stop receipt of alleged dual pay, and monetary relief by reimbursement of the State Treasury for any dual pay.</p> <p>The merits were not reached. Complainant lacked standing as only the Attorney General can represent the State on litigation where matter is of statewide interest. <a href="#"><u>29 Del. C. § 2504.</u></a></p>	<p><b>Del. Super., C.A. No. 06C-09-025 J. Cooch (12/04/06)</b></p>	<p><b>Order. Dismissed for Lack of Standing</b></p>
<p><a href="#"><u>Robert P. Reeder and John D. Flaherty v. Hon. Nancy Wagner, et al.</u></a></p> <p>The allegations against the Representative were the same as above. However, the initial complainant was joined by another citizen, and they added to the “double dipping” claim against her, that the State Auditor failed to audit the time records, and also named the School Board Superintendent. <a href="#"><u>29 Del. C. § 5822 and § 5823.</u></a> The relief sought was Declaratory Judgment, as opposed to an injunction in the above.</p> <p>Chancery Court had no jurisdiction as it is an equity court. It cannot decide matters if a sufficient remedy exists under common law or statute through any other State Court. <a href="#"><u>10 Del. C. § 342.</u></a> The Superior Court has authority to consider Declaratory Judgments.</p>	<p><b>Del. Ch., C.A. No. 2907 V.C. Lamb (11/01/07).</b></p>	<p><b>Order. Transferred to Superior Court</b></p>

[Reeder v. Honorable Wagner, et al.](#)

Appeal of Superior Court decision dismissing the complaint for lack of standing and lack of an actual controversy. (C.A. No. 07C-11-016—unavailable. This was the Superior court action after transfer by chancery court).

They sought declaratory relief for (1) alleged violations of the Dual Compensation law by the Legislator; and (2) State Auditor’s failure to audit State employee time records. 29 Del. C. § 5822 and § 5823. The Superior Court had ruled that complainants had no standing and no actual controversy existed.

For plaintiff must show an “injury in fact,” a causal connection, and the likelihood the Court will favorably address the injury. The suit could not be considered a tax-payers’ claim because it was not to stop the misuse of money, but to have the Auditor perform discretionary duties to audit only one official.

**Del. Supr., No. 435,  
2008, June 2, 2009.**

**Order. Superior  
Court affirmed.**

## ***D. Lobbying Law***

### **Subchapter IV, Lobbying Registration, Authorizations and Expenses**

**Subchapter IV, Lobbying**—Public Records of Lobbyists’ registrations, authorizations, and expense reports of those lobbying at the State level.

**Jurisdiction:** In 2008, 319 lobbyists were registered to represent 748 entities. Aside from registrations and authorizations, the lobbyists filed 2,992 expense reports showing amounts spent on General Assembly and/or other agency members.

**Purpose:** Registering and reporting identifies special interest groups for the public and officials. That is so the people’s voice is not drowned out by special interest groups.

**Report requirements:** Registrations provide specific information on the lobbyist. Authorizations give specific information on the entity represented. Expense reports must show the total expenditures and the identity of the public servant if more than \$50 is spent. They must affirm notice to the official. No expenditures also must be filed.

**Penalties:**

**Criminal:** Failing to register, or giving false information, are misdemeanors.

**Administrative:** Failure to file is a voluntary cancellation, and lobbyists may not re-register or lobby until all delinquent reports are filed.

## *2008 Lobbying Law Commission Actions*

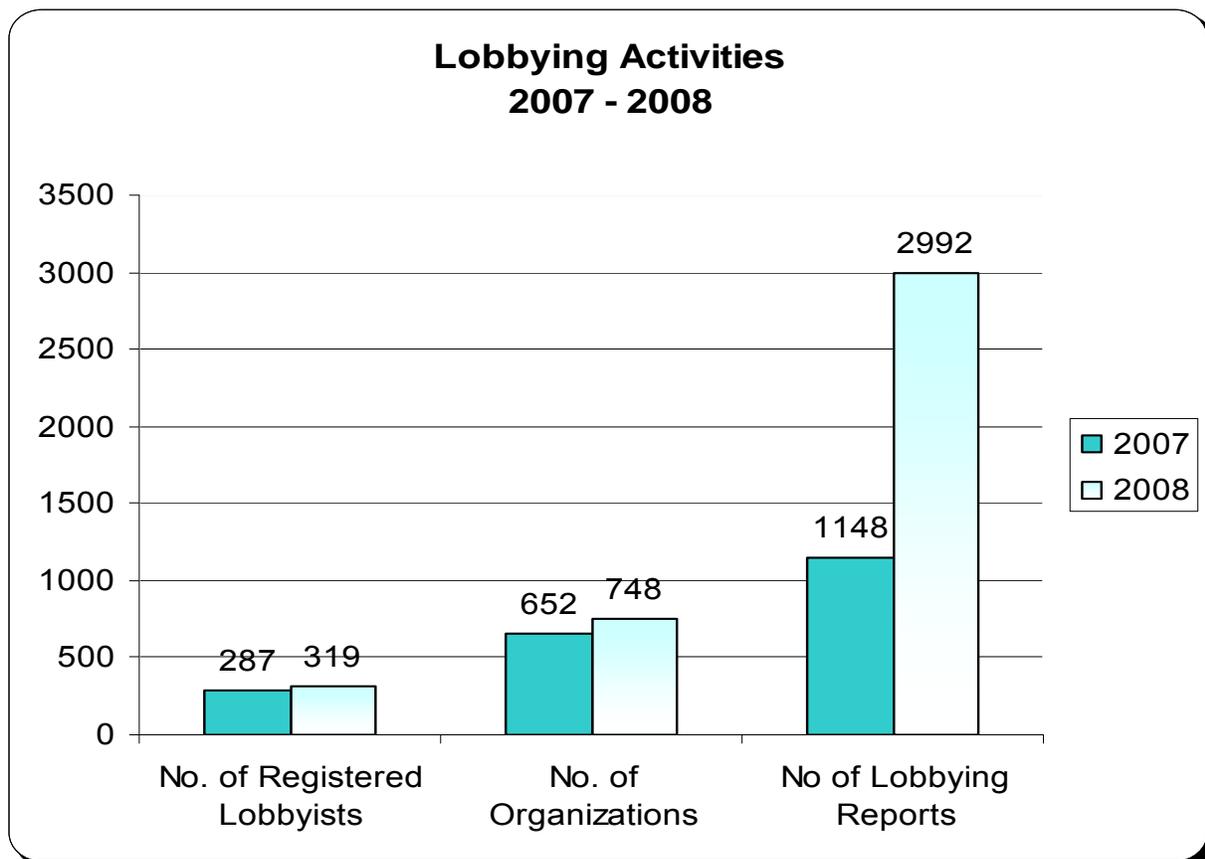
**Complaints:** Dismissed. It was alleged that two lobbyists had not registered.

However, the Commission's database showed they registered several months earlier.

**Failure to File:** In 2008, six lobbyists' registrations were cancelled for failing to file reports. The list goes on the Commission's web site, and is posted in Legislative Hall.

**On-line Filing:** Approximately 99% filed on-line.

### *Lobbying Activities Chart Comparing 2007-2008*



## V. Training: The Tool for Promoting Government Ethics

The Public Integrity Commission Act tasks the Commission with training. No previous agency handling these laws gave training.

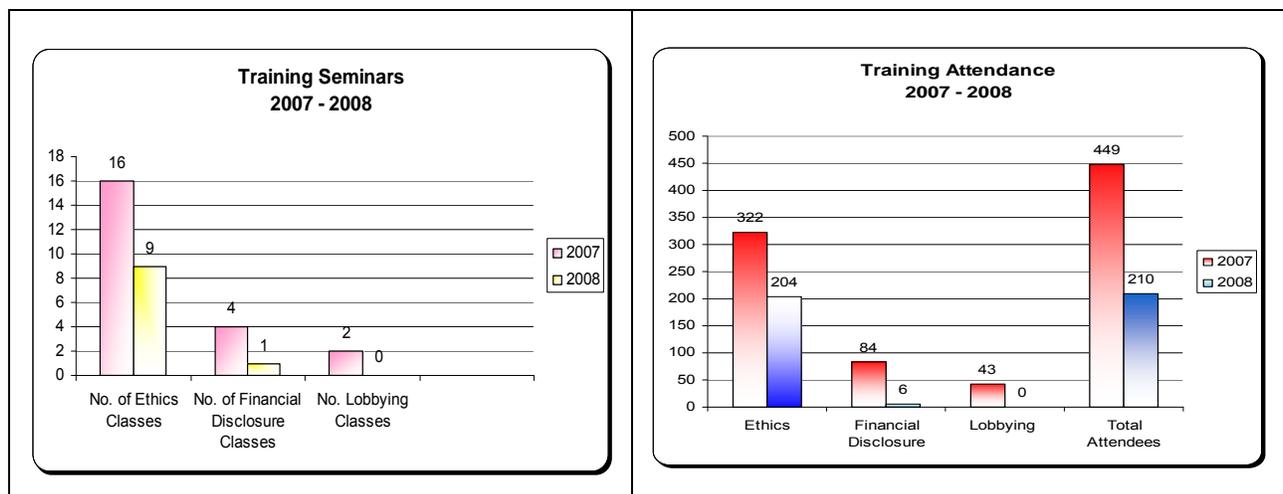
In January 1995, the first week of employment for the Commission's Counsel, Financial Disclosure training was given to then-Governor Thomas Carper, his Cabinet and staff.

The first year of training saw an 86% increase in requests for advisory opinions, showing that public servants' strong interest in complying.

Training covers the laws, obtaining advice, filing complaints, responding to complaints, etc. Tools are opinion synopses, brochures, bulletins, and the Commission's website.

Education remains the Commission's primary focus. The lower number of classes and attendees for 2008, in part reflects: (1) in 2008 there were no new decisions or any changes to on-line filing; (2) two Financial Disclosure classes were cancelled for lack of attendees; and (3) the law does not require anyone to attend.

### Training Charts, Classes and Publications



**(1) Training and Publications - 29 Del. C. § 5808(A)(a)(1)**

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials for trainees and for public distribution, etc., are the Commission Counsel's statutory duties. *Id.*

To best assist employees, officials and lobbyists in understanding and complying with the law, the Commission's primary focus is training. Handouts of publications are distributed to trainees which can be reviewed later to reinforce class training. The class evaluations show that attendees find the publications most helpful. However, due to budget constraints in 2008, the Commission reduced the number of hard copy publications that are distributed to trainees. It also reduced the number of hard copies distributed to the public. Trainees and the public are referred to the Commission's website. However, the Commission previously conducted a survey to see if trainees would use a CD instead of hard copies, and the result showed that none of them did. The concern is that if they did not want to use that non-paper system, they may not want to use the website either.

**Ethics Training:** For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief case examples is provided at training. It also gives procedures for obtaining advice or waivers, and filing or responding to complaints. Opinion synopses have specific cases decided over the years. Previously, hard copies of all synopses were distributed at training. To reduce costs, the Commission is only providing synopses from 1991 through 1995, and referring trainees to its website, even though trainees evaluations reflect that the hard copy handouts were the most valuable tools from the training.

In 2008, nine Ethics classes were given, with 204 attendees.

**Financial Disclosure Training:** Six new General Assembly members were given financial disclosure training at their Legislative Orientation in November 2008. The Commission scheduled two financial disclosure classes for others but they had to be cancelled due to lack of registrants—only one person registered. This is the first year any class was cancelled due to lack of registrants. Notice was sent to all public officers that if they wished to schedule a training session just for persons in their agency who must file, it could be done. No agency requested the training.

At the end of 2008, the Commission, to save on its budget, ceased publication of the yearly financial disclosure synopses used as a training handout. Copies of the slides will continue to be distributed. This information is also on the Commission's website.

**Lobbying Training:** No classes were requested. Again, to save costs, the Commission does not publish Lobbying Synopses hard copies. They are on the website.

**Website Publications:** Non-confidential publications are on the web site. Previously, synopses were added annually after all decisions for a particular year were completed. Now, after the meeting minutes are approved, they are filed on the Commission's calendar of events within 5 workdays after being approved. This insures those subject to the law, and interested members of the public, are current on the Commission's activities and decisions. The web site also includes the statutes, all Ethics Bulletins, a brochure on Delaware's gift laws, the Commission's rules and its annual reports. For Financial Disclosure filers and Lobbyists, it has instructions so they can complete on-line filing. Lobbyists can link to the Legislative Bill Drafting manual if drafting legislation for their clients. The site links to related laws like the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

## Website Publications and 2008 Hits

The following snapshot of the Commission's website identifies all materials available to those subject to the law, and to the public, followed by data on the use of the website.



# Delaware Public Integrity Commission

<b>Code of Conduct</b> <a href="#">Statute</a> <a href="#">Opinion Synopses</a> <a href="#">Ethics Bulletins</a> <a href="#">Ethics Disclosure</a> <a href="#">Ethics Brochure</a> <a href="#">Executive Order - Gift Limits</a>	<b>Financial Disclosure</b> <a href="#">Statute</a> <a href="#">Opinion Synopses</a> <a href="#">Ethics Bulletin</a> <a href="#">Executive Orders</a> <a href="#">Consanguinity Chart</a> <a href="#">Instructions and Forms</a> <a href="#">FOIA AG Opinion</a>	<b>Lobbying</b> <a href="#">Statute</a> <a href="#">Opinion Synopses</a> <a href="#">Ethics Bulletin</a> <a href="#">Lobbyist List</a> <a href="#">Related Laws</a> <a href="#">Lobby Reports</a> <a href="#">Bill Drafting Manual</a> <a href="#">FOIA AG Opinion</a> <a href="#">Executive Order - Gift Limits</a>
<b>Annual Report</b> <a href="#">Index of Annual Reports</a>	<b>Commission Rules</b> <a href="#">Index of Commission Rules</a>	<b>Lobbying Registration</b> <a href="#">◆ New Lobbyists</a> <a href="#">◆ Current Lobbyists</a>
<b>Compensation Policy</b> <a href="#">Statute</a> <a href="#">Opinion Synopses</a> <a href="#">Ethics Bulletin</a>	<b>Related Laws</b> <a href="#">Delaware Gift Laws</a> <a href="#">Legislative Conflict Laws</a> <a href="#">Judicial Code of Conduct</a>	



Delaware Courts



Governor's Office



Delaware Code



Legislature



Election's Dept

## 2008 Web Site Hits, except for the Lobbying and Financial Disclosure on-Line hits, which follow this chart.

Month	Unique visitors	Number of visits	Pages	Hits	Bandwidth
Jan 2008	1037	1848	4803	25623	441.53 MB
Feb 2008	856	1458	4337	20771	411.77 MB
Mar 2008	801	1351	3343	15177	405.92 MB
Apr 2008	900	1670	3963	22303	393.67 MB
May 2008	755	1382	2853	14169	381.13 MB
Jun 2008	897	1462	3279	15282	310.78 MB
Jul 2008	923	1551	3543	22636	398.99 MB
Aug 2008	614	1170	2942	16275	289.65 MB
Sep 2008	687	1283	3528	15889	332.27 MB
Oct 2008	766	1377	3398	21817	414.61 MB
Nov 2008	1270	2151	4634	29518	699.80 MB
Dec 2008	794	1620	3627	20472	463.43 MB
<b>Total</b>	<b>10300</b>	<b>18323</b>	<b>44250</b>	<b>239932</b>	<b>4.83 GB</b>

## Hits on the Lobbying and Public Officer On-Line Filing Databases

Report: Summary - www.delawaregov.us		Export:
Date Range: 01/01/2008 - 12/31/2008		   
Total Sessions	16,898.00	
Total Page Views	85,397.00	
Total Hits	189,148.00	
Average Sessions Per Day	46.17	
Average Page Views Per Day	233.33	
Average Hits Per Day	516.80	
Average Page Views Per Session	5.05	
Average Hits Per Session	11.19	
Average Length of Session	00:04:39	

## **(2) Advisory Opinions - 29 Del. C. § 5807(c)**

Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them.

While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waivers based on a particular fact situation gives personal attention to the individual with a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. 29 Del. C. § 5807(a) and (c). Those opinions later become the latest updates for the training classes.

In 2008, the most recent information on the Superior Court's decision concluding that the Commission can accept requests from public servants even if they are not the subject of the request, and that advisory opinions cannot be appealed was added to the training.

## **(3) Waivers - 29 Del. C. § 5807(a)**

Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. Any waiver granted becomes a public waiver so the public will know why that particular individual was allowed to deviate from the law. Making the information public instills confidence because an independent body made that decision based on the particular facts of that situation. It also gives the public better exposure to the Commission's deliberation process which may not be as clear when only synopses, without any facts identify the individual's type of or other identifying facts.

Waivers are rare. In 2008, three post-employment waivers were sought. None were granted. They are only given if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or

employee.

**(4) Complaints - 29 Del. C. § 5810(a)**

Any person, public or private, can file a complaint.

Where training, advice, or waivers fail, the Commission can enforce compliance through the complaint process.

The Commission may act on sworn complaints, or its own initiative, on violation allegations. A majority (4) must find “reasonable grounds to believe” a violation occurred. 29 Del. C. § 5808(A)(a)(4). If probable cause is found, the Commission may conduct a disciplinary hearing. 29 Del. C. § 5810. The person charged has statutory rights of notice and due process. 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 discipline. 29 Del. C. § 5810(d). It may also refer substantial evidence of criminal law violations to appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Conversely, frivolous or non-merit complaints, or those not in the Commission’s jurisdiction, may be dismissed. 29 Del. C. § 5809(3).



# DELAWARE PUBLIC INTEGRITY COMMISSION

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Phone (302) 739-2399 Fax (302) 739-2398

## VI. *Legislation of Interest - 144<sup>th</sup> General Assembly (2007-2008)*

➤ *Budget*: FY09 PIC Operating Funding - \$40,100 - same for 13 Fiscal Years.

➤ *Lobbying - H.B. 68*: Amend Lobbying Law to restrict Legislators from Lobbying for One Year after their term expires. Similar proposal for Senior Level Executive Branch officials. At present, Executive Branch and Local Government public servants have a 2-year post-employment law. H.B. 68 would overlap with it for the first year. The Commission submitted comments. The bill nor its amendments were passed before the 2007-2008 session ended.

➤ *Lobbying - S.B. 172*: Bars gifts from lobbyists to General Assembly, State employees, and officials. This legislation did not pass by the end of the 144<sup>th</sup> Legislative Session.

➤ *Local Government Conflicts of Interest - S.B. 195*: Amends Milton's Charter to give elected officials authority to decide conflicts of other elected officials. The Commission provided comments. The Charter was approved with an amendment removing the elected officials as the decision making, to provide that the Public Integrity Commission, or a subsequent local Ethics Commission, would decide conflicts.

➤ *Other Legislation of Interest*: A chart of all monitored legislation follows. For most recent action on the legislation, each bill is linked to the General Assembly's web site. Legislation that has not been signed into law in the 1<sup>st</sup> session of the 144<sup>th</sup> General Assembly can be considered in the 2nd session.

**SENATE LEGISLATION**

<b>BILL #</b>	<b>SYNOPSIS</b>	<b>REASON FOR MONITORING</b>
<a href="#">S.B. 40</a> <b>Senate Exec. Committee</b> <b>3/13/2007</b>	Prohibits legislators who are State employees from serving on Bond Bill & Joint Finance Committees.	Amends legislative conflict law. PIC administers dual employment law re: advice etc. PIC will have additional duty of legislative ethics training if H.B. 349 passes.
<a href="#">S.B. 84</a> <b>Signed 7/24/07</b>	Replaces & updates Title 24, Pharmacy chapter. Provides that Board appointees are subject to the Code of Conduct.	Board & Commission members are already subject to the Code, but provisions in their enabling law helps reinforce the Code.
<a href="#">S.B. 88</a> <b>Stricken</b>	Amends 24 Del. C., Ch. 52, Board of Examiners for Nursing Home Administrators. Provides Code of Conduct applies to Board members.	See above purpose; see passage of legislation below.
<a href="#">S.B. 94</a> <b>Signed 7/5//07</b>	Nursing Home Administrators – See above	See above
<a href="#">S.B. 135</a> <a href="#">SA 1 to SB 135</a> <b>Senate Exec. Committee 6/13/07</b>	Freedom of Information Act - Gives 10 days, minus weekends & holidays to respond to public records request; minutes to be no later than 30 days from meeting date or by the next regularly scheduled meeting, whichever is first. Make reasonable efforts to accommodate # of people who might attend.	PIC is subject to FOIA. Usually responds same day or next day. Related legislation passed last year – have agenda on State calendar 7 days before meetings; post minutes within 5 days of approval. Has always met deadline. Results in 2 sets of minutes, as PIC's minutes are mainly confidential; rewritten to avoid identities of those who come before PIC if no violation.
<a href="#">S.B. 164</a> <b>Signed 07/09/2008</b>	S.A. 1 = Technical Corrections	PIC – Candidates to file financial disclosure. Will work with Elections Board to get list and notify candidates as it does with any other candidate for State office.

<p><a href="#">S.B. 166</a> <b>Signed 3/20/08</b></p>	<p><b>Truth in Testimony. Amends “swears falsely” in perjury crimes, for sworn and unsworn statements, if given the privilege of the floor at General Assembly sessions.</b></p>	<p><b>PIC regulates lobbyists who appear before the General Assembly. Lobbyists will be advised if passed.</b></p>
<p><a href="#">S.B. 190</a> <b>Senate Finance Committee 1/24/08</b></p>	<p>Appropriations through June 30, 2009</p>	<p>PIC - \$40,100 – same since 1996 except years when cut.</p>
<p><a href="#">S.B. 196</a></p> <p><b><u>S.A. 1</u></b></p> <p><b><u>H.A. 1</u></b> <b>Signed On 03/26/2008 as amended.</b></p>	<p>Amends Milton’s Town Charter to have Mayor &amp; Council decide conflicts.</p> <p><b>Stealth Legislation:</b> PIC unaware Charter would give Town officials decisions over conflicts until day before hearing. PIC delivered letters saying the change was contrary to State law. It suggested an amendment to clarify that an independent Board must decide. It was too late for the House to act as it was out of Committee and to the floor before they had time to read PIC’s letter. However, the Senate amended as PIC recommended. It went back to the House &amp; passed.</p>	<p>Charter amendment is contrary to State law which places the conflict duty only on PIC unless it approves a local Code which also must have independent board, not political figures, to make conflict decisions.</p> <p>NOTE: This “stealth legislation” was submitted by the Mayor of Milton who had obtained an advisory opinion from the Commission saying it was improper for him to appoint his brother to the Town’s Zoning Board. Aside from this attempt to avoid PIC’s “interference” he also filed an appeal of PIC’s decision. See Litigation Section.</p>
<p><a href="#">S.B. 199</a> <b>Signed 5/1/2008</b></p>	<p>Housekeeping: deletes outdated terms: “associate” and “resident:” judges &amp; justices in Financial Disclosure law.</p>	<p>Prior legislation removed the terms in other laws. PIC asked for this technical change to the financial disclosure law. Will change in public officer database, etc.</p>



<p><a href="#">H.B. 155 A. 1 thru 5</a></p>	<p>Creates Inspector General Office. To be given office space &amp; staff by Secretary of State “Secretary shall have no oversight and control similar to the Public integrity Commission.” H.A. 2 – Definitions almost identical to PIC’s</p> <p>H.A. 3 – 5 e.g., appropriations; tech. change</p>	<p><b>Reinforces PIC’s independence.</b></p>
<p><a href="#">H.B. 196</a></p> <p><b><u>H.A. 1 - Stricken</u></b></p> <p><b><u>H.A. 2</u></b></p> <p><b><u>H.A. 3</u></b></p>	<p>Lobbying Law: 1-year after terminating, no lobbying by Legislators, Cabinet Secretaries, Office Heads, &amp; Gov.’s Staff.</p> <p><a href="#">H.A. 1 would have removed Exec. n on State matters if they were responsible.</a></p> <p><a href="#">H.A. 2- Lobbying Law – re: definitions.</a></p> <p><a href="#">H.A. 3 – adds</a> any person elected to State office</p>	<p>PIC Administers Lobbying Law – See Comments under H.B. 68</p> <p>PIC already gives Executive Branch post-employment trng; would add this; and add to Legislative trng if H.B. 349 passes.</p>
<p><a href="#">H.B. 248</a></p>	<p>29 Del. C. § 9004C. Signing - Acceptable Use of Computers for personnel file.</p>	<p>PIC employees signed current policy. Will comply with new policy. PIC trng reinforces.</p>

<p><a href="#">H.B. 250</a></p> <p>Signed 7/7/07</p>	<p>Fiscal Year 2008 Appropriation Act.</p> <p>Section 33. Amend §5806 of Title 29 of the Delaware Code: New subsection (i): Notwithstanding 29 Del. C. c. 58, 59, 69 &amp; the Merit Rules, State employees may contract with the State as foster care or respite providers with State paid fees if they do so at other than assigned State hours. Cannot participate in reviewing or disposing of foster and/or respite care if they have a personal or private interest &amp; may not be monitored or reviewed by other State employees who are more junior or related to them.</p>	<p>Appropriate \$204.9 for PIC personnel and operating costs.</p> <p><b>Stealth Legislation:</b> Foster Care. Health &amp; Social Services. Used budget bill to overturn PIC's ruling that DHSS must follow Ethics laws: (1) State agencies to publicly notice &amp; bid contracts of more than \$2,000 if State employee wants contract. Avoids bias appearance in awarding &amp; regulating by their agency. Public notice &amp; bidding benefit: DHSS said it needs more providers so public notice lets citizens know of need; (2) State employees may not do business with or be regulated by own agency. Insures colleagues or co-workers do not evaluate their care as a provider; they will not feel pressured by Senior officials to be a provider; or feel their job ratings depend on being a provider; (3) PIC's advice protects against a complaint. PIC's ruling noted a complaint alleged a DHSS employee she double-dipped. They may think this legislation protects them. A separate law covers double dipping so complaints could still be filed; (4) employees with State contracts must file disclosures with PIC to begin &amp; continue State jobs.</p>
<p><a href="#">H.B 334</a></p> <p>House Admin. Committee</p> <p>Out of Committee 4/23/08</p>	<p>Provides for Searchable Budget Data Base for State spending – including salaries, funding sources, compliance with performance measures, etc., back to FY 2008. At later date, Director to try to add the past 5 years</p>	<p>Applies to PIC's Staff and Commissioners – Agency (PIC) to provide data to Budget Office</p> <p>Would become effective January 1, 2009.</p> <p>Additional Administrative Work</p>

<p><a href="#">H.B. 349</a></p> <p><a href="#">HA 1 to HB 349 –</a></p> <p>House passed</p> <p>4/24/208</p> <p>Sen. Exec. Committee 5/6/08</p>	<p>Mandates continuing professional training for state legislators and staff and creation of a reference guide for legislators. 4-year refresher</p> <p>H.A. 1 2-year refresher for certain Legislators.</p> <p>H.A. 1 to H.A. 1 – Train within 60 days of election.</p>	<p>New training for PIC. Bill refers to “ethical conduct training.” PIC asked if that should be “financial disclosure training,” as it only has jurisdiction of legislators under that law. House attorney said it was Ethics training for legislators on 29 Del., C. ch. 10, Legislative Conflicts Law.</p> <p>PIC sent comments</p>
<p><a href="#">H.B. 350</a></p> <p>House Passed 4/22/08</p> <p>Senate Exec. Committee 4/23/08</p>	<p>Amends State Constitution to change name of the Office of Auditor of Accounts to the Office of Auditor General.</p>	<p>Constitutional change--2 years. Will need title change in Dual Compensation Law; update title in database &amp; disclosure mailing label. Administrative Action.</p>
<p><a href="#">H.B. 380</a></p> <p>House Admin. Committee 4/23/08</p>	<p>Amends lobbying law. Lobbyists to disclose to PIC the name of non-profit organizations, community association and trade group of which the lobbyist is a council or board member. Will increase number of requests for advisory opinions, as new legislation does result in increased requests in that area. Would entail paper and postage costs.</p>	<p>PIC administers lobbying law. Will require changes in lobbying forms for those who file by hard copy. Will require change to database system to add these items. Will increase number of requests for advisory opinions, as new legislation does result in increased requests in that area. Would entail paper and postage costs.</p>

<p><a href="#">H.B. 354</a></p> <p><a href="#">HA 3 to HB 354 -</a></p> <p><a href="#">HA 2 to HB 354 -</a>  <a href="#">HA 1 to HB 354 -</a>  <a href="#">HA 4 to HB 354 -</a></p> <p><a href="#">S.A. 1</a>  House Passed 4/24/08</p> <p><a href="#">HA 3 to HB 354 - Defeated</a>  <a href="#">HA 1 to HA 3 to HB 354</a>  <a href="#">HA 1 to HB 354 - Defeated</a>  <a href="#">HA 4 to HB 354 - Stricken</a>  <a href="#">HA 2 to HB 354 - Passed</a></p> <p>Senate Exec. Committee  5/6/08</p>	<p>Officials to file annual report on close relatives who work for the State. To be filed on same date as financial disclosure report.</p> <p>H.A. 1: Adds close relative reports if they work for entities that get "Significant" State funds.</p> <p>H.A. 2 - Expands "family member" to be consistent with other Delaware Code areas.</p>	<p>Establishes new filing with PIC. Bill requires "sworn" statements. Last year, Legislators removed "sworn" statements from financial disclosure law to allow electronic filing. Sworn statements need signature &amp; notary, so cannot be done on-line.</p> <p>Would add paper, postage, etc., costs for advisory opinions, as terms, e.g., "Significant State Funds" not defined.</p> <p>Increases annual PIC costs as H.B. requires sworn statements, and adds more people than the 300 present "public officers," adding to the costs. Local elected, appointed officials, &amp; higher education officers are now excluded. The database system would have to be expended to include all new names, positions, e-mail addresses, etc. It took over 2 months for this two person office to get the initial public data base of more than 300 set up with the names, addresses, positions, etc. As the new officials do not file financial disclosures at this point, it means creating a separate form, adding printing costs.</p>
<p><a href="#">H.J.R. 18</a>  Signed 6/30/08</p>	<p>Periodic reports by agencies, boards and commissions who must, by law, report to the General Assembly may provide the General Assembly the option of electronic report.</p>	<p>Would save printing costs e.g., Annual Reports. However, Ethics class attendees say hard copies are best feature. Prior survey: PIC gave CDs. Attendees returned to finish training. None reviewed the CD.</p>
<p><a href="#">H.B. 435</a>  House  Out of Committee  6/11/208</p>	<p>Officials to report name &amp; address of nonprofits, civic &amp; community associations, foundations, maintenance organizations or trade groups if they are a council or board member.</p>	<p>Public officer database will need expanding.</p>

<p><a href="#">H.B. 436</a>  <b>S.A. 1</b>  Passed House Senate  Out of Committee 6/11/08</p>	<p>See H.B 354 above –</p>	<p>Senate amendment removes the “sworn” requirement so officials can file “close relative” reports electronically. Changes annual filing date from February 15 to March 15 each year. Presently, officials’ reports arrive before lobbyists’ quarterly reports for the last calendar quarter. Means reviewing forms twice to insure public officers know of lobbyists’ additions. At the same time, campaign reports are due. A March 15 date will avoid confusion on which report is due.</p>
<p><a href="#">H.B. 439</a> - <a href="#">House Policy Analysis &amp; Gov’t Accountability Committee 5/29/08</a></p>	<p>Board of Cosmetology and Barbering and Licensure of Aesthetician is subject to the State Code of Conduct.</p>	<p>Boards are already subject to the Code of Conduct., but this reinforces its jurisdiction in their enabling law. NO ACTION REQUIRED</p>
<p><a href="#">H.B. 488</a>  House  Out of Committee 6/24/08</p>	<p>Contracts with Private Attorneys – No funds can be used to hire private attorneys without AG, Gov, JFC Chair &amp; Vice Chair approved.</p>	<p>PIC is exempt. The AG does not represent it. By law, it employs its own attorney. NO ACTION REQUIRED.</p>
<p><a href="#">H.B. 68</a>   <b><u>H.A. 1</u></b></p>	<p>Legislators may not lobby for a year after term expires; penalty - unclassified misdemeanor.  H.A. 1 Changes one-year to 2 years. See H.B. 196 below.</p>	<p>PIC administers lobbying law &amp; Executive Branch post employment .  PIC: aid former legislators &amp; their private employers in complying; add to lobby training; Legislative training if H.B. 349 passes.</p>
<p><a href="#">H.B. 196</a>   <b><u>H.A. 1 - Stricken</u></b>   <b><u>H.A. 2</u></b>  <b><u>H.A. 3</u></b></p>	<p>Lobbying Law: 1-year after terminating, no lobbying by Legislators, Cabinet Secretaries, Office Heads, &amp; Gov.’s Staff.  <a href="#">H.A. 1 would have removed Exec. Officers, They already have 2-year ban on State matters if they were responsible.</a>  <a href="#">H.A. 2- Lobbying Law – re: definitions.</a>  <a href="#">H.A. 3 – adds</a> any person elected to State office</p>	<p>PIC Administers Lobbying Law – See Comments under H.B. 68   PIC already gives Executive Branch post-employment training; would add this; and add to Legislative training if H.B. 349 passes.</p>

[H.B. 380](#)

House Admin. Committee  
4/23/08

Lobbyists to disclose to the Public Integrity Commission the name of every nonprofit organization, community association and trade group of which the lobbyist is a council or board member.

PIC administers lobbying law. Will require changes in lobbying forms for those who file by hard copy. Will require change to database system to add the form and instructions. Will increase number of requests for advisory opinions, as new legislation results in increased requests. Would entail paper costs and postage.

## ***VII. Commission's 2008 Goals***

**(1) Continue emphasizing training in all four areas of the law.** Result: Training classes were fewer in 2008 than in 2007. This was due, in part, to the fact that in 2007, financial disclosure classes were set up to train filers not only on the law, but also on-line filing. In 2008, no new opinions were issued on the law, and public officials had the opportunity to file on-line in the 2006 and 2007, so were more familiar that process.

**(2) Increase access to services for those subject to the laws:** Result: Services to Public Officers and Lobbyists increased. With both now having databases with all the names, notice is being sent to them when new legislation is introduced that may impact on their responsibilities if passed.

**(3) Increase access to services for the public:** Result: The list of persons who failed to file financial disclosure report and as a result had their registration cancelled and barring them from lobbying until all reports are filed, is now on the website, and is publicly posted in Legislative Hall.

**(4) Work to achieve an on-line training program:** A draft of the training module for post-employment was created, and tested. However, it will not be on the website until the draft is finalized.

## **VIII. *Funding and Cost Savings Efforts***

For the 13<sup>th</sup> fiscal year, the Legislature appropriated \$40,100 for PIC's operating budget. Several of those years, PIC and all agencies' appropriated funds were cut. The FY 09 appropriations were later reduced by more than 17% by the Department of State's finance office. PIC was not consulted. For the FY 10 Budget, former Governor Minner proposed a \$6,000 reduction from the prior \$40,100 appropriations-- more than a 14% cut. The Joint Finance Committee further reduced it to \$7,000.

The Commission operates at less than a penny per person just at the State level. It tightly managing its funds, and staggers goals over several fiscal years to provide more services. In 2008, although there was little room, PIC continued to reduce costs.

With the State's introduction of secure e-mail, each Commissioners' confidential package to review before meeting, with all requests for advice or waivers, or complaints, Counsel's legal memorandums, are now e-mailed to save paper and shipping costs. It is recycling paper printed only on one side through the copier and the fax, whether created by PIC or incoming from other agencies, if the document is not a needed record.

PIC was recognized by for its recycling efforts in the American Bar Association's publication of Public Sector Law Offices.

Other savings efforts include: Cancelling cell phone for staff to conduct official business when out of the office; some Commissioners declining travel reimbursement and the \$100 stipend for an official duty day. By law, they are entitled to both.

*Appendix A - Post v. Public Integrity Commission*



Tab B

STATE OF DELAWARE  
**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 3  
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399

FAX: (302) 739-2398

June 25, 2007

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

**Advisory Op. No. 07-05 – Nepotism**

*Hearing and Decision by: Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, Dennis Schrader and Wayne Stultz*

Dear Mr. Brady:

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

**I. Jurisdiction:**

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

**II. Standard of Review**

All facts are assumed as true at the preliminary stage. *29 Del. C. § 5808A(a)(4)*. A Commission majority must find reason to believe<sup>1</sup> a violation occurred. *Id.* Officials have a "strong legal presumption of honesty and integrity," which the facts must overcome. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996). Town of Cheswold v. Vann, Del. Supr., C. A. No. 05C-08-07, No. 445, 2006, J. Ridgely (April 23, 2007)(facts did not overcome presumption)(Attachment B, Unreported Cases).*

<sup>1</sup>

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

### III. Application of Law to Facts:

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

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

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

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

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

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

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

2

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

3

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

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

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

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

#### IV. Conclusion:

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

Sincerely,

  
Bernadette Winston, Vice Chair  
Public Integrity Commission

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



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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**September 5, 2007**

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10 E. Pine St.  
P.O. Box 742  
Georgetown, DE 19947

***Motion for Reconsideration - 07-05***

***Hearing and Decision by: Terry Massie, Chairman and Vice Chair Barbara Green;  
Commissioners Dennis Schrader, William Daily and Wayne Stultz***

Dear Mr. Brady:

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

**I. Standard for Reconsideration**

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

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

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

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

## II. Application of Legal Principles and Facts

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

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

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

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

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

### **(B) Process in this Particular Case.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Argument 5. A common practice has been that all nominees receive council approval, although the Charter may reflect different. The minutes show that this was the process that the Mayor was performing; that he put all names in for consideration by council and since neither the Town Solicitor nor the Town Manager were present due to the fact that both positions were vacant. The Mayor then contacted the Attorney General's office to get the opinion of Assistant State Solicitor, Keith Brady (no relation to the Town Solicitor).**

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

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<sup>3</sup>Relatives can be public servants; but relatives who are officials cannot review or dispose of that decision.

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

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

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

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

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

**III. Conclusion**

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

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

<sup>5</sup>See footnote 2.

<sup>6</sup>See, Tab H. Mr. Dickerson stating that the Mayor wanted to “create” the alternate positions.

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

Sincerely,

  
Terry Massie, Chairman  
Public Integrity Commission

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

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

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

C.A. No. 07A-09-008  
Notice of Appeal

RECEIVED  
AND  
FILED  
07 NOV 15 AM 10:27  
KENT COUNTY  
PROTHONOTARY

**APPELLEE’S MEMORANDUM IN SUPPORT OF A MOTION TO DISMISS**

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

The Appellee moves the Court as follows:

**THE PARTIES**

1. Appellant, Donald Post, Mayor, Town of Milton, 115 Federal Street, Milton, DE 19968.
2. Appellee, Delaware State Public Integrity Commission, a State agency, 410 Federal Street, Suite 3, Dover, DE 19901.

**FACTUAL BACKGROUND**

3. Paragraphs 1 and 2 are incorporated herein by reference.
4. The Delaware State Public Integrity Commission (hereinafter “PIC”) issued advisory opinions to Mayor Donald Post on appointing his brother, William Post, to the Milton Board of Adjustment/Historic Preservation Committee. (Tab A, Advisory Op. No. 07-05, June 25,

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

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

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

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**REASONS TO DISMISS APPELLANT'S CLAIMS**

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

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

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

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

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DONALD POST, MAYOR OF THE :  
TOWN OF MILTON, :

Defendant Below- :  
Appellant, :

v. :

DELAWARE STATE PUBLIC :  
INTEGRITY COMMISSION, :

Plaintiff Below - :  
Appellee. :

Submitted: January 18, 2008

Decided: April 30, 2008

**ORDER**

Upon Appellee's Motion to Dismiss.  
Granted.

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

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

WITHAM, R.J.

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

### **BACKGROUND**

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

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

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<sup>1</sup>Advisory Op. No. 07-05, June 25, 2007; Motion for Reconsideration–07-05, September 5, 2007).

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

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

**DISCUSSION**

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

**Conclusion**

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



R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

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<sup>2</sup>Super. Ct. Civ. Proc. R. 72(b).

*Appendix B - King Advisory Opinions*



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 3  
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399  
FAX: (302) 739-2398

**January 24, 2008**

Mr. Craig A. Karsnitz  
110 West Pine Street  
P.O. Box 594  
Georgetown, DE 19947

**Advisory Op. No. 07-42 Motion for Reconsideration  
Decision and Hearing by: Chairman Terry Massie; Vice Chairs Barbara  
Green and Bernadette Winston; Commissions William Dailey, Barbara  
Remus and Dennis Schrader**

Dear Mr. Karsnitz:

The Public Integrity Commission (PIC) reviewed the Motion for Reconsideration of its advice that David King, Vice Chair, Dewey Beach Planning and Zoning Commission, recuse from matters on the Ruddertowne property. *Tab A, Op. No. 07-42*. No controlling precedents or legal principles were overlooked; nor were the law or facts misunderstood. The advice is the same: Mr. King, as Zoning Commissioner, must recuse on the Ruddertowne development matters.<sup>1</sup> *Just as in the underlying opinion, the conduct creates at least an appearance of impropriety. Id. at ¶ 3 ("specter of bias")*.

**I. Standard for Reconsideration**

PIC's statute does not address reconsideration. *29 Del. C. § 5807 and § 5810*. PIC's Rules allow it in complaints. *Tab B, PIC Rule IV (C)(p), p. 7*. Mr. King's reconsideration motion acknowledged that the Rule applies to complaints,

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<sup>1</sup>We discuss the term "matter" later in this opinion.

but not advisory opinions. *Tab C, Motion for Reconsideration, p. 1. (July 31, 2007)*. Mr. Eisenhauser's filing was treated as an advisory opinion request. *See, infra*. While the statute nor the Rules provide for reconsidering advisory opinions, we have done so. *Tab D, Commission Op. No. 07-05*. We do so here.

Superior Court Rule 59 is the standard.<sup>2</sup> *The motions are to correct errors; not add new arguments.*<sup>3</sup> *Del. Super. Ct. Rule of Procedure 59*. They are denied unless controlling precedents or legal principles were overlooked, or the fact finder misunderstood the law or facts that would change the underlying decision. *Id.*

## II. Background

Dewey Beach's Town Council appointed the Ruddertowne Architectural Committee (RAC) to evaluate and negotiate development of the Ruddertowne property. *Tab E, RAC Chair Eisenhauar, e-mail filing (June 14, 2007); Tab F, Town Minutes, December 9, 2006*. As an appointee,<sup>4</sup> *Mr. Eisenhauar, may seek an advisory opinion. 29 Del. C. § 5807(c)*. He asked PIC if Mr. King's conduct in expressing a personal opinion on RAC's work and the development violated the Code since the Zoning Commission considers these matters. *Tab E, Eisenhauar e-mail*. The Mayor appoints and Council confirms Zoning Commissioners, such as Mr. King. *Dewey Beach Code ch. 185 § 33-2*. The Zoning Commission acts on developers' draft ordinances affecting their property; building height, site plans, etc. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.; Tab G, Transcript, PIC meeting, see, e.g., p. 20, line 272 (Zoning Commission makes recommendations to Council on "substantive matters"); pp. 39-40, lines 530- 546 (Zoning Commission reviews draft ordinances and the Ruddertowne developer has submitted a draft).*<sup>5</sup>

## III. Arguments and Responses

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<sup>2</sup>*Tab D, Commission Op. No. 07-05, fn. 1 (State Commission's inherent authority to hear rearguments).*

<sup>3</sup>*In some instances, but not all, we note the new arguments. We address them anyway.*

<sup>4</sup>*Under the Code, appointees are "Honorary Officials" or "employees." 29 Del. C. § 5804(6) and (12)(b)(2). Delaware Courts have applied the Code's "personal and private interest" provision, 29 Del. C. § 5805(a)(1), to unpaid appointees to a State Board. Tab N, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).*

<sup>5</sup>*Mr. King sometimes says the Zoning Commission has no power over such things as height restrictions, site plans, etc., but Dewey's Code shows otherwise.*

**Argument 1. The Advisory Opinion was not in accord with 29 Del. C. § 5802(4); and is outside PIC's jurisdiction. See, also, 29 Del. C. § 5812. - New Argument.**

Mr. King gives no legal or factual understanding of why PIC has no jurisdiction. He only gives the two Code sections without any reasoning on why they preclude PIC's jurisdiction. Accordingly, we will try to cover numerous legal principles as they relate to jurisdiction under those two provisions.

**RESPONSE (A): Jurisdiction Under 29 Del. C. §5802(4)**

The statute provides:

“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 [Public Integrity Act of 1994] to apply to their employees and elected and appointed officials. Subchapter I, Chapter 58, of Title 29 shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993. No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29. Any change to an approved Code of Conduct must similarly be approved by the State Ethics Commission to continue the exemption from Subchapter I, Chapter 58, Title 29.” *Tab H-6, 67 Del. Laws, c. 417, §§ 1, 2; 68 Del. Laws, c. 433, § 1(emphasis added).*

To the extent it is argued that Subchapter I does not apply to local officials because Subchapter I defines “State agency” as exempting “political subdivisions,” that is a definition, not the substantive law. 29 Del. C. § 5804(11). Substantive law is clear: “This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993....” 29 Del. C. § 5802(c). That law specially tells local governments how they can be “exempt” and how to “continue that exemption.”

**Application of Facts and Law:** (1) Dewey is a Town; and (2) has no approved Code.<sup>6</sup> Thus, it has not established the "exemption." Its employees, elected, and appointed officials are subject to Subchapter I. 29 Del. C. § 5802(4). Mr. King is a Zoning Commission appointee. Subchapter I gives PIC jurisdiction.

**RESPONSE (B) - Jurisdiction under 29 Del. C. § 5812.**

The motion does not refer to a specific provision in § 5812. Section 5812 defines the terms in Subchapter II, Financial Disclosure. It applies to "public officers" as specifically listed, but exempts "elected and appointed officials of political subdivisions of the State...." 29 Del. C. § 5812(n)(2). If it is argued that by exempting them from Subchapter II that they are exempt from Subchapter I, that is contrary to the plain language. Subchapter I says the only way local officials are exempt, and can "continue the exemption from Subchapter I," is to have their own Code and changes approved by PIC.

**Legal Principle:** "Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls." See, generally, Cede & Co. and Cinerama, Inc., v. Technicolor, Inc., 758 A.2d 485 (Del., 2000); Coastal Barge Corp. v. Coastal Zone Indus. Control Board, 492 A.2d 1242, 1246 (Del., 1985).

**Application of Facts and Legal Principle:** The language of both Subchapters is clear. Subchapter I gives PIC jurisdiction over local officials; Subchapter II does not.

**RESPONSE (C) - Jurisdiction - Consistency with Rules of Statutory Construction**

**(1) Legislative Intent.** The law requires construction consistent with the General Assembly's manifest intent. 1 Del. C. § 301.

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<sup>6</sup>Local officials were notified of the General Assembly's desire on or about April 15, 1992. Later, a letter was sent specifically to then Mayor, Patricia Wright, saying local Codes need approval. Tab I, Ltr to Mayor Wright, ¶ 2, January 6, 2003. In April 2003, an ordinance was passed. It was never sent for approval. The 2003 version was replaced July 8, 2005. The 2005 version was not sent for approval. Dewey's Code was submitted for review at PIC's September 2007 meeting, but was not as stringent as State law. Tab I, Commission Op. No. 07-55. Dewey has not submitted any changes to make it as stringent.

(a) In deciding legislative intent, Courts look first to the statutory language. *Tab N, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)*. Where the persons and things to which a statute refers are affirmatively or negatively designated, it infers the legislative intent. *Id.* (citing *Norman v. Goldman, 173 A.2d 607,610 (Del. Super., 1961)*).

**Application of Principle:** The law affirmatively declares local officials subject to Subchapter I, absent an approved Code. It negates Subchapter II application to them.

(2) **Legislative History:** Courts also look to the legislative history to aid in deciding legislative intent. *Cede & Co., supra*.

The original Subchapter I did not mention local officials. *59 Del. Laws, c. 575 and 64 Del. Laws, c. 110*. Later, the 135<sup>th</sup> General Assembly asked the Delaware State Bar Association's Special Committee on Public Officials' Code of Conduct<sup>7</sup> to assist in drafting ethics legislation. *Tab H-1, Committee Report, June 7, 1990*. The Committee said to General Assembly leaders:

"Your request indicated an intent that our proposed legislation should provide rules for the Executive branch of State government and for local government officials similar to the rules we proposed in 1986 for the members of the General Assembly." *Id.*

In discussing local officials and employees, they noted that elected and appointed officials of political subdivisions... "are not deemed public officers within the meaning of the financial disclosure law." *Tab H-4 and 5*. Regarding the Code of Conduct, [Subchapter I], the report said local political subdivisions could enact their own Codes. *Tab H-4*. It also said local ordinances were not reviewed for purposes of the report. *Id.*

The Committee proposed that the legislation include the General Assembly's "desire" that local governments adopt their own Code within two years. *Tab H-2 and 3*. In 1991, when Subchapter I was rewritten, passed and approved, it included the language about its "desire" that all local governments adopt Code of Conduct legislation similar to the act to apply to their public officials. *Tab H-6, 67 Del.*

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<sup>7</sup>Hereinafter "Committee."

*Laws, c. 417 § 2.* It also directed the State Ethics Commission [now PIC] to report to the General Assembly within two years the existence of local legislation and make a recommendation on legislation to be adopted and to cover such officials. *Id.* The exemption of local officials from Subchapter II, Financial Disclosure, was not changed.

In 1992, the General Assembly adopted new language. Rather than a “desire,” for local Codes, it mandated that local officials were subject to Subchapter I, unless they had an approved Code. *Tab H-6, 68 Del. Laws, c. 433.* That is the present law. *29 Del. C. § 5802(4).*

**Application of Principle:** The legislative history repeatedly reflects the manifest intent of the General Assembly that local officials are subject to Subchapter I, absent a PIC approved Code, with changes also approved. It is the only means of “continuing exemption.”

**(3) Unreasonable results:** Interpretations of statutes should not lead to a result so unreasonable or absurd that it could not have been the legislature’s intent. *Synder v. Andrews, 708 A.2d 237 (Del., 1997).*

**Application of Principal:** To conclude PIC has no jurisdiction would lead to the unintended result that most local governments would not have a Code of Conduct.<sup>8</sup> *Such conclusion would be an attempt at an implied repeal of 29 Del. C. § 5802(4). Implied repeals are not favored at law. Silverbrook Cem. v. Board of Assm’t Review, 355 A.2d 908 (Del. Super., 1976), aff’d. as modified, 378 A.2d 619 (Del., 1977).* Further, that conclusion would ignore: (1) the clear language in Subchapter I mandating application; (2) the clear distinction between Subchapter I jurisdiction, as opposed to Subchapter II; (3) the repeated legislative acts that lead to including local officials; and (4) the rules of statutory construction.

**(4) Consent to Jurisdiction:** Delaware Courts have long recognized the ability to consent to jurisdiction. “The consent doctrine has been enunciated in many judicial decisions and is a satisfactory enough explanation of the basis of jurisdiction where consent is in fact given.” *Standard Oil v. Superior Court, 44 Del. 538 (Del., 1948).* Jurisdiction is appropriate when persons waived defenses to

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<sup>8</sup>Seven of 57 local governments have approved Codes: Dover, Lewes, Millsboro, Newark, Smyrna, Wilmington, and New Castle County. PIC Annual Report, March 2006.

personal jurisdiction by their conduct. Hornberger Management Company v. Haws & Tingle General Contractors, Inc. 768 A.2d 983 (Del. Super., 2000).

**Application of Law and Facts:** At the time of the filing, Dewey Town Solicitor, John Brady, represented Mr. King. He had a copy of Mr. Eisenhauer's filing; was advised it would be treated as an advisory opinion; advised of the meeting date; and said PIC could proceed, but he would not be available. PIC's underlying opinion states that the decision was "at your request." *Tab A-1*. That is not disputed. No jurisdictional objection to jurisdiction was made between the time of the filing through the issuing of the underlying opinion. Jurisdiction issues can be considered waived if they are not raised. Here, it was newly raised in this motion. Motions for Reconsideration are not for new arguments. *Del. Super. Ct. Rule of Procedure 59*.

**CONCLUSION:** No jurisdictional precedents or legal principles were overlooked. No law or facts were misunderstood. The underlying decision is not changed. PIC has Subchapter I jurisdiction of local officials, including Mr. King. *29 Del. C. § 5802(4)*. It does not have Subchapter II jurisdiction over locals. *29 Del. C. § 5812(n)(2)*.

**Argument 2. This complaint was not based on sworn testimony and is in violation of the law and the Rules of this Commission. See, Public Integrity Commission Rule III.**

**RESPONSE: 29 Del. C. § 5807(c) and 29 Del. C. § 5810(a).**

Complaints require a "sworn complaint of any person" or PIC may act on its own. *29 Del. C. § 5810(a)*. If PIC acts on its own, after an investigation, a complaint must be filed with PIC by Commission Counsel, the Attorney General, or Special Counsel. *29 Del. C. § 5809(a); Tab B, PIC Rules, III. INVESTIGATIONS, (C) (1) Report of Investigation.*

**Application of Law to Facts:** Neither Mr. Eisenhauer nor PIC instigated a complaint. It was a request for an advisory opinion which only require a "written statement." *29 Del. C. § 5807(c)*. They may be filed by employees, officers, honorary officials, an agency or a public officer.<sup>9</sup> *Id.* Mr. Eisenhauer was

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<sup>9</sup>As discussed above, "public officers" are specifically identified at those who must file financial disclosure reports. *29 Del. C. § 5812*. Local officials are exempt from that requirement. *Id.* The 1994 law increased PIC's

appointed to RAC, a Town Council created body. RAC acted on Council's behalf on Ruddertowne negotiations.<sup>10</sup> *Mr. Eisenhower was authorized to seek an advisory opinion. 29 Del. C. § 5807(c).* The law and procedures used were for advisory opinions, not complaints. *29 Del. C. § 5807(c); Tab B, PIC Rules, (VI) "Requests for Advisory Opinions and Waivers," § (A)(1)-(5).* PIC treated the filing as an advisory request at the proceeding. The underlying opinion was captioned "Advisory Op. 07-42." *Tab A.* Mr. King's motion acknowledged it as such, and called it an "advisory opinion." *Tab C, Motion for Reargument, pp. 1 & 2.* The motion also acknowledges that *Rule IV(C)(p)* "applies to hearings and decisions on complaints and does not appear to apply to requests for Advisory Opinions." *Id. at p. 1.* The argument that it was a "complaint" was made at the reargument motion. PIC's deliberations covered the "complaint" versus "advisory opinion" issue. *Tab G-58 lines 778-817 and G-79 lines 1062-1064.* PIC again concluded it was an "advisory opinion."

Aside from the use of the word "complaint" in this argument and argument 4, the motion refers to a "complaint" one other time. It says: "it is believed" that "the true nature of this dispute is a complaint..." *Tab C-1 ¶ 1.* No facts are given to support that belief. Mere allegations, without supporting facts, are insufficient. *Del. Super. Ct. Procedural Rules 6(b) and 56.*

**CONCLUSION:** No law or facts change the underlying decision, nor is it shown that any legal principle was ignored in treating the filing as an advisory opinion.

**Argument 3. This entire process violated Mr. King's right to due process since he had no notice of the complaint against him and no opportunity to be heard on any of the issues. - New Argument**

**RESPONSE: Notice and Due Process**

(A) The complaint provision provides for "notice and opportunity to be heard." *29 Del. C. § 5810(a).* Again, it was not a "complaint," or treated such. *See, above.* The advisory opinion provision does not require appearance, only a

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*authority to interpret and administer more than Subchapter I. 29 Del. C. § 5809(15). When it gave that authority, effective January 15, 1996, for the Financial Disclosure law, it amended the Advisory Opinion section to include "public officers," as those who could seek and receive advice from PIC.*

<sup>10</sup>*RAC was later disbanded.*

written statement by the requesting official. 29 Del. C. § 5807(c)(emphasis added). PIC's Advisory Opinion rules only require written statements. Tab B, PIC Rules, Advisory Opinions and Waivers.

Attendance is at PIC's discretion:

**Rule IV(A)(5) Attendance at Meeting - Decisions Without Attendance -** Prior to reaching its decision on the Application for a Waiver or an Advisory Opinion, the Commission *may* require the applicant and others, with pertinent knowledge of the facts necessary for the Commission to reach a decision, to attend a meeting of the Commission and testify. The Commission may in its discretion require that the testimony be under oath. The Commission may in a clear case grant or deny a Waiver or issue an Advisory Opinion based on the written application without requiring the attendance at a meeting of the applicant or others. (emphasis added).

**Application of Law and Facts:** It is undisputed that: (1) Mr. Eisenhower had authority to make a request; (2) he filed a written request with pertinent knowledge of the facts, attaching Mr. King's e-mail; and (3) it is undisputed that Mr. King wrote the e-mail. Mr. King does not deny the contents, but says the e-mail was: a "note;" "a draft;" "a brain dump," and/or a "scenario." No matter what it is called, the factual contents are not questioned. Those facts were used for the underlying decision. Tab A, Commission Op. No. 07-42.

This argument does not identify the basis of any notice and due process denial. Assuming the basis of this argument is that he was entitled to notice and process under: (1) a Constitutional right; (2) the Code and Rules for complaints; or (3) the Code and Rules for advisory opinions, we previously addressed those issues in Commission Op. No. 07-05. Tab D-2 and D-3.<sup>11</sup> We also addressed Counsel's duty of notice. *Id.* To the extent those notice and due process requirements are the basis of this argument, the same laws and procedures apply.

Even the complaint provision, says "notice and the opportunity to be heard." That does not necessarily mean physical appearance. For example, a motion to dismiss may be filed by Counsel, and the subject of the motion need not physically appear. He is "heard" through Counsel. Commission Op. No. 07-05.

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<sup>11</sup> It was sent to the Town Solicitor and to present counsel before this reargument. Tab J.

Aside from notice and opportunity to be heard given prior to the first ruling, Mr. King had the opportunity to physically appear, and did so, to give facts at this motion.

**CONCLUSION:** The facts nor the law were ignored, and no facts or law in the reargument change the underlying opinion.

**Argument 4: The complaint against Mr. King is factually incorrect. At the time of the preparation of the material of which Mr. Eisenhower now complains, there was no pending proceeding by any individual regarding “Ruddertowne” before the Planning and Zoning Commission. In addition, Mr. King’s notes were talking points only and in no way indicated any prejudice for or against any particular development. - New argument**

**RESPONSE: Use of term “complains.”**

The filing was not a “complaint.” *See, above.*

**RESPONSE: “No Pending proceedings”**

In his e-mails, Mr. King repeatedly refers to upcoming zoning matters as they relate to the Ruddertowne Development. The Town ordinance identifies specific areas with which the Zoning Commission deals, e.g., height, footage, site plans, Comprehensive Development Plan (CDP). *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.*

(a) **June 3, 2006** –“Thoughts from the last RAC meeting.” *Tab K.* He specifically identified the Ruddertowne developer selected by Highway One LLP, Harvey Hanna & Associates (HHA). He said the developer “had read the new Comprehensive Development Plan (CDP)...walked into this deal planning to build a mega mall and include a large hotel...with an understanding that they could build to a height that is more than twice the current height limit ...planned on an expanded structured parking which will require developing to a higher total square footage...a primarily residential along the Van Dyke side --image six or seven floors of new condos from SR-1 to the Bay...they want a major re-development statement and intend a convention hotel as the keystone to this project.”

He said three meetings were scheduled, June 15, 22 and 29...that “will build sequentially to a final design concept that will be launched into the Town’s preliminary zoning approval process at the July Town meeting. *Id.*

(b) **June 5, 2006--** “HW1 coming through the back door.” He said RAC is talking about special zoning for the proposed RB1, to permit 70 feet. ...there is strong concern from many town residents that this will spread to other zoning districts, it is clear that this dramatic change in zoning will apply to the Highway One Rusty Rudder property.” *Tab K.*

(c) **June 7, 2006 -** “Call to arms.” Said there was a “strong concern that the starting point will be “too high/too big.” *Tab K.* He then proposed a course of action on these particular issues as it related to opposing the Ruddertowne Development:

(1) “get as many like-minded residents and property owners to” attend the Town meeting, we need voices to say they strongly favor retaining commercial or mixed us in Ruddertowne, but not at the cost of a too-massive development. He said “see talking points in my earlier e-mails.” *Id. at ¶1.*

(2) “get as many like-minded residents and property owners to”–“meet on Saturday at 2:30 behind my condo to discuss what we heard at the Friday meeting and to plan a contingent course of action pending the 6/15 presentation by HHA. I am assuming we will respond to an undesirable proposal with a two-to-three page mailing to all town voters and would like to collect names of residents and property owners who support our efforts and are willing to be identified in any such mailing at this meeting and/or are willing to help finance this mailing.” *Id. at ¶2.*

(3) “get as many like-minded residents and property owners to” attend, listen, and as appropriate voice their concerns at the June 15<sup>th</sup> RAC meeting at which HHA is to present their design concept–presuming including drawings, specifications, etc., of their proposed development. *Id. at ¶ 3.* He said he was hopeful that when the RAC and commissioners were confronted with strong community opposition to any massive development project “grossly exceeding current zoning restrictions” that they will require a downscaling of the proposed

development or rejection of such a plan.

(d) June 8, 2006. "Change in plan and role." He said he was advised by a Town official that it was premature for him to appear to be "taking sides" in the developing Ruddertowne discussions. *Tab K*. He continued:

"It has been my intent in circulating the 'convention/resort hotel complex' scenario—now as throughout the entire comprehensive plan development process..."

...Although I have not taken a position for or against any specific proposal or future zoning applicant, there is the possibility that convening/hosting a meeting that might lead to the formulation of a defensive plan of action against a potential future zoning applicant might be perceived as bias on my part against any such application. This would be improper and has not been/is not my intent."

"Therefore, to avoid an appearance of conflict of interest *I must retract my offer to host a meeting of Dewey Beach citizens concerned about any potential developments inconsistent with current town zoning*" (emphasis in original). *Tab K*.

The e-mails alone identify areas where, as a Zoning Commissioner, he could expect to be involved. He confirmed that at PIC's meeting on this motion.

(E) December 9, 2006—The Town minutes show he discussed the CDP. He was specifically asked how he about the recent site plan<sup>12</sup> from Highway One would affect the CDP. *Tab F, Town Minutes, "Discuss and Vote—To approve a draft of the Town of Dewey Beach Comprehensive Plan." (December 9, 2006).*

The facts show Mr. King knew about the Ruddertowne's development; its connection to the CDP and zoning approval process. He repeatedly spoke against it on zoning issues, and specifically said zoning issues would be considered the very next month after his e-mails were sent. *Tab K*.

To say nothing was pending pertaining to the Ruddertowne zoning, or that he did not recognize zoning issues in which he would be involved, is inconsistent with:

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<sup>12</sup> *At the reargument motion, Mr. King said the Zoning Commission does not review site plans. It is unclear why he would have been asked about the site plan impact if the Zoning Commission does not review them.*

- (1) his undisputed correspondence, and the Town minutes;
- (2) his presumed knowledge of his legal and official duties to act on Zoning matters. *Dewey Beach Code, ch. 181-1; 185-43, 185-68, etc.*;
- (3) his own recognition that he had to make a “change in role and plans,” because of his official position;
- (4) his own concern that his actions could raise an appearance of impropriety because of his remarks as they related to his official duties;
- (5) his own concern that his actions could be perceived as “bias.” If he did not believe any of this would come before the Zoning Commission, what would be his reason for any concern about appearance or bias?

**CONCLUSION.** The facts were not incorrect. The facts used were Mr. King’s own statements. PIC arrived at the very same conclusion he did— his conduct could raise an appearance of impropriety and of bias. It said it could “raise the specter of bias.”

**Argument 3: Mr. King’s note were talking points only and in no way indicated any prejudice for or against any particular development.**

(a) The e-mails show that Mr. King’s “note” refers only to the Ruddertowne development—a “particular development.”

(b) The “note”—the initial e-mail—is five pages, formatted with headings, bullets, issues, etc. The plain and ordinary meaning of “note” is “a condensed or informal record;” “a brief comment or explanation.” *Webster’s Collegiate Dictionary, p. 794, 10<sup>th</sup> ed. (1994)*. It means “to make a brief written statement.” *Black’s Law Dictionary, p. 1060, 6<sup>th</sup> ed. (1990)*. Mr. King’s e-mail initial e-mail refers to it as a “draft” and a “brain dump.” *Tab K-1*. In later e-mails, he says he is proposing “the following course of action;” that “like-minded residents,” use them as “talking points.” *Tab K-8*. At the reargument motion, he says it was a “scenario” that “I thought” the town should discuss. *Tab G-11 and 12, lines 150 to 163*. He referred to that scenario as a “massive development” with townhouse and hotel. *Tab G-12*. That is the same description in his initial e-mail. *Tab K-3*. Although he said it thought was for the “town” to discuss, he then said his e-mails were sent to about 12 people who were “friends.” *Tab G-12*. He had asked those “friends” to pass the talking points to their network of “concerned friends.” *Tab K-7*. As a factual matter, just his initial e-mail was more than a mere note. He wanted it used for much more.

(c) In the e-mail he: expressed “disappointment that these developers

(1) seemed so poorly informed/mis-informed about the needs and desires of the Town's residents and property owners, and (2) seemed into a massive re-development rather than something more in scale with the rest of Dewey Beach and more closely mated to the 'way of life' that brought us here." He called it a "white elephant."

(d) He consistently found faults. After just one meeting, he said RAC "seems unwilling to make critical comments and/or to take a hard stand." *Tab K-2*. That comment is interesting in light of his many statements that he did not know what the proposal would be. RAC's officials, like all public officials, are stay open-minded and base their decisions on the merits. Courts have noted that requirement when decision makers are involved in zoning. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6 ("Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed); Brittingham v. Board of Adj., City of Rehoboth Beach, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9 (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).*

If the proposal is not known, taking a hard stand would be inconsistent with the need for open-mindedness. Mr. King was the one who took a hard stand, when he says he did not know the proposal. *Tab K-2 through 8*. Assuming he did not know the proposal, he still was able to find faults with the developer and the development. The developer was "poorly informed/misinformed;" had "no sense" of the Town's "needs/desired; did not "read the new Comprehensive Development Plan;" etc. *Tab K-2*. Again assuming he did not know their proposal, he was able to identify very specific items that were problems: the footage size, the height, the "structured parking lot" that would "raise the construction costs;" result in a "twenty-fold" increase in vacant stores; etc.

(e) He acknowledges that "then it hit me. The RAC is talking about special zoning." *Tab K-7*. After sending out more e-mails, he notified his "friends" that a Town official advised him that it was "premature for him to 'take sides' in the developing Ruddertowne discussions." *Tab K-9*. Regarding his earlier offer to have "like-minded residents" meet as his home to "plan a contingent course of action," *Tab K-8*, he said "there is a possibility that convening/hosting a meeting that might lead to the formulation of a 'defensive plan of action' against a potential future zoning applicant might be perceived as bias on my part against such application" and "this would be improper...." *Tab K-9*.

**CONCLUSION:** The Town official's concern and Mr. King's concern about at least the perception of bias were on target. Contrary to the argument, the facts show he: talked only of one "particular development;" criticized the developers and the project; even before he allegedly knew the proposal; sought to ally a force of "like-minded" persons to develop a "defensive" plan, etc. The plain and ordinary meaning of "prejudice" is: "an adverse opinion or leaning formed without grounds or before sufficient knowledge." Webster's Collegiate Dictionary, p. 919. It arises from: prejudging or "bias." Id. The facts are his written facts. We find as before--his acts at least raise the "specter of bias."

**Argument 5: The citation to Jones v. Board of Edu. of Indian River Sch. Distr., C. A. No. 93A-06-003, Graves, J. (Del. Super., January 19, 1994), is inapposite. The reasoning in the Jones case involved the review of a decision maker in a teacher dismissal case whose own children had been taught by the teacher in question and had certain negative experiences in that teacher's classroom. This is far from the circumstances of this case. Had the Board allowed a full record to be developed, this distinction would have been made clear.**

**RESPONSE:** The Code of Conduct states that an official cannot review or dispose of official matters where he has a "personal or private" interest that tends to impair judgment in making official decisions. 29 Del. C. § 5805(a)(1).

In Jones, a government official's "personal or private interest" was the result of a familial relationship with a teacher, when he knew his official duties were to hear termination proceedings for that particular teacher. Before performing those duties he made negative statements about her. It was decided his statements showed pre-judgment and he should not have reviewed or disposed of that matter. Here also, Mr. King expressed his "personal and private interest" on a particular matter --the Ruddertowne development--when he knew, or should have known, his official duties were to participate in proceedings on that particular development. He made personal and negative statements about the particular development and developer. His "personal and private statements" were negative and showed pre-judgment. Thus, Jones is not inapposite.

"Personal or private interests" need not be familial as in the Jones case, nor do the proceedings have to be termination proceedings. They are "any matter" in

which the official has a “personal or private interest.” 29 Del. C. § 5805(a)(1). If the “personal or private interest” may result in a financial benefit or detriment to the official or their close relatives, those are automatic conflicts under the law, rather than a conflict that must be decided on the particular facts. 29 Del. C. § 5805(a)(2).

Delaware Courts have held under the common law that personal interests can arise from a relationship between an official and parties to planning and zoning matters. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del., 1967) (alleging “personal interest” or “conflict of interest” where church of decision maker would benefit from decision was sufficient to raise factual issue for Court). The common law has not been abrogated; it is codified in 29 Del. C. § 5805(a)(1). Tab L-and 2.

Thus, it is an issue of fact of whether the relationship is sufficient to create a “personal interest” or “conflict.” Recusal, when there is an interest that rises to the level of a conflict, is so that judgment will not even *tend to be impaired*. 29 Del. C. § 5805(a). No actual impairment is required; only the appearance thereof. *Commission Op. No. 92-11*. Recusal insures that the conduct will not “raise suspicion among the public” that the public trust is being violated. 29 Del. C. § 5802 and 5806(a). Thus, in a re-zoning case, the Court found no actual violation on the requirement to recuse when close relatives and/or the official had financial interests, but as a factual decision said the Board members would be “prudent” to recuse themselves because of the rule of necessity—recusal was not possible. *Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C.A. No. 00A-04-007, J. Goldstein (January 12, 2001)*.<sup>13</sup> As in *Harvey* and *Jones*, this case does not show Mr. King has any financial interest. PIC has never said he did.<sup>14</sup> *That does*

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<sup>13</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; 29 Del. C. § 5802(4). The Court and attorneys for each party were notified by PIC after the opinion came out. Despite the statement that the Code did not apply to locals, the Court used it 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 there was no technical violation, but recusal was required to avoid an appearance of impropriety. In this underlying decision, PIC found Mr. King’s conduct created at least an appearance of impropriety—“specter of bias.”

<sup>14</sup> Mr. King has raised the issue of the reason for citing 29 Del. C. § 5806(b), indicating that it appears to relate only to financial interests, e.g., in a private enterprise, other employment, compensation, gifts or anything of value. While it specifically identifies those interests, it also says “or incur any obligation” which substantially conflicts with performing their duties. Statutory terms “must be construed according to the common and approved

*not mean he should not recuse. He still has a "personal or private interest" in a matter for which he would also have official authority, and, thus, should not "review or dispose of the matter." 29 Del. C. § 5805(a)(1)*

In interpreting that very provision, Delaware Courts assumed a conflict because a Board appointee to an unpaid position said he might have a conflict. The Court said even though his statements were "neutral" and "unbiased," and he did not participate in the final vote, he should have recused himself "at 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, Veasey, C. J. (January 29, 1996).<sup>15</sup> The Board member's participation was challenged by an applicant who was not successful with the Board, and alleged the Board member had a "personal or private interest" because his private employer had an indirect business relationship with the other applicant, and his failure to recuse rose to the level of a violating his due process rights before the Board. Thus, it does not matter if the official statements are unbiased, nor is actual bias required.

Like *Beebe*, Mr. King is an unpaid appointee. He has a "personal and private interest" in an official matter that would come before him. Unlike *Beebe*, his comments were not neutral and unbiased, but slanted against the party who would have to deal with Mr. King's Board. Once a conflict arises, recusal should occur "from the outset." *Beebe*. The reason is not only to avoid actual bias, but the appearance thereof. As in *Beebe*, we gave Mr. King the strong presumption of honesty and integrity, even though his biased remarks were made when the CDP was to be considered the next month, and he spoke about it the site plans at the December Town meeting. These final facts may suggest he did not recuse himself on the matter, however, he was given every benefit of the presumption of honesty.

**CONCLUSION:** *Jones* is not inapposite. Not only does *Jones* apply, but so does *Beebe*, which interpreted the same provision at issue here—29 Del. C. § 5805(a)(1). Again, PIC did not misunderstand the law or facts, or the legal principle.

**Argument 6: The opinion of the Public Integrity Commission is so broad and**

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usage of the English language." 1 Del. C. § 303. The common and ordinary meaning of "any" includes "every - used to indicate selection without restriction" and "all - used to indicate a maximum or whole." *Webster's Seventh New Collegiate Dictionary*, p. 40 (1967). To limit the provision to only things that have a monetary value would be contrary to the plain word "any." Further, it would ignore the fact that non-monetary items can create conflicts, e.g., relationships with civic associations seeking decisions. See, *Shellburne, supra*.

<sup>15</sup>The official in *Beebe*, like Mr. King, was a non-paid appointee to a government board.

sweeping as to cast doubt on Mr. King's ability to participate in any zoning decision. The decision itself is not clear in what "decisions on this matter" Mr. King should not participate.

(a) "Matter" is the term used in the statute. *29 Del. C. § 5805(a)(1)*.

(b) "Matter" is defined in the statute. *29 Del. C. § 5804(a)(1)*. It means: "any application, petition, request, business dealing or transaction, of any sort."

(c) "Matter" is framed in the context of the "personal or private interest," as it relates to Mr. King's duties pertaining to the Ruddertowne development, as the Commission bases its findings on the law and the "particular fact situation." *29 Del. C. § 5807(a)*. That was identified in the underlying opinion. As the decision must rest on the particular facts, we cannot speculate on all of the "matters" that could arise for Mr. King, as it would be engaging in hypotheticals, not "particular facts."

(d) At least one "matter" example was given by Mr. King at the meeting. (*Tab G, transcript, pp.26, lines 349-355*). He said "it was his understanding" that if read literally it [the underlying opinion] would mean he could not participate in a review of a site plan on the Ruddertowne property. He then said that site plan review would not come to the Zoning Commission. Again, that statement is contrary to the Dewey Code which says the Zoning Commission reviews site plans. It also is contrary to the Town Minutes which show he was asked to comment on this specific site plan. *Tab F-2*. However, the significance of his statement is that he identified an action [review of a site plan] and the particular property [Ruddertowne] on which he made his statements. This shows the lay person's grasp of the term "matter." In fact, Argument 9 of this motion asks that Mr. King be able to respond on "this matter" but "this matter" is not specified. It is from the particular facts—the context—that it is understood that "this matter" means the subject of this particular motion—PIC's opinion, just as Mr. King understood the advisory opinion as referring to "matter" within the factual contents.

(e) As "matters" arise, if clarification is needed, Mr. King can request additional guidance, just as guidance was requested on the same day as a Town meeting he was attending after the underlying opinion. Guidance was given to the Town Solicitor for him that same day. *Tab J-14*. The guidance given was also sent to Mr. Karsnitz that same day. *Id.* Guidance, when the Commission is not available, is Commission Counsel's duty, based on PIC's prior rulings. *29 Del. C.*

§ 5808(A)(a).

Any upcoming matters of which he is now knowledgeable can be asked now. As agendas for the Zoning Commission's upcoming meetings are normally posted at least 7 days in advance of a hearing, he would have time to get guidance. To be able to post in advance, he might even know before the posting date if he has any need for guidance.

**CONCLUSION:** This argument does not change the underlying opinion. That opinion found he should recuse from "matters" on the Ruddertowne Development/its developer. It does not apply to other zoning "matters" unrelated to that development. The statute defines "matter," and examples of the definition are that, "application" or "petition" or "request" would include such things as requests for variances (e.g., height, footage), review of site plans, review of draft ordinances, etc., as they relate to the particular development/developer which was the subject of Mr. King's statements.

**Argument (7): Fundamental due process requires an ability to respond on behalf of Mr. King in this matter.**

**RESPONSE:** "Due process" is the opportunity for notice and the opportunity to be heard. No facts or law suggest this argument is different from Argument 3 on Mr. King's right to "due process" was denied. *See, Argument 3 response.*

(C) The following arguments were not raised in the written reargument motion, but raised at the meeting for the first time.

**Argument (8): Mr. King does not know the length of time the advice should be followed.**

Again, this argument would require speculation rather than "particular facts." 29 Del. C. § 5807(c). It could entail such speculation as: *If* the development submits a proposal; *if* the proposal is accepted by the Zoning Commission; *if* it is accepted by the Town Council put in the CDP, *if* the CDP is kicked back; *if* a basis of the rejection relates to this development; etc. The basic rule is that he recuse in the Ruddertowne development "matter." He has indicated an ability to spot a "matter." Further, he can seek guidance from the Commission.

**CONCLUSION:** This argument does not change the underlying opinion. He is to recuse from matters on the Ruddertowne Development

**Argument 9: The Zoning Commission acts in a legislative capacity, not a quasi-judicial capacity.**

**RESPONSE:** Mr. King said the Zoning Commission does not act as a legislative body. *Tab G, p. 4, line 50, e.g.* The Zoning Commission is appointed by the head of the Executive Branch (the Mayor). No law or facts are given to substantiate that the Zoning Commission is an arm of, or operates as, a legislative body. No facts or law suggest the Zoning Commission can pass laws, which is the purview of the legislative body. Delaware Courts have recognized the quasi-judicial nature of Zoning entities. *Tab N, Mackes v. Board of Adj. of the Town of Fenwick Island, C.A. No. 06A-03-001-RFS, Stokes, J. (February 8, 2007), p. 7 and fn. 6* (“Zoning hearing Board is quasi-judicial; Board member was prejudiced and biased; Board decision reversed”); *Brittingham v. Board of Adj., City of Rehoboth Beach, Del. Super., C.A. No. 03A-08-002, Stokes, J. (January 14, 2005), p. 9* (Zoning Board is quasi-judicial and must act with impartiality, as a neutral arbiter and not as an advocate for one position or another).

In a prior decision, we discussed at length why the judicial standard is relevant in interpreting the State Code of Conduct. *See, Extract of Commission Op. No. 02-23, see fn. 18, infra.*

**CONCLUSION:** No law or facts were misunderstood.

**Argument (10) Right to Free Speech: Mr. King is entitled to free speech.**

**RESPONSE:**

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To the extent this is a Constitutional question, PIC has no jurisdiction. *See, Argument 3, supra, citing Commission Op. No. 07-05.*

The State statute does limits the matters on which an official can speak. Applicable here is that they may not review or dispose of matters where they have

a personal or private interest. 29 Del. C. § 5805(a)(1). When they have such interests, they are required to recuse themselves from speech in their official capacity. *Id.* Delaware Courts have recognized that it can restrict speech. *Beebe, supra.* (State Board appointee should not have made even “neutral” or “unbiased” statements because of possible conflict). This restriction is not uncommon in conflict of interest rules for both public officials and private persons, e.g., Judicial Code of Conduct; Legislative Conflict of Interest Law, 29 Del. C. § 1002(a)(legislator cannot participate in debate nor vote if there is a personal or private interest). The ban on General Assembly members voting if they have a “personal or private interest,” is also found in the Delaware Constitution. *Del. Const., art. II § 20.* Corporate entities can have by-laws on such restrictions. *Commission Op. No. 02-23.* Attorneys can be made to withdraw from a case because of a conflict. *Delaware Lawyer’s Rules of Professional Responsibility.*

To the extent it is argued that elected officials can speak on their platform on a particular issue, they have the right to political expression to their constituents because their duty is to represent those persons. Mr. King is not an elected official who can run on platforms. He was not elected to office to represent the people. He was appointed to a board to make fair and unbiased decisions in his official duties. If there is a “personal and private interest,” the government duties must “command precedence.” *In re Ridgely, 106 A.2d 527, 530-31 (Del. Super., 1954).*<sup>16</sup> The Court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “his private interest must yield to the public one.” *Id. at 531.* In *Ridgely*, the Court concluded the official duties were so significant that it did not need to interpret the Lawyer’s canons which also would apply to Mr. Ridgely. *Id.* Mr. King placed the “personal interest” before the public one, so he must now recuse himself from his public responsibility on this matter.

**CONCLUSION:** Mr. King’s argument is contrary to the statute and case law. The argument does not change the underlying decision.

**(B) Ms. Joan Claybrook’s letter was incorporated into the motion for**

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<sup>16</sup>*Ridgely* was decided before the Code of Conduct was enacted, but interpreted the common law restriction against public officials having a personal or private interest which would impair judgment in performing official duties. See, Tab L-1 and 2.

**reconsideration.**

**RESPONSE:**

She states that she is not a lawyer. Yet, her letter makes strictly legal arguments on such things as jurisdiction, due process, statutory interpretation, etc. *Tab C-4 thru 7*. She also is not a Town employee, officer or appointed official. We first address a concern about her right to intervene and then a concern about incorporating her letter, as it relates to the legal arguments as part of the motion.

**(1) Right to Intervene:**

Delaware Superior Court Rule 12 addresses the circumstances of intervention.

A person desiring to intervene must state the grounds for intervening. She states no grounds to intervene.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when an applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties.

The advisory opinion statute limits the persons who can seek an opinion and to whom an opinion can apply. *29 Del. C. § 5807(c)*. It authorizes only government employees, officers, officials or agencies to seek opinions, and the advice applies only to government officials. *Id.* Ms. Claybrook is not a government official. The statute does not confer any unconditional or unconditional right to intervene. She has no legal interest or claim or defense in the "matter."<sup>17</sup> *The disposition of the action would not impair or impede her ability to protect a legal interest, as she has none in this "matter."* She may have a personal and private interest, but not a legal interest. *Tab N, e.g., Gamble v. Thompson, Del. Super., C.A. Number 98A-07-007-JOH, Herlihy, J. (October 27, 1999)(individual had no standing as a complainant).*

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<sup>17</sup> This time, the term "matter" is the term in the Court Rules.

**(2) Practice of Law:** As noted, she is not a lawyer but mainly makes legal arguments, statutory interpretations, etc. They are mainly the same legal arguments as in motion submitted by Mr. King through his Counsel. As her legal arguments were incorporated into the motion for Mr. King, the question is if her acts constitute representation of him, and if she is interpreting the law, preparing legal instruments, etc. *Tab N, see, e.g., In re Mid-Atlantic Settlement Services, Inc., Board on the Unauthorized Practice of Law, File No. UPL 95-15.* Again, we note the concern, but have do not entertain whether her conduct is contrary to non-lawyers acting as lawyers.

**(3) Fact Witness:** To the extent Mr. King may want her considered a “fact witness,” that has not been indicted. However, as the letter supports him, and it includes many of the same things in Mayor Tesh’s letter and the facts she stated at the PIC meeting, we will assume Mr. King wanted her as a fact witness. We also received additional correspondence and calls supportive of him, and considered them.

**(a) Letters of Good Will and Good Intentions:** Ms. Claybrook’s letter and letters from others, and phone callers spoke to the important role of Mr. King on the Zoning Commission, his value to the community, that he is honest, etc. (e.g., *Tab Tab C-4 thru 7, Ms. Claybrook; Tab M, Mr. Cooke and Mayor Tesh*). We have never suggested Mr. King’s work is not of value to the Zoning Commission, the community, etc. However, the law does not distinguish between the “good” and the “bad,” the “honest” and “dishonest. *29 Del. C. § 5805(a)(1).* It applies to all officials--that is what insures the public’s confidence in its government. *29 Del. C. §5802.*

Mr. King, and these persons, say he had no intent to violate the law. He is entitled to a strong legal presumption of honesty and integrity, as are all public officials. *Beebe, supra.* Mr. King was given that presumption, even though he apparently did, at a minimum, review the draft ordinance. He was given an advisory opinion, which requires no sworn statements, from Mr. King, or any others. *29 Del. C. § 5807(a).* A violation of this law may be found during an advisory opinion request, and may then be referred for prosecution. *29 Del. C. § 5807(b)(3).* The filing was not treated as a criminal prosecutorial matter. If so, the law would require “knowingly or willfully violating any provision,” carrying up to a year in prison and/or up to a \$10,000 fine. *29 Del. C. § 5805(f).* Thus, he received

the benefit that he did not intend to violate the law.

What the advisory opinion section requires is “full disclosure” of all the material facts. 29 Del. C. § 5807(c). Although Mr. King did not disclose he wrote e-mails other than the June 3, 2006 e-mail, PIC and the Town Solicitor were sent copies of additional e-mails by him attached to a “complaint.” That complaint alleged violations of the Dewey Beach Code, not the State Code. It was dismissed because, among other things, PIC has no jurisdiction to interpret the local ordinance, only the State law. *Tab J, Commission Op. No. 07-47*. Specific reference to the June 8 e-mail was made in PIC Counsel’s e-mail to Mr. King’s Counsel, as was the letter from Mayor Tesh. *Tab J-13*.

It is PIC’s Counsel’s statutory responsibility to “review information coming to the attention of the Commission relating to potential violations of this chapter.” 29 Del. C. § 5808A(a)(3). Mr. Eisenhower’s request was already pending at the time of the “complaint” referred to above. Counsel, pursuant to those duties, brought the information to PIC’s, to aid in “full disclosure” as required by 29 Del. C. § 5807(a).

Mr. King cannot have it both ways—have PIC consider the letters of goodwill, but not the e-mails he wrote on this matter.

Ms. Claybrook’s other facts:

(1) She repeatedly refers to PIC’s ruling as an advisory opinion. (*Tab C-4 and 5*).

**RESPONSE:** Her factual statement, like the fact that the motion refers to PIC’s ruling as an advisory opinion, supports PIC’s position that the filing was, as a factual matter, treated as an advisory opinion. Using that term is also contrary to the argument previously addressed that there was a “belief” that it was a “complaint.” *See, Argument (3)*. An argument that had no factual basis.

(2) PIC is inconsistent in its opinions because it previously ruled it had no jurisdiction over a school board member under 29 Del. C. § 5812[financial disclosure].

**RESPONSE:** PIC is not inconsistent. Had it had been asked to consider how the financial disclosure law applied to Mr. King, it would have found no jurisdiction under that Subchapter. *See Tab H-1, Legislative History, and Response to Jurisdiction argument. (Subchapter I, Code of Conduct, applies; Subchapter II, Financial Disclosure, does not apply)*.

(3) PIC’s decision was “a very brief opinion less than one page in

length” on a “highly controversial issue” and “800 voters” who registered their concerns.

**RESPONSE:** This argument is factually and legally incorrect.

(a) As a factual matter, the 800 registered voters were not expressing their concern about PIC’s opinion, but about the development.

(b) As a matter of law, no Code provision or rule gives the number of voters as a basis for the length of an opinion, or the basis to exempt officials from the law. *Commission Op. No. 01-20*. In that opinion, it was argued that a local official had been elected by a large number of voters, and so he should not have to recuse. PIC said: “No Code provision states that the number of votes received is a basis for letting an elected official participate in the face of a conflict of interest. If those were the rules, no elected official would ever have to recuse themselves when they had a conflict of interest. The restrictions would then become meaningless.” In essence, we would be putting an exemption in the law. Language cannot be grafted onto the law. *Goldstein, supra*.

(c) As a matter of law and fact: Land use issues are usually controversial, so that fact is not unique to Dewey. Delaware Courts have recognized some issues can be so “highly controversial,” that a State official should not even serve on a committee at all. *Tab N, Your [Judge’s] April 20, 1999 Request for an Opinion from the Judicial Ethics Advisory [sic] Committee, JEAC 1999-1, Super. Ct., 1999*.<sup>18</sup> The Court concluded that even though it was unlikely any matters related to the education committee, on which he wished to serve, may come before him, or that he could recuse himself, that it may raise the appearance of impropriety if he served on the committee at all. Similarly, PIC concluded that

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<sup>18</sup>*Extract - Commission Op. No. 02-23. 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 also, Harvey, supra*. (using judge’s recusal standard for local government officials on land use issue, e.g. rule of necessity).

Some examples of similar purposes and obligations for Judges subject to the Judicial Code of Conduct and officials subject to the State Code of Conduct are 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.

Mr. King's participation (but only on this particular matter) could "raise the specter [appearance] of "bias" [impropriety]. PIC did not go so far as to bar him from being on the Zoning Commission; it only required that he properly recuse.

(4) PIC cited only one case.

**RESPONSE:** No law or procedure mandates the number of cases to cite. No facts are given to suggest that when a person goes for advice on the law that the advice must be a legal treatise.<sup>19</sup> *It is advice--non-binding--not a Court briefing. As a factual matter, when advice is given, including legal, it is difficult to image that every case, regulation, etc., would be identified.*

(5) *PIC's practice is to treat correspondence about the behavior of third parties as a complaint.*

**RESPONSE:** *Ms. Claybrook gives two opinions she believes support that fact. Commission Op. No. 00-28 and 93-15.*<sup>20</sup> Both were filed by private citizens, not officials or agencies. Advisory opinions are not given to private citizens. 29 Del. C. § 5807(a). Any person, including private citizens, can file complaints, but they must be sworn. 29 Del. C. § 5810(a). The private citizens did not file a sworn statement. They were told of the law and rules on the requirement. PIC also advised that "even assuming a complaint," the law gave PIC no jurisdiction over a school board member or General Assembly members. Ms. Claybrook is factually incorrect about the implications of those opinions. Aside from the law given in the opinion, as a factual matter, it would be a waste of the citizens' time to be told only about the need for a "sworn complaint," and not be told about the jurisdictional limits. They would then file a sworn complaint, only to have it dismissed for lack of jurisdiction. (5) Mr. King has no "financial" interest in the matter, and no "personal" interests have been asserted for Mr. King.

**RESPONSE:** As addressed in detail above: (1) PIC has never said or suggested that he has a financial interest; (2) the law is not limited to pecuniary interests; (3) his "personal interest" was given in his own e-mails; identified in the underlying opinion; and (4) his own remarks at reargument. *Tab A, Tab G ("I personally would have started at the other extreme, start low and build up rather than start up and build low....") and Tab K.*

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<sup>19</sup> *It appears that this document is turning into a legal treatise as a result of duplicate arguments, arguments made so broadly without facts and law to identify exactly what the claim is, etc.*

<sup>20</sup> *Ms. Claybrook noted that in Op. No. 93-15, PIC concluded it had no jurisdiction of the individual in his School Board capacity. It is unclear what she believes is the factual relevance. In 1993, at the time of that decision, the law was: (1) PIC had jurisdiction over local officials in towns, municipalities, etc. See, Legislative History discussion above. School districts and Board members were not subject to the law until it was amended in 2000 to include "school districts," "Boards of Education," and "Board members." 29 Del. C. § 5804(11) and (12)(a)(3).*

Ms. Claybrook refers to his e-mail as “the musing of a private citizen.” That shows even a lay person’s understanding of the “personal” or “private interest.” A “personal and private interest” for Mr. King has been established, and he should not “review or dispose” of matters related to the Ruddertowne development. *29 Del. C. § 5805(a)(1)*.<sup>21</sup>

(6) PIC called Mr. King’s e-mail an “open letter” to the community, but it was only e-mailed to nine people.

(a) PIC called it by the name Mr. King used. *Tab K-1, “Open Letter to Dewey Beach Residents and Property Owners.”*

(b) Mr. King asked those persons to pass this along your network of concerned friends. *Tab K-8.*

(c) Regardless of the number of people to whom it was sent; who received it; saw it; had it read to them; were told about it, etc., the content is the same—it gives his personal position on the development. Conflicts are not based on the number of persons who are aware of an official’s personal or private interest. It is the official’s duty to recuse even if no one else is aware of the conflict. There is no legal or factual basis for such an exemption. *29 Del. C. § 5805(a)(1)*.

**FINAL CONCLUSION:** Based on the above law and facts, we find that no law or facts were misunderstood, nor were facts or legal principles overlooked. The underlying opinion is not changed: Mr. King has a “personal or private interest” in the Ruddertowne matter. His personal statements about the development and developer, when he knew or should have know the development matter could come before him, at a minimum raise the “specter of bias,” and he should recuse from those matters.

Sincerely,

---

<sup>21</sup>*Ms. Claybrook says: “Many, including David King, believed that the Ruddertowne project would go before the Board of Adjustment for a zoning variance rather than coming before his commission.” To the extent Ms. Claybrook can speak to the facts of who believed what, regardless of what “many” believed, Mr. King knows, or should know, his official duties under the Dewey Code including such things as height variances, etc. He knew it would be considered as part of the CDP. He knew there was a concern about the potential conflict, and expressed that in his own e-mails, saying he would have to decline from hosting a meeting at his private residence for other like-minded people. Tab K. Recusal from hosting the meeting at his private residence, is not recusal in this official capacity, which is what the statute requires once the personal or private interest exists. 29 Del. C. § 5805(a)(1). PIC’s advice was to recuse from the official duties on this on “matters” before the Zoning Board.” Thus, even if the facts showed that it was “his belief” that it would not come before him, if and when it did, he was to recuse.*



Terry Massie, Chairman  
Public Integrity Commission

cc: John F. Brady, Esq.



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

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July 24, 2007

John F. Brady, Esquire  
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10 E Pine St.  
P.O. Box 742  
Georgetown, DE 19947

*Advisory Op. 07-42 -- Local Land Use Issue*

*Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey and Wayne Stultz*

Dear Mr. Brady:

At your request, the Public Integrity Commission reviewed the letter from Michael Eisenhauer, Vice Chair, Dewey Beach Ruddertowne's Architectural Committee. He asked if it was a conflict for David King, Vice Chair, Planning and Zoning Commission to write to all Residents and Property Owners on a land use issue. Based on the following law and facts, we find he should not participate in his official capacity on the re-development of the Ruddertowne Property.

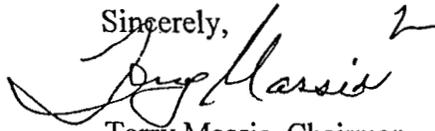
Under the Code of Conduct, officials may not have any interest that may tend to substantially conflict with their official duties. *29 Del. C. § 5806(b)*.

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The letter clearly expresses his position, which is against the Architectual Committee and developer before any hearing by his Board. His "loud and clear" position may, at a minimum, raise the specter of bias in participating in the zoning decision. Delaware Courts have imputed bias to a School Board member who made negative public statements in advance of an individual coming before his Board for a decision. *Jones v. Board of Educ. of Indian River Sch. Dist., C.A. No. 93A-06-003, J. Graves (Del. Super., January 19, 1994)*. Such action is considered prejudgment, when the official duties require an official to hear all the facts, and without bias render a decision. The Court considered the argument that officials are entitled to a strong presumption of honesty and integrity. However, it concluded that even with that legal presumption, it still must impute bias.

Accordingly, he should not participate as a board member in decisions on this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Terry Massie", with a small flourish at the end.

Terry Massie, Chairman  
Public Integrity Commission

01-42

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 EDWARD B. MAXWELL, 2ND

July 31, 2007

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

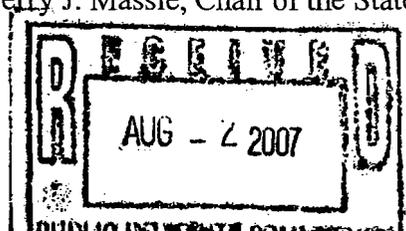
Delaware State Public Integrity Commission  
 Margaret O'Neill Building  
 410 Federal Street, Suite 3  
 Dover, DE 19901

Re: Advisory Op. 07-42 – “Local Land Use Issue”  
“Advisory Opinion” dated 7/24/07

Dear Ladies & Gentlemen:

I represent David King and by this letter I am moving this Commission for reconsideration of its July 24 Decision pursuant to Commission Rule IV(p). While I recognize that the Rule I have just cited applies to hearings and decisions on Complaints, and does not appear to apply to request for Advisory Opinions, we believe that the true nature of this dispute is a complaint filed by Michael Eisenhauer by e-mail dated June 14, 2007 to Janet Wright. For your review, I enclose a copy of that e-mail with its enclosure. (See Exhibit A).

Our objection to the Advisory Opinion and the procedure which resulted in its issuance is multifold. We are in receipt of a letter to Terry J. Massie, Chair of the State Public Integrity



Commission, from Joan Claybrook dated July 31, 2007 (Exhibit B) and adopt all of the positions stated therein.

Specifically, we raise the following:

1. The Advisory Opinion in this matter was not in accord with 29 Del. C. §5802(4) and is outside the jurisdiction of the Public Integrity Commission. See, also, 29 Del. C. §5812.
2. This complaint was not based on sworn testimony and is in violation of the law and the Rules of this Commission. See, Public Integrity Commission Rule III.
3. The entire process violated Mr. King's right to due process since he had no notice of the complaint against him and no opportunity to be heard on any of the issues.
4. The complaint against Mr. King is factually incorrect. At the time of the preparation of the material of which Mr. Eisenhower now complains, there was no pending proceeding by any individual regarding "Ruddertowne" before the Planning and Zoning Commission. In addition, Mr. King's notes were talking points only and in no way indicated any prejudice for or against any particular development.
5. The citation to Jones v. Board of Edu. of Indian River Sch. Dist., C.A. No. 93A-06-003; Graves, J. (Del. Super. 1/19/94), is inapposite. The reasoning in the Jones case involved the review of a decision-maker in a teacher dismissal case whose own children had been taught by the teacher in question and had certain negative experiences in that teacher's classroom. This is far from the circumstances of this case. Had the Board allowed a full record to be developed, this distinction would have been made clear.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Public Integrity Commission

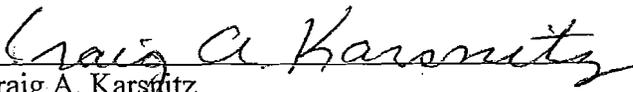
July 31, 2007

Page 3

6. The Opinion of the Public Integrity Commission is so broad and sweeping as to cast doubt on Mr. King's ability to participate in any zoning decision. The decision itself is not clear in what "decisions on this matter" Mr. King should not participate.

7. Fundamental due process requires an ability to respond on behalf of Mr. King in this matter.

WHEREFORE, it is respectfully requested that this Motion be granted and the Opinion of July 24, 2007 be withdrawn. It is also requested that any further proceedings be with notice and an opportunity to be heard on behalf of Mr. King.

  
Craig A. Karstitz  
s / jwc

CAK:jwc  
Enclosures

cc: John F. Brady, Esquire  
Michel Eisenahuer

**Wright Janet (DOS)**

---

**From:** MICHAEL EISENHAUER [meisenhauer1@verizon.net]  
**Sent:** Thursday, June 14, 2007 10:36 AM  
**To:** Wright Janet (DOS)  
**Subject:** Town of Dewey Beach RAC  
**Importance:** High  
**Attachments:** David King's Comments.doc

The Ruddertowne Architectural Committee (RAC) was established by the Town Council to determine if there was an opportunity to influence the development of the Ruddertowne area after Highway One, LLP announced their intention to demolish all existing buildings, to include the Rusty Rudder, and convert to Townhouses and Condos. Under then current zoning codes they had the right to convert the commercial activities to residential.

Highway One, LLP has given the Town an opportunity to negotiate with a developer to change the development and end process to a more mixed use concept. HarveyHanna Associates (HHA) have made an offer to Highway One, LLP for the property based on their ability to negotiate an agreement with the Town. HHA has paid for the option and has until the end of October 2007, to make final arrangements.

At this time there has been no concept or development plans. HHA has not as of this date offered any ideas on what they propose to develop. The process that the Town will follow will be for the RAC to negotiate with HHA for specific results; retention and/or development of the existing Ruddertowne commercial activities (Light House Rest., Bay Center, Crabber's Cove, etc.), Reception Center, Public Restrooms, Parking, and mixed use development with residential over commercial. RAC will make its recommendations to the Town Commissioners. Town Commissioners will refer the proposal to the Town Planning & Zoning Commission for review and public hearings and their recommendations. The Town Commissioners will make the final decision.

My question is: Did David King, as Vice Chairman of the Planning & Zoning Commission, violate State Ethics Rules when he published and distributed the attachment? And, based on your opinion, what action should be taken.

Michael Eisenhauer  
Chairman, RAC  
Commissioner, Town of Dewey Beach  
302-858-3002

EXHIBIT B

6/14/2007

## On Open Letter to Dewey Beach Residents and Property Owners

The most recent meeting of the Dewey Beach Ruddertowne Architectural Committee (May 24, 2007) – the first public meeting with a developer who has arranged with Highway One to perform due diligence on the re-development of the Ruddertowne property – has given us a sense of both excitement and disappointment.

- Excitement that there is now a player at the table who seems committed to a mixed use re-development of the Ruddertowne complex (i.e., the two lots containing the Baycenter, Crabbers Cove and Light House restaurants, various retail and associated parking);
- Disappointment that these developers 1) seemed so poorly informed/mis-informed about the needs and desires of the Town's residents and property owners, and 2) seemed intent on a massive re-development rather than something more in scale with the rest of Dewey Beach and more closely matched to the "way of life" that brought us all here.

### What did we learn at the last meeting of the Ruddertowne Architectural Committee?

**The developer** selected by Highway One LLP, Harvey Hanna & Associates (HHA):

- Appears to view itself as a large-scale mall developer, calling our attention to the fact that it has developed over 3 million square feet of commercial space;
- Had read the new Comprehensive Development Plan (CDP), but has no sense of the Town's needs/desires, and in fact has no sense of what Dewey Beach and its "way of life" is all about;
- Walked into this deal planning to build a "mega" mall – of some 400,000 square feet, approximately half the size of Christianna Mall – and including a large hotel;
- And with the clear understanding that they could build to a height "a few inches" lower than the Ruddertowne lighthouse, which we were told may be as tall as 74 feet – this is more than twice the current height limit in Dewey Beach;
- Talked about reaching out to 10 specific types of uses, of which only 4 were discussed as being desirable (e.g., Expanded BayCenter, Expanded Retail, Baywalk, Public Bathrooms) in the many, many CDP-development meetings, and many of which are likely to rely on seasonal and/or hotel-guest patronage (e.g., Welcome Center, Funland, Grocery Store, Movie Theatre, Fitness Center/Spa, Pharmacy, Day Care Center) and thus result in a lot of empty retail/commercial space during the off-season months – picture the empty storefronts in Ruddertowne now vacant most of the year, multiplied twenty-fold;
- Planned on expanded "structured parking", i.e., a high-rise parking garage in the center of the Ruddertowne parcel, which will substantially raise the construction costs and require developing to a higher total square footage;
- Planned on building primarily residential along the Van Dyke side – imagine six- or seven floors of new condos from SR-1 to the Bay.

HHA came in sending the very strong message: they want to make a major re-development statement and intend a convention hotel as the keystone to this project.

**The Committee** is fearful that this deal may fall through, and seems unwilling to make critical comments and/or take a hard stand in negotiating for the Town's best, long-term interests.

Why should you care at this stage of negotiation?

*The outcome of the next three meetings of this committee will change the nature of Dewey Beach in a fundamental and non-reversible way.*

Why do we think this to be true? Picture the current options on the table:

1. Give HHA zoning incentives to build to a height of 70 feet from Van Dyke to Dickinson, from SR-1 to the bay. Once started, this will be irreversible. If the proposed development is successful, we will have massive traffic congestion during the summer, and every day off-season will be like a summer holiday weekend now; if “unsuccessful”, we will have an empty hulking “warehouse” district 7 or 8 months out of the year and massive congestion during the summer.
2. Recognize that Highway One will slowly convert Ruddertowne to residential land use. This option provides time for economic changes that favor commercial over residential land use to occur, or for another buyer with a gentler development scenario to come into the picture. Although Highway One has stated that the Rusty Rudder will be the last to go – possibly not for 10 years – minor parking concessions by the Town would allow the LightHouse, Baycenter and associated restaurants/retail to continue operations as the first several phases of residential construction proceeded.

**How do we see the sides lining up?** It appears that the Architectural Committee is willing to make any sacrifice to “save” commercial activity at Ruddertowne, while everyone we talk to (most of whom really, really like Ruddertowne as it is today) clearly state that they would rather see Ruddertowne “condominiumized”, i.e., turned into townhomes and multi-family dwellings rather than “malled”, i.e., turned into a very-large mall cum hotel.

**What can you do?** It is critical for every Town resident and property owner to become informed, and to make their informed-voice heard now. There are three meetings scheduled, June 15, 22 and 29 – all on Fridays at 7:00 pm at the Life Saving Station (later on a Friday to provide increased opportunity for out-of-town property owners to get to them). These meetings are not parallel, information gathering meetings. They will build sequentially to a final design concept that will be launched into the Town’s preliminary zoning approval process at the July Town meeting,

At the end of the Jun 29<sup>th</sup> meeting it will be too late for any major structural changes to the development concept in response to town-property owner input; minor tweaks might be possible, but the economics will have been finalized and then Town will be in a “take-it or leave-it” situation – by June 27<sup>th</sup>.

What are some of our specific fears?

**Increased congestion**, and all the associated negatives that come with that.:

- HHA is talking about over 400,000 square feet of development (possibly another 100,000 square feet of new space if it builds over the Baycenter) in a 70 foot tall monolith that will raise year round congestion in Dewey to a level comparable to that around the Rehoboth Beach discount malls on SR-1 (if the developers bring in successful retail);
- Loss of the small town feel that is part of life in Dewey Beach. The new Ruddertowne will dominate life in Dewey and its associated congestion will require an enhanced police presence and increased enforcement;
- A more crowded beach, that will look like Rehoboth’s beach and require banning of surfing, surf fishing, skim boarding, beach volley ball, dogs on the beach, etc
- Increased litter and crime.

Dewey Beach residents (both full time and part-time/occasional residents, of which there are some 3,500 to 5,000 of us) and visitors (which most likely includes some 100,000-plus weekly and seasonal visitors and guests) will see fundamental change in the character of the Town, a loss of the small-town look and feel that drew them here, rather than Rehoboth Beach, or Ocean City, or the Jersey shore.

**The development fails** to produce a year-round destination, will result in:

- A white elephant that appears to look like a blighted, “warehouse”-like district 7 or 8 months a year – possibly encouraging vagrancy and crime.
- Partial success might result in a vibrant hotel operation weekends in expanded shoulder seasons, and stores and restaurants that are closed or empty all week, and during the winter;
- Even partial success will transform the Town, and require major infrastructure developments and increased full time police staffing.

An important consideration is the impact of such a massive commercial development on existing businesses, that have made Dewey their home, and stood with us in good and lean times. They are likely to be devastated by the new mall – a reality often seen in on-street retail/eateries surrounded by a new large-mall development.

**Increased Town expenditures**, such as:

- Increased road-related expenditures due to the increased wear and tear, including widening of SR-1 to accommodate the increased traffic required to support such a mega development;
- Need for new/enhanced water, sewer and electrical infrastructure;
- More (and upgraded) on-street parking since there will only be limited parking on the Ruddertowne site – at the expense of individual property-owner access to their property and a loss of our now “beachy”, sand-lined lanes leading to the ocean strand;

Many of these infrastructure upgrades will have to be put in place long before we see if this development is really going to be a success. It is unlikely that HHA will be willing to pay for these, and other required capital infrastructure developments (e.g., expanded Town Hall and Police Department facilities) and operating costs (expanded year-round police, parking enforcement, and trash removal and maintenance staffing) that will come with any large-scale development such as that envisioned at the May 24 meeting. This will require the imposition of a PROPERTY TAX – a property tax on the scale of other coastal towns and not just a few hundred dollars like our current, beach replenishment tax – to support the Town’s increased responsibilities. Not immediately, but soon after this complex becomes operational.

**Loss of the Dewey Way Of Life**, and declining property values, for example:

- Property owners all over town will lose their view of the bay over the Ruddertowne area (even though some 70 feet tall, the light house presents a very small skyline – not so a two-square block development);
- Residents, property owners, guests and visitors will find that Dewey is now more like Ocean City of Atlantic City than Dewey; or even than Rehoboth Beach, Bethany Beach or Lewis. The Town will no longer be able to allow dogs on the beach or even off lease, no more group houses, no more beach weeks, no more peaceful evening strolls, no changing of the season as we move from the summer crunch, to the shoulder season calm and winter peace.
- There will be a significant and escalating property tax (a conservative estimate of an increase in the required Town budget of \$2 million for operational expenses and debt service, would result in an annual property tax starting around \$1,500, and rising as the Town is required to take over more and more of the costs of infrastructure, maintenance, and operations).

The one thing everyone agrees about – and that came through loud and clear during the comprehensive plan meetings – is that we should retain Dewey’s characteristic “Way Of Life”. To do otherwise is to betray the faith of all Town stakeholders.

**Loss of property value, due to:**

- Decreased demand for Dewey Beach properties. We will lose the uniqueness that makes Dewey so desirable as a home, second home, or vacation destination;
- Increased housing stock, for both residences and rentals. HHA is planning on building a lot of residential space – perhaps as much as 300,000 square feet of residential space – and a large hotel (which could accommodate a lot of our current rental clients).

So, property values will decline due to loss of uniqueness, increased housing supply and reduced rental demand.

**Two final thoughts:**

1. What do we really think? Clearly, Rehoboth Beach is a regional “destination”, and yet it is pretty dead from Thanksgiving to early May – lots of closed restaurants and retail shops despite the hard work of the Chamber to put together special weekend events. And if it were not for the close relationship to the SR-1 discount outlets, Rehoboth would likely be even more desolate. Why would any of us think that any development short of a casino-on-the-bay would be able to be more successful than the Chamber of Commerce-driven Rehoboth Beach Destination?
2. The “town center” envisioned in the Comprehensive Development Plan was very different from that painted by the HHA representative at the May 24 RAC meeting; more on the size and scale between Lewis’ Second Street nexus and Bethany’s town center development – an interesting mix of two and three story structures with mixed use, with an interesting mix of small eateries and retail, and few or no discount and/or chain stores.

What are we asking you to do?

First and foremost, we ask you to become informed, and to be sure your voice and informed-opinion is heard. The best way to accomplish this is to attend the June 15, 22 and 29 Ruddertowne Architectural Committee meetings – this decision will change the face of Dewey one way or the other. Whether you agree with our opinions or not, please become informed. And if the negotiations are going in a direction that gives you serious concern, make your voice heard by speaking up at these meetings, or writing the committee members, Town commissioners and Mayor.

If you share our concerns, please communicate with the decision makers – the members of the Architectural Committee, the members of the Town Planning and Zoning Commission, Town Commissioners and the Mayor. Our specific objectives are simple, specifically::

1. A target development height of 35 – consistent with the rest of the Town. Take a look at the Marina Suites Condominiums, a set of structures built for commercial purposes under current zoning and building codes that support 3 full occupancy levels above an extensive parking lot. Taking this approach would give the current level of Ruddertowne parking with some 180,000 square feet of new space for business and residential use. Developing this for the maximum amount of residential, would still give us the existing approximately 200 street-level parking spaces and 60,000 square feet of new commercial space (compare this to the two proposed new restaurants at Dickerson & SR-1 have a combined footprint of about 6,000 square feet, and most of Dewey’s eateries and retail stores that are in the size range between 500 to 2,000 square feet). Also take a look at the five new townhouses just built on the beach block of \_\_\_\_\_,

- and imagine what you would see if this level of development were twice the height, and ran from SR-1 to the beach, and wrapped around the corner and down the adjacent block.
2. Reasonableness in scope and scale of development. Dewey does not need or want 400,000 square feet of new development. This was not the intent of P&Z in its vision of a town center. Many small towns have revitalized their downtowns and/or main streets with modest two and three story, contiguous and detached mixed use structures – rejecting out of hand mega-mall proposals. The Town currently has some 45 commercial enterprises, with an estimated, combined floor area of maybe 25,000 square feet (actual numbers are not available). Conservative development of the current Ruddertowne parking lot area (i.e., the 60,000 square feet that Highway One offered to sell to the Town) would result in more than a 200% increase in available commercial square footage. What assurances do we have that this space will not be empty/closed much of the year – even as commercial space is closed in Rehoboth late fall to early spring. A good model for such a conservative development would be to build permanent eateries/storefronts surrounding broad corridors, corridors that could be occupied during the peak season with vendor “carts”, “sidewalk” cafes, and temporary store fronts (typical of many malls, etc.) – to avoid a mass of empty store fronts that we see even in Rehoboth in January. What possible use(s) could the Town, its property owners and visitors do with 150,000 square feet, or more, new commercial space? If we build small/smart to start, there can always be the opportunity for increased development as the Town grows into its new “clothes”; if we go overboard on day one, we are stuck for ever with a white elephant.
  3. Put the final decision to binding referendum. By August we should have a good picture of what HHA needs to build, and how it will be marketed and occupied. At this point it is unlikely that there will be substantive changes in the overall picture. This is a plan that the Town’s voters can review, evaluate the relative tradeoffs of each individual’s perceived pros and cons, and cast a vote in the September election on the proposed development. This gives HHA an answer within the timeframe they have stipulated. Most important – because it is a decision that will profoundly change the life of each and every Dewey Beach resident and property owner – it will be a decision into which each and everyone of us has had equal input.

We welcome your support and input. Please feel free to share your opinions and insight with us,

David King ([king.deweybeach@verizon.net](mailto:king.deweybeach@verizon.net))

07-42

August 22, 2007

Terrie J. Massie, Chair  
Janet Wright, Esquire  
Public Integrity Commission  
410 Federal Street, Suite 3  
Margaret O'Neil Building  
Dover, Delaware 19901

RE: David King Complaint

Dear Honorable Members,

I am very disturbed at the suggestion that David King not be allowed to discuss and vote on the RB 1 District that is to be applied to our new zoning code to comply with our Comprehensive Plan. Mr. King served on Planning and Zoning and was instrumental in getting our Comprehensive Plan to the stage it is today. To not allow his input after all the work, time, and effort put into this because of a non proposal by a developer is neither fair nor practical.

Council did discuss at our last council meeting and it was unanimously decided, including Mr. Eisenhower, that David King should be allowed to serve on P & Z since there was nothing before Planning and Zoning by any developer. I do believe he should be allowed to do this. He is only one of seven members of this board.

Currently the developer, Harvey Hanna Associates, has filed absolutely nothing with the Town of Dewey Beach. If in fact, they followed the correct process required of the Town of Dewey Beach, any application that contained what they propose would have had to go to our Board of Adjustment. Instead, they have taken a back door approach to P & Z to try to force the town to approve their plan even though it is against our code. It is my opinion that David King was actually drawn into the process by members of the Ruddertown Architectural Committee in order to do exactly what has been done. I believe Mr. King was set up. Mr. King had been a part of all the discussion of P & Z concerning height during the Comprehensive Plan process and it has consistently been agreed by the members not to exceed 35 feet. This has been over the last two and a half years.

I also object to this opinion being requested by Mr. Eisenhower on the basis that the information provided to you by Mr. Eisenhower was erroneous. The PIC had an obligation to verify the information provided before rendering an opinion and that was not done. The request was made for an opinion on a third party with false information. Mr. Eisenhower was even untruthful to a fellow member of the RAC when asked if he filed anything with the PIC by denying doing so. The PIC is negligent, in my opinion, to have allowed themselves to be manipulated in this manner by a group who is fighting so hard to have this developer be allowed something that is against the code of Dewey Beach. The time for this developer to come in with a proposal of this type is after our Comprehensive Plan process is completed. The State by law, gives us 18 months to change zoning to comply with the plan. This is being taken away from the town by Commissioners Walsh and Eisenhower and our P & Z is being forced to do this in 60 days without even the aid of a planner to help.

While I have no problem with the developer proposal as stated verbally, none of it complies with our current zoning code and the property owners are very outspoken against it. The RAC voted unanimously to give the people the right to have a say with a survey On June 15, 2007. They turned around and voted at the next meeting on June 22, 2007 to disallow it. We do have a formal process which is being ignored. David King has been targeted because it is a known fact that he was in favor of not raising our current height. Who will be next? Any member of the board who is not willing to give the developer what he wants?

It should also be noted that the RAC committee had no authority and no right to even meet with a developer since they were formed to work with Highway One on a compromise with them. If Highway One

07-42

chose to sell the property to a third party, then the proper procedure would have been for the buyer to file a site plan and an application and follow the normal procedures. Since nothing has been filed with the Town of Dewey Beach, this is a non issue since Mr. King would most certainly have served the Town in his capacity as vice chair of P & Z.

The Public Integrity Commission is basing this on a non issue since HHA has nothing before the Town of Dewey Beach other than a conceptual drawing. No site application or permits would be issued on the information provided to the town with the information we have seen, but the PIC issued a very serious opinion based on this and false information provided by someone who is even more prejudiced in favor of the project. Why is it not against the Ethics of the PIC for Mr. Eisenhower & Commissioner Walsh to make public statements in favor of this proposal knowing full well it would come before council to vote on and knowing council votes are binding? They have both gone on record as saying we need to give the developer whatever they want. The PIC has taken a one sided view of the situation without even hearing from the other side. This is quite disturbing. By this ruling a person is not entitled to a personal opinion. I could understand this if Mr. King knew this would come before Planning and Zoning. Mr. Eisenhower actually stated it would not go to Planning & Zoning.

I am requesting that anything before the Public Integrity Commission that pertains to David King be dismissed based on the facts:

1. There is no proposal by any developer before Planning and Zoning
2. The information provided is erroneous.
3. The request was not sworn testimony and not verified.
4. Mike Eisenhower has requested an opinion on a third party rather than on him.
5. The complaint filed by Patricia Wright was done, in my opinion, out of personal and political motivation to embarrass and malign David King and to benefit a special interest group and not the town of Dewey Beach
6. It should be noted that at the time of the alleged offense, no picture, proposal, or anything else from this developer had been submitted to the Ruddertown Architectural Committee. How can Mr. King be deemed prejudiced to something that he had no way of knowing what it would be? Why would Mr. King assume anything from this proposal would come before P & Z since nothing had been filed with the town and if anything was filed, it would have had to go to Board of Adjustments?
7. If it is shown to be this easy to get rid of someone that a special interest group deemed a threat to their wishes, it will certainly be abused as is being shown to be the case here
8. If a volunteer has to be concerned about this kind of treatment by a governmental agency, why would anyone ever want to serve in any capacity for a municipality?
9. It should not be so easy for unsubstantiated complaints to be able to manipulate a board as prestigious as the Public Integrity Commission so as to cause harm to a Town process and a hard working volunteer's reputation with no recourse by the accused for those actions. There was no investigation into the accuser's allegations. I am appalled that the PIC would take away the rights of an individual because they are given false information and no due process has been done. Everyone is entitled to defend charges against them. It should be obvious to the PIC that what is being done here, based on a similar complaint filed against a member of the RAC Committee, is because they differ with the opinion of two Commissioners.
10. The Commission has stated they are not finding David King guilty and are not rendering an opinion, but they in essence are when they tell him he cannot serve on the board of which he has been a hard working member.

It is vital that the Public Integrity Commission not allow itself to be abused in the manner this was done. The Commission provides a great service and need to the communities. That service needs to be allowed to continue without being questioned or tarnished.

Respectfully submitted,  
Dell Tush  
Mayor of Dewey Beach

*Appendix C - PIC's Motion*

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

DAVID S. KING	)	
	)	
Plaintiff (Appellant),	)	
	)	
v.	)	Civil Action No. 08A-02-002 ESB
	)	
DELAWARE STATE PUBLIC INTEGRITY	)	
COMMISSION	)	
	)	
Defendant (Appellee).	)	

**DEFENDANT APPELLEE MEMORANDUM IN SUPPORT OF A MOTION TO DISMISS**

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

**THE PARTIES**

1. Appellant David S. King, Vice Chair, Dewey Beach Planning and Zoning Committee appointee, Town of Dewey Beach, 105 Rodney Avenue, Dewey Beach, DE 19971.
2. Appellee Delaware State Public Integrity Commission, a State agency, 410 Federal St., Suite
3. Dover, DE 19901.

**FACTUAL BACKGROUND**

4. The Delaware State Public Integrity Commission (hereinafter "PIC") received a written request from Michael Eisenhauer, Vice Chair, Dewey Beach Ruddertowne's Architectural Committee asking for PIC's opinion of the Code of Conduct's applicability to David S. King, Vice Chair, Dewey Beach Planning and Zoning Commission appointee. *Appellant's Notice of*

*Appeal, Exh. A, ¶ 4.* PIC advised that Mr. King should recuse in his official capacity on Ruddertowne property matters because his correspondence to residents and property owners showed biased in advance of the development/developer appearing before his Commission. *Advisory Op. 07-42 "Land Use Issue," July 24, 2007, Appellee's Exh. A.* Mr. King asked for reconsideration; PIC reached the same conclusion. *Advisory Op. 07-42, "Motion for Reconsideration," January 24, 2008, Appellee's Exh. A without Attachments.*

5. Appellant filed a Notice of Appeal on February 12, 2008.

### REASONS TO DISMISS APPELLANT'S CLAIMS

6. Paragraphs 1-5 are incorporated herein by reference:

7. The Court lacks jurisdiction over the appeal for the following reasons:

(a) The Superior Court has held that PIC has authority to issue such advice and the Court lacks jurisdiction to review the merits on appeal. *Post v. State Public Integrity Commission, Del. Super., C.A. No. 07A-09-008 WLW, Witham (April 30, 2008), pp. 1-3.* In *Post*, a local official asked for advice on another official's conduct. *Id. at 3.* PIC, in its opinions, said the conduct was improper. *Id. at 2.* *Post* appealed, arguing PIC had no authority to issue the opinion, and "therefore violated the statute." *Id.* The Court found to the contrary, dismissing the appeal. Here, too, another official asked for advice on Mr. King's conduct. *Appellant's Notice of Appeal ¶4.* PIC advised that Mr. King should recuse. *Advisory Ops. 07-47, Exh. A and B.* Mr. King appeals on the same basis as *Post*--the decisions were beyond PIC's authority. *Appellant's Notice of Appeal ¶ 5.* As in *Post*, the Court should dismiss for lack of jurisdiction. *Super. Ct. Civ. R. 12(b)(1).*

(b) The Code of Conduct gives no statutory right to appeal non-binding advisory opinions. PIC has authority to issue local officials advice. *29 Del. C. § 5802(4) & § 5807(c).*

*Post, supra.* Advisory opinions are non-binding, fixing no rights and entailing no legal consequences. *In re: Opinions of the Justices*, 88 A.2d 128, 134 & 136 (Del., 1952); *Council 81, AFSCME v. Dep't of Finance*, 288 A.2d 453, 455 (Del. Ch., 1972). The only Code of Conduct appeal right is in a separate and distinct section. 29 Del. C. § 5810A. Appeal rights are only triggered after a complaint, notice, hearing, prosecution; finding of a violation; and imposing of a penalty. 29 Del. C. § 5810 and § 5810A. No complaint was filed. Mr. Eisenhauser's written request says "my question is" ... "based on your opinion" what action should be taken." *Appellant's Notice of Appeal, Exh. A*, ¶ 4. Courts must have express jurisdiction authority over administrative agency appeals. *IFIDA v. Div. of Social Services, Del. Super., C.A. No. 93A-04-019, Alford, J. (February 9, 1994), p. 2, ¶ 5.* The Legislature expressly gave jurisdiction under § 5810A, but no express jurisdiction § 5807(c) advisory opinions--consistent with rulings that advisory opinions carry no legal rights.

(c) Jurisdiction is not given by the Administrative Procedures Act (APA). 29 Del. C. § 10142. PIC is not on the list of agencies subject to the APA. 29 Del. C. § 10161; *Fortuna v. Red Clay Consol. Sch. Dist., Del. Super., C.A. No. 97A-08-002 CG, Goldstein, J. (September 19, 1997), p. 3, ¶ 11 (no jurisdiction as agency statute nor APA granted appeal rights).*

(d) Jurisdiction is not given by Super. Ct. Civ. R. 72. Rule 72 appeals from commissions, boards and courts must also be permitted by law. *Id. at (c); Fortuna, supra at ¶ 11.* As in *Fortuna*, neither PIC's statute nor the APA permit appeals of PIC advisory opinions. Further, in *Post*, the Court found that as a matter of law under Rule 72(b), advisory opinions are not final judgments, so it did not have jurisdiction. *Post, supra at 3.* In *Fortuna*, the Court assessed costs against Appellant for filing an appeal over which the Superior Court had no

jurisdiction. *Id.* at ¶ 16. Under Rule 72, the Court shall specify the terms of dismissal, including provisions for payment of cost. *Super. Ct. Civ. R. 72(i)*.

(e) Even if the Court had Rule 72 jurisdiction, it can dismiss the appeal because it was not filed “within 15 days from entry of the final judgment, order or disposition.” *Super. Ct. Civ. R. 72(b)*. PIC’s reconsideration opinion was issued January 24, 2008. *Advisory Op. 07-47 Appellee’s Exh. B*. Notice of Appeal was filed February 12, 2008--19 days later. *Appellants’ Notice of Appeal, Exh. A*.

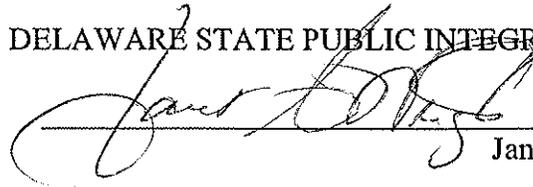
8. Alternatively, the Court should dismiss for failure to state a claim on which relief can be granted. *Super. Ct. Civ. R. 12(b)(6)*. If the Court considers matters outside the pleadings, it may treat the motion as a Rule 56 summary judgment and dismiss it for lack of a genuine issue of material fact. *Super. Ct. Civ. R. 12(c) and 56(c)*.

### CONCLUSION

WHEREFORE, for the reasons above, Appellee respectfully requests this Honorable Court to enter an Order:

- A. Dismissing the appeal;
- B. Granting reasonable attorney’s fees and costs of this action; and
- C. Granting Appellee such other and further relief as is just and equitable.

DELAWARE STATE PUBLIC INTEGRITY COMMISSION



Janet A. Wright, Esquire  
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410 Federal St., Suite 3  
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[janet.wright@state.de.us](mailto:janet.wright@state.de.us)  
Attorney for Appellee

Dated: November 24, 2008

*Appendix D - Auditor's Report 2008*

**STATE OF DELAWARE**  
**OFFICE OF**  
**AUDITOR OF ACCOUNTS**

**DUAL EMPLOYMENT**

**AGREED-UPON PROCEDURES ENGAGEMENT**

**YEAR ENDED JUNE 30, 2008**

**FIELDWORK END DATE: MAY 7, 2009**

**R. THOMAS WAGNER, JR., CFE, CGFM, CICA**  
**AUDITOR OF ACCOUNTS**

Townsend Building, Suite 1  
401 Federal Street  
Dover, DE 19901  
TELEPHONE 302-739-4241  
FACSIMILE 302-739-2723

[www.state.de.us/auditor/index.htm](http://www.state.de.us/auditor/index.htm)

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STATE OF DELAWARE  
OFFICE OF AUDITOR OF ACCOUNTS

R. THOMAS WAGNER, JR., CFE, CGFM, CICA  
AUDITOR OF ACCOUNTS

PHONE: 302-739-4241  
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Independent Accountant's Report  
on Applying Agreed-Upon Procedures

Janet Wright, Esq.  
Commission Counsel  
Public Integrity Commission  
Margaret O'Neill Building  
Suite 3  
410 Federal Street  
Dover, DE 19901

Dear Commission Counsel Wright:

We have performed the procedures enumerated below, which were agreed to by Delaware Public Integrity Commission and the Office of Auditor of Accounts (AOA). The procedures were performed solely to assist the specified parties in evaluating compliance with the Dual Employment Law, Delaware Code, Title 29, Chapter 58, Subchapter 3 (Sections 5821, 5822, and 5823). Management is responsible for their agency's compliance with those requirements for the period July 1, 2007 through June 30, 2008.

This agreed-upon procedures engagement was performed in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States and the attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

Our objectives and related procedures were as follows:

***Objective #1:***

**Determine if State agencies, departments, divisions, universities, and school districts are in compliance with the Dual Employment Law.**

***Procedures:***

1. Determine the population of State of Delaware legislators and State Board of Education members working as State employees at agencies, departments, divisions, universities, and school districts.
2. Select a sample of elected or appointed officials, who were also State employees during Fiscal Year 2008, and paid with more than one tax-funded source.
3. Obtain dual employment and compensatory policies from departments/divisions/agencies selected for test work.

***Findings:***

There were no findings associated with this objective.

***Objective #2:***

**Determine if elected or other paid appointed officials' pay was appropriately reduced or vacation, personal, or compensatory time was charged for time served in the elected or appointed position which required the employee to miss time during the normal workday.**

***Procedures:***

1. Obtain timesheets and leave records for the Fiscal Year 2008 legislative session for the selected sample of elected or appointed officials.
2. Review timesheet and leave records to determine if employees were in compliance with dual employment law for the selected sample of elected or appointed officials.

***Findings:***

See **Schedule of Findings** section of this report.

***Objective #3:***

**Review all allegations related to dual employment received by AOA that fall under the audit period.**

***Procedures:***

1. Request the Special Investigations designee to review the Auditor of Accounts Hotline Complaint Log and note any significant issues that may relate to or affect the current engagement.

***Findings:***

There were no findings associated with this objective.

We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on compliance with specified laws. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

R. Thomas Wagner, Jr., CFE, CGFM, CICA  
Auditor of Accounts  
Office of Auditor of Accounts

May 7, 2009

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# SCHEDULE OF FINDINGS

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## **Objective #2**

Determine if elected or other paid appointed officials' pay was appropriately reduced or vacation, personal, or compensatory time was charged for time served in the elected or appointed position which required the employee to miss time during the normal workday.

## **Finding #1**

### **Criteria**

Title 29, Chapter 58, §5822 states, "Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions."

### **Condition**

The examination of elected officials during Fiscal Year 2008 disclosed the following:

#### **Department of Labor**

Four instances, in January 2008, and four instances, in March 2008, where the Department did not record time missed for one employee's attendance at Legislative sessions.

#### **Red Clay Consolidated School District**

One instance, on June 10, 2008, where the District did not record time missed for an employee's attendance at a Legislative session.

#### **New Castle County Vocational Technical School District**

One instance, in May 2008, where the District did not record time missed for one employee's attendance at a Legislative session.

### **Cause**

Management did not provide proper oversight regarding the employee's timekeeping records.

### **Effect**

As a result of the above discrepancies:

#### **Department of Labor**

The Department overpaid the employee 5.00 hours, or \$92.45.

#### **Red Clay Consolidated School District**

The District overpaid the employee 2.00 hours, or \$109.72.

#### **New Castle County Vocational Technical School District**

The District overpaid one employee 45 minutes, or \$39.01.

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# SCHEDULE OF FINDINGS

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## ***Recommendation***

We recommend that:

### Department of Labor

The Department recover 5.00 hours, or \$92.45, from the employee.

### Red Clay Consolidated School District

The District recover 2.00 hours, or \$109.72, from the employee.

### New Castle County Vocational Technical School District

The District recover 45 minutes, or \$39.01, from the employee.

Management may reduce either the employees' leave records or compensation by the amount of the noted discrepancy.

## ***Auditee Response***

### Department of Labor

The 5.00 hour deduction appears on the employee's February 27, 2009 pay in the amount of \$92.43 (5.00 hours x 18.485074 = \$92.425370 rounded to \$92.43).

### Red Clay Consolidated School District

The District agrees with the finding. The employee incorrectly recorded leaving at 2:40 rather than 12:40 on the time log and the error was not corrected by the building administrator. The two hours have been deducted from the employee's pay.

### New Castle County Vocational Technical School District

The District recognizes the importance of precise recordkeeping and continues to accurately process the supervisor-approved Legislative Timesheets. These timesheets are prepared by a building-level secretary in coordination with the employee. In the instance above, the employee inadvertently failed to document leaving the building on a particular day. The information provided to the building by the employee was processed, approved, and forwarded to the District Office for processing. The 45-minutes of unrecorded time was not due to lack of oversight, it was due to the employee failing to record their time as prescribed in the Board Policy. The necessary adjustment has made to deduct the employee for the time.

## **Finding #2**

### ***Criteria***

Title 29 Del. Code § 5822 (b) states, "Any day an employee misses work due to his or her elected or paid appointed position, he or she shall have his or her immediate supervisor verify a time record stating specifically the number of hours worked that day; said verification to take place at least once every pay period."

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# SCHEDULE OF FINDINGS

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## ***Condition***

Employees' pay was not reduced in the same pay period in which the hours were not worked.

### Red Clay Consolidated School District

During the period reviewed, the employee requested that his pay be reduced for hours not worked on 37 days. Of these 37 days, the pay for 21 days was not properly reduced until the following pay period.

### New Castle County Vocational Technical School District

There were 66 days among the two employees reviewed where the pay was not properly reduced in the same pay period. All pay was eventually reduced; however, most were one to two months from the time the hours were not worked. In one instance, hours that should have been reduced in January 2008 were not reduced until August 2008.

### Delaware State University

One employee's pay was not reduced until the following pay period for hours not worked on two days.

The same employee's pay was not reduced for hours not worked on one day until September 26, 2008. The delay in docked pay was approximately six months and was initiated as a result of the University's internal audit of Dual Employment.

## ***Cause***

Management did not provide proper oversight regarding the employee's timekeeping records.

## ***Effect***

The employees' pay was not reduced in the appropriate pay period.

## ***Recommendation***

We recommend that the Districts and the University ensure employees' pay is reduced in the proper pay period.

## ***Auditee Response***

### Red Clay Consolidated School District

The District does not agree with the finding and recommendation. While the verification takes place at least every pay period, due to restriction of payroll entry availability in PHRST [the State's payroll system], there are only five days available for data entry out of a 10 day work period. This leads to entry in the payroll system in the subsequent pay period. As noted by the auditors, all of the payroll adjustments were reflected in the subsequent pay period. In the current fiscal year, the employee has changed from payroll deductions to vacation time which does not require adjustments in the payroll records and is reflected in the affected pay cycle.

### New Castle County Vocational Technical School District

The District recognizes the importance of accurate recordkeeping as it relates to payroll. This process is further complicated by the number of hours deducted by those serving our State in a legislative capacity. The District is aware of Title 29 and believes the deduction of pay is occurring within a reasonable time period. The District is not aware of language that specifically mandates a timeframe for deductions of legislative hours. Though the supervisor verifies employee work hours on a daily basis, the District's

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# SCHEDULE OF FINDINGS

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policy is to process the Legislative Timesheets through the Payroll Department on a monthly basis. The information is reviewed, at which time the amount of deduction is determined. In no way are the employees' benefiting financially from the deduction process. The spreading of deductions is a common practice in an effort to not penalize the employees for their dedicated service and many contributions to the State of Delaware.

## Delaware State University

The University agrees with this finding and will strengthen its procedures for monitoring Dual Employment employees. However, it may not always be feasible to reduce an employees pay in the current pay period due to timing of when the payrolls are due. The University will make every effort to ensure that all time is accounted for within the acceptable time constraints.

## ***Auditor Comment***

In order to maintain timely and accurate records for each pay period, time should be adjusted in the same pay period that an event occurs.

## ***Finding #3***

### ***Criteria***

The State of Delaware Budget and Accounting Manual, Chapter II, defines authorization as a control objective that should be used by management and financial managers. Authorization is defined as "ensuring that all transactions are approved by management."

*Internal Control - Integrated Framework*, published by COSO, defines control activities as policies and procedures that help ensure that management's directives are carried out. Management review controls are defined as the activities of a person different than the preparer analyzing and performing oversight of activities performed and its integral part of any internal control structure.

### ***Condition***

The examination of two elected officials employed by the Delaware Technical and Community College (DTCC), for Fiscal Year 2008, disclosed the following:

For one elected official, 4 out of 15 timesheets, equating to 10 Legislative Days tested, did not contain a supervisor's approval. The four timesheets were for two weeks in April 2008, one week in May 2008, and one week in June 2008.

### ***Cause***

Management did not provide proper oversight regarding the employee's timekeeping records.

### ***Effect***

Lack of proper authorization and management approval may result in payroll being improperly recorded.

### ***Recommendation***

We recommend that DTCC ensure all timesheets are submitted timely and properly reviewed and approved by the employee's supervisor.

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# SCHEDULE OF FINDINGS

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## *Auditee Response*

Delaware Tech has an existing policy that requires leave requests to be approved by an employee's immediate supervisor. The Campus Human Resources Department will review future leave requests submitted by the employee to ensure all signatures are present.

## *Finding #4*

### *Criteria*

Delaware Code, Title 29, Chapter 58, §5821 (b) states, "The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday." Delaware Code, Title 29, Chapter 58, §5821 (c) states, "The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than one tax-funded source for duties performed during coincident hours of the workday."

### *Condition*

Currently, a legislator who chooses to remain at their primary State job in lieu of attending a scheduled meeting or session of the General Assembly does, in fact, receive compensation from two State sources, concurrently. As an example, a legislator who works at their primary State job from 8 a.m. to 1 p.m. before leaving to attend a committee meeting that commenced at 10 a.m., would receive compensation from both their primary State job and their legislative pay for the overlap time of three hours (10 a.m. to 1 p.m.); pay is not docked for time not spent at the committee meetings due to the lack of formal time attendance records maintained by the Office of the Controller General.

### *Cause*

The Office of the Controller General, in taking attendance at certain committee meetings, does not record time attendance to document the time in which committee members enter and/or exit the respective committee meetings. The current Dual Employment statute does not provide any requirement on the part of legislators to dock their legislative pay, and therefore, there are no remedies to address activities that directly conflict with the Legislature's own findings as stated in §5821 (b).

### *Effect*

Due to this lack of time attendance documentation, we are not able to verify that State employees who serve on legislative committees are not paid from more than one tax-funded source.

### *Recommendation*

We recommend, that the General Assembly revisit the current statute regarding Dual Employment and amend to resolve this issue. See **Appendix B** for the Attorney General's Opinion regarding legislative committee meetings.

All committees should maintain detailed sign in/out sheets for each committee meeting as attendance record documentation. The Office of the Controller General should establish clear policies and procedures requiring both the Office of the Controller General and/or the committee chairs to maintain time attendance records in addition to the existing process of attendance listings, which detail the individuals present at the meetings. These additional time attendance records should include the time in which the State employee who is also an elected or appointed official enters all committee meetings as well as time out when leaving the meeting prior to its completion.

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# SCHEDULE OF FINDINGS

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***Auditee Response***

See **Appendix A** to this report for the auditee response received from the Controller General during the Fiscal Year 2007 audit.

***Auditor Comment***

We confirmed the Fiscal Year 2008 status of this finding with the Controller General's Office on January 26, 2009. As of June 30, 2008, our previous recommendations had not been implemented.

# SCHEDULE OF PRIOR YEAR FINDINGS

The following schedule summarizes the prior status as of June 30, 2008 of findings and recommendations included in the June 30, 2007 Dual Employment Audit Report:

<i><b>Finding</b></i>	<i><b>Recommendation</b></i>	<i><b>Status</b></i>
<b>Capital School District</b>		
The District did not record sufficient time missed for an employee's attendance at a legislative session. A former employee's time sheet reported that the planning period was from 12:30 p.m. to 1:45 p.m., which reflected a half hour overcharge. The contract between the District and Teachers allowed for a planning period the length of an instructional period. The former employee owes .50 hour or \$19.03 because the District did not deduct the correct amount of time for the planning period.	Capital School District must recover 0.50 hours or \$19.03 from the former employee. Since the District no longer employs the employee, District management should request a cash payment. In addition, the District needs to establish a written policy regarding the intended and proper use of duty free planning period.	Partially Implemented. During the Fiscal Year 2008 engagement, AOA noted that the \$19.03 was recovered from the employee. The District and the Teacher's Association reached a temporary agreement in February 2009 that teachers may leave during their planning period for emergencies only.
<b>Red Clay Consolidated School District</b>		
Red Clay School District does not have formal, written policies and procedures for administering the dual employment law. Due to the lack of policies and procedures, the District is not consistently reporting docked time. Out of 46 legislative dates tested for one District employee subject to the dual employment law, 18 were processed in the following pay period and one was processed five months subsequent to the meeting date. As a result of the discrepancies, the District underpaid the employee a total of 5.33 hours or \$306.72.	Red Clay School District should develop and implement written policies and procedures for administering the dual employment law to ensure each employee's pay is correctly reduced for coincident hours. In addition, the District should reimburse 5.33 hours or \$306.72 to the employee. District management may either increase the employees' leave records by 5.33 hours or increase compensation by \$306.72.	Partially Implemented. The District developed and implemented adequate written policies and procedures regarding Dual Employment. As of February 17, 2009, the District had not reimbursed the employee either 5.33 hours, or \$306.72. The District stated that the employee will receive, in his February 27, 2009 paycheck, a reimbursement of 4.33 hours, which consists of the 5.33 hours from the prior year audit and a deduction of 1.00 hours from a current year issue discovered during fieldwork. AOA verified that the reimbursement was processed in the February 27, 2009 paycheck.

# SCHEDULE OF PRIOR YEAR FINDINGS

<i>Finding</i>	<i>Recommendation</i>	<i>Status</i>
<b>Delaware Technical and Community College (DTCC) – Wilmington Campus</b>		
DTCC does not have formal written policies and procedures for administering compensatory time for all employees.	DTCC develop and implement written policies and procedures for administering compensatory time for all employees.	Implemented.
<b>Office of the Controller General</b>		
The Office of the Controller General, in taking attendance at certain committee meetings, does not record time attendance to document the time in which committee members enter and/or exit the respective committee meetings. Due to this lack of time attendance documentation, we are not able to verify that State employees who serve on legislative committees are not paid from more than one tax-funded source. The AOA has identified an instance, during the course of fieldwork, where a legislator has chosen to remain at their primary State job, rather than attending a scheduled committee meeting or legislative session, thus receiving compensation from two State sources, concurrently. In this instance, the current Dual Employment statute does not provide any requirement on the part of legislators to dock their legislative pay, and therefore, there are no remedies to address activities that directly conflict with the Legislature’s own findings as stated in §5821 (b).	All committees should maintain detailed sign in/out sheets for each committee meeting as attendance record documentation. The Office of the Controller General should establish clear policies and procedures requiring both the Office of the Controller General and/or the committee chairs to maintain time attendance records in addition to the existing process of attendance listings, which detail the individuals present at the meetings.	Not Implemented – See current year finding.

# SCHEDULE OF PRIOR YEAR FINDINGS

<i>Finding</i>	<i>Recommendation</i>	<i>Status</i>
<b>New Castle County Vocational Technical School District</b>		
New Castle County Vocational Technical School District did not record time missed for an employee's attendance at a Legislative session in two instances. As a result of this oversight, the District overpaid the employee 20.75 hours (or \$836.43). Also, Dual Employment Timesheets were not signed by the Superintendent for the months of May through June 2007, as required by District policy.	New Castle County Vocational Technical School District recover 20.75 hours (or \$836.43) from the employee. District management may either reduce the employee's leave records by 20.75 hours or reduce compensation by \$836.43. In addition, the District should ensure that all Dual Employment Timesheets are submitted and properly reviewed and approved by the Superintendent as required by District policy.	Implemented.

***Status Key***

Implemented	The concern has been addressed by implementing the original or an alternate corrective action.
Partially Implemented	The corrective action has been initiated but is not complete and the auditor has reason to believe management fully intends to address the concern.
Not Implemented	The corrective action has not been initiated.

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# DISTRIBUTION OF REPORT

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This report is intended solely for the information and use of the Delaware Public Integrity Commission, and is not intended to be, and should not be, used by anyone other than this specified party. However, this report is a matter of public record and its distribution is not limited. This report, as required by statute, was provided to the Office of the Governor, Office of the Controller General, Office of the Attorney General, Office of Management and Budget, and Department of Finance.

Copies of this report have been distributed to the following public officials:

The Honorable Jack Markell, Governor, State of Delaware  
The Honorable Russell T. Larson, Controller General, Office of Controller General  
The Honorable Joseph R. Biden, III, Attorney General, Office of the Attorney General  
The Honorable Ann Visalli, Director, Office of Management and Budget  
The Honorable Gary M. Pfeiffer, Secretary, Department of Finance  
Ms. Trisha Neely, Director, Division of Accounting, Department of Finance  
The Honorable John McMahon, Secretary, Department of Labor  
The Honorable Thurman Adams, President Pro Tempore, Delaware State Senate  
The Honorable Robert F. Gilligan, Speaker of the House, Delaware House of Representatives

#### Officials of Audited Entities

Ms. Janet Wright, Esq., Commission Counsel, Public Integrity Commission, Department of State  
Dr. Claibourne D. Smith, Interim President, Delaware State University  
Dr. Orlando J. George, Jr., President, Delaware Technical and Community College  
Dr. Steven H. Godowsky, Superintendent, New Castle County Vocational Technical School District  
Dr. Michael D. Thomas, Superintendent, Capital School District  
Dr. Robert J. Andrzejewski, Superintendent, Red Clay Consolidated School District

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APPENDIX A: CONTROLLER GENERAL RESPONSE TO PRIOR YEAR FINDING

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STATE OF DELAWARE  
OFFICE OF THE CONTROLLER GENERAL  
LEGISLATIVE HALL  
DOVER, DELAWARE 19901

November 15, 2007

The Honorable R. Thomas Wagner, Jr.  
Auditor of Accounts  
401 Federal Street  
Townsend Bldg.  
Suite One  
Dover, DE 19901

Re: Dual Employment Audit

Dear Mr. Wagner:

In response to your November 5 letter regarding dual employment I offer the following:

Attendance of members of the Joint Finance and Bond Committees at all committee meetings is duly recorded by one of the attaches employed to keep such records as part of their responsibilities. We do not record the exact time of arrival or departure. In point of fact, it is not possible to record the constant movement of legislators nor is it of any particular value to either ourselves or you for audit purposes.

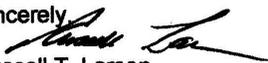
A legislator who is also employed by the State in some other capacity must record the fact that they are not at their State job whether they're going to a committee hearing, the general session of the House or Senate or simply going to the doctor or a grocery store. All State agencies require documented time sheets from their respective agencies. These time sheets are used for Time and Labor reports for the purpose of paying employees.

Legislators who are members of the JFC or Bond committees are paid a stipend for their work on these committees. The stipend (and legislative salary) is paid whether they attend the meetings or not. Therefore, it doesn't make any difference if we record actual times of attendance or not.

**The only way there can be abuse of dual payments is if they do not record their absence from their primary job.**

If you require further clarification on this issue, please feel free to contact me.

Sincerely,

  
Russell T. Larson  
Controller General

Cc: Frank N. Broujos, Deputy Attorney General  
Keith R. Brady, Assistant State Solicitor

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APPENDIX B: ATTORNEY GENERAL OPINION  
REGARDING LEGISLATIVE COMMITTEE MEETINGS

---



JOSEPH R. BIDEN, III  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
NEW CASTLE COUNTY  
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February 21, 2008

The Honorable R. Thomas Wagner, Jr.  
Auditor of Accounts  
401 Federal Street  
Townsend Building, Suite 1  
Dover, Delaware 19901

**ATTORNEY-CLIENT PRIVILEGED  
AND CONFIDENTIAL**

**RE: Legislative Committee Meetings**

Dear Mr. Wagner:

Chief Administrative Auditor Stacey Wynne has asked this office whether time should be “docked” from a State legislator who remains at his or her State job and does not attend a simultaneously scheduled meeting of a legislative committee of which the legislator is a member.<sup>1</sup> We conclude that the relevant statute does not authorize the legislator’s State job pay to be docked under your scenario.

The General Assembly’s findings on dual employment are recited in the State Compensation Policy (the “Policy”) at 29 *Del.C.* §§ 5821(b)<sup>2</sup> and 5821(c)<sup>3</sup> (the “Findings”). The Findings convey the General Assembly’s expectation that so-called “double-dipping” should not occur under *any* circumstances. The provision that implements the Findings states in pertinent part:

*Any person employed by the State ... who also serves in an elected ... position ... shall have his or her pay reduced on a prorated basis for any hours or days **missed** during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected ... position which **requires the employee to miss** any time which is normally required of other employees in the same or similar positions.*

29 *Del.C.* § 5822(a) (Emphasis added).

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<sup>1</sup> It is my understanding from your Office that State legislators are paid a stipend for committee membership and that no dollar amount is allocated per meeting.

<sup>2</sup> “The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday.”

<sup>3</sup> “The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole ... are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday.”

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APPENDIX B: ATTORNEY GENERAL OPINION  
REGARDING LEGISLATIVE COMMITTEE MEETINGS

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The Honorable R. Thomas Wagner, Jr.  
February 21, 2008  
Page 2

The plain meaning of this provision requires the State legislator be away from the job physically (actually “miss” time) in order for a reduction in pay to occur. The language of the Policy is also unambiguous in that only the State job pay can be docked. There is no corresponding provision that permits a legislator’s General Assembly pay to be docked when a legislator is absent from legislative business.

Further support for this interpretation is found in the legislative history of the Policy. Your scenario was raised and discussed during the Senate debate.<sup>4</sup> While noting that a legislator has a moral obligation to attend legislative sessions, the General Assembly chose not to create a statutory remedy for the situation where a legislator chooses to remain at his or her State job during a legislative session (thus receiving State funds for both positions during the same time period). As a result, each legislator in this situation has the discretion to double-dip without the consequences set forth in the Policy.

We believe this situation is inconsistent with the express Findings of the Policy. Nonetheless, given our review of the legislative history and the plain meaning of the statute, we also must reach a conclusion that is inconsistent with the Findings. We conclude the General Assembly did not intend that a legislator’s State employment pay be docked when that legislator remains at his or her State job during the time scheduled for that legislator to attend a committee meeting.

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<sup>4</sup> *President [of the Senate]:* Senator Vaughn.

*Senator Vaughn:* Thank you, Mr. President. A question to the sponsor: Suppose a State employee stays on his job and does not come to the General Assembly to serve. How does your bill handle that situation?

\* \* \*

*President:* Senator Connor?

*Senator Connor:* Thank you, Mr. President. Senator, the question is answered to the fact that there is no time sheet on that particular day because there are no coincident hours on that particular day shown. The individual does not show up in the Senate. The individual stays in his place of employment. There is no time sheet turned in. There’s no sign-off on the time sheet. There’s no coincident hours. So the individual is not docked from being at his normal place of work since that’s the place where his responsibility has not been shirked. Now whether that creates a problem because the individual is paid from the State at the same time, that’s his responsibility – a moral responsibility as well as a statutory responsibility to be here and acting on behalf of his constituency. If he’s not here acting on behalf of his constituency, I think that matter will be resolved very quickly through the next election and through also hopefully other types of releases in the press and so forth that would force him into that situation.

*President:* Senator Vaughn.

*Senator Vaughn:* Mr. President, I agree with the Senator that the individual is obligated to be here, but from his response it’s not clear to me whether under this bill he would be docked pay in the General Assembly pay.

*President:* Senator Citro.

*Senator Citro:* Mr. President, I think I know what Senator Vaughn...you’re talking about the Senator misses a day, but if you look down on the first page, under Policy, it says any person employed by the State or county, who serves in a State or county elected or paid appointed position, shall have his or her pay reduced on a prorated, we’re talking about that State employee that’s an elected official. There’s nothing in here that says anything about the elected official. Maybe next term around that will be a good bill for you.

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APPENDIX B: ATTORNEY GENERAL OPINION  
REGARDING LEGISLATIVE COMMITTEE MEETINGS

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The Honorable R. Thomas Wagner, Jr.  
February 21, 2008  
Page 3

We note that at the end of the Senate debate on the Policy, Senator Citro suggested that Senator Vaughn might wish to address this situation in the subsequent term of the General Assembly. No one acted on this suggestion. In light of the inconsistency noted above, you may wish to recommend that the General Assembly reconsider this issue as was previously suggested by the late Senator Vaughn.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Frank N. Broujos  
Deputy Attorney General

Xc: Lawrence W. Lewis, State Solicitor  
Jennifer D. Oliva, Deputy State Solicitor

*Appendix E - Link: 0808*



STATE OF DELAWARE

**DELAWARE STATE PUBLIC INTEGRITY COMMISSION**

MARGARET O'NEILL BUILDING  
410 FEDERAL STREET, SUITE 3  
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399  
FAX: (302) 739-2398

**July 2, 2008**

The Honorable R. Thomas Wagner, Jr.  
Auditor of Accounts  
401 Federal St.  
Townsend Bldg., Suite 1  
Dover, DE 19901 **D370A**

**Interpretations of the Dual Compensation Law**

*Chair Terry Massie; Vice Chairs Barbara Green and Bernadette Winston;  
Commissioners William Dailey and Wayne Stultz*

Dear Mr. Wagner:

The Public Integrity Commission (PIC) received your Office's Dual Compensation Report. It has two Attorney General (AG) opinions on the law: (1) the University of Delaware's status and how the Dual Compensation Law applies to its employees; and (2) "docking" legislators' pay for staying at their State job and not going to the General Assembly.

As you know, PIC previously expressed its concerns on other agencies issuing advisory opinions on *29 Del. C., ch. 58*, and feels compelled to do so again. *Ethics Bulletin 009*, ¶¶ 6-9 (attached).

**I. PIC's concerns:**

**(a) Consistency:** PIC is to interpret the law "with a view toward achieving consistency of opinions...." *29 Del. C. § 5809(5)*; *Bulletin 009*, ¶¶ 6-8. *Bulletin 009* was issued after the Public Defender's Office gave a dual employee an opinion he followed. After an audit, an AG opinion was sought and it reached the opposite result. Legislation was used to fix the problem. PIC was never brought into the process.

The AG's Dual Compensation role is to investigate and/or prosecute under Title 11 (tampering with public records) and other appropriate laws, if a matter is referred. *29 Del. C. § 5823(b)*. That authority does not change PIC's advisory duty, under which it has authority to refer matters to the AG. *29 Del. C. § 5807(b)(3) and § 5807(d)(4)*; *29 Del. C. § 5809(4)*.

(b) **Protection from Complaints:** PIC’s advice protects against complaints or discipline. *29 Del. C. § 5807(a) and (c)*. Courts have said officials lose the protection if the advice is not from the agency charged with administering the law. *Bulletin 009, ¶7*.

## II. University of Delaware Decision

The AG opinion concluded that the University is a “State agency” for purposes of Subchapter III, Dual Compensation. It was based on the “State agency” meaning in Subchapter I, Code of Conduct.

(1) The Dual Compensation law says: “state agencies, educational and other institutions, and other jurisdictions of government within the State.” *29 Del. C. § 5821(a)(emphasis added)*. The Code of Conduct does not use “educational institutions.” Under the rules of statutory construction, terms not defined by law are given their common and ordinary meaning, and read within their context. *1 Del. C. § 303*. “Educational institutions” was not used in its context or given meaning.

(2) PIC has not ruled on this Subchapter III issue, so inconsistent decisions could occur.

(3) Dual office holders could be confused and rely on an opinion which may not protect them from complaints or discipline.

(4) PIC also has not interpreted if the University is a “State agency” under Subchapter I.<sup>[1]</sup> Again, the results could be inconsistent and confusing under that Subchapter.

(5) Another AG opinion interpreting Subchapter I has already raised inconsistency issues. *AG Ltr. Op. to Milton Mayor Donald Post, May 5, 2006*. It said a local official was not subject to Subchapter I, and even if he were, no conflict existed. However, the law says: “Subchapter I, Chapter 58 shall apply to any county, municipality or town and the employees and elected officials thereof which has not enacted” a PIC approved Code. *29 Del. C. § 5802(4)*. PIC advised the official of its jurisdiction, and also that appointing his brother to a non-existent Town position was a conflict. The official appealed PIC’s advisory opinion to the Superior Court, arguing, among other things, that the AG reached the opposite conclusion on both issues.<sup>[2]</sup>

## III. “Docking” Legislative Pay

This AG opinion said: (1) legislative pay cannot be “docked” if a Legislator stays at the primary job, rather than go to the General Assembly; (2) not “docking” Legislative pay is inconsistent with the policy against double-dipping; and (3) the Auditor could recommend that Legislators consider “docking” dual office legislators’ pay if they do not attend a Legislative Committee meeting.

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<sup>[1]</sup> It has noted the University’s hybrid nature, but did not need to reach a conclusion on that issue. Commission Op. No. 01-22.

<sup>[2]</sup> The Court granted PIC’s motion to dismiss. *Post v. Public Integrity Commission, C.A. NO. 07A-09-008 WLW, WITHAM, R.J. (April 30, 2008)*.

PIC's concerns:

(1) PIC already ruled that pay is "docked" from the full-time job; not the part-time job. *Comm. Op. No. 07-06*. Thus, an opinion on that issue was not needed.

(2) The language was clear on that issue. Generally, clear and unambiguous language is ordinarily conclusive, so considerations of other statutory aids are not needed to decide legislative intent. *Helpand v. Gambee*, 136 A.2d 558, 561 (Del. Ch., 1957). However, the AG opinion used the interpretive aids of legislative history and the policy purpose. The legislative history showed the General Assembly specifically debated whether legislative pay should be docked if a dual office holder member did not appear. The AG opinion said not docking legislative pay is inconsistent with the policy on anti-double-dipping. The General Assembly wrote the policy. 29 Del. C. § 5822. It did not provide for docking of the part-time pay for any dual officer holder. Rather, all are subject to "docking" from their full-time job. Thus, the "docking" issue could, alternatively, be seen as consistent.

(3) PIC is to base its opinions on the particular facts of each case. 29 Del. C. § 5807(a) and (c) and § 5809(2). The AG issued the opinion and, subsequently, the State Controller General sent a letter pointing out facts that were not considered. As a result, again, inconsistent opinions could occur.

(4) On whether the State employee should be required to go to the General Assembly rather than stay on the full-time job, we note, but do not interpret the State Constitution: "Each House"... "shall be authorized to compel the attendance of absent members, in such manner, and under such penalties, as shall be deemed expedient." *Del. Const., art. II, § 8*.

#### **IV. Summary:**

Because of these concerns, we ask that advice on 29 Del. C., ch. 58 be consistently submitted to the Public Integrity Commission. We also ask that if any legislation is proposed that the Commission be included in the process as part of its duty to recommend rules to the General Assembly. 29 Del. C. § 5809(1).

Thank you for your attention to this matter.

Sincerely,

  
Terry Massie, Chairman  
Public Integrity Commission

cc: The Honorable Joseph R. Biden, III, Attorney General  
The Honorable Richard Gebelein, Chief Deputy Attorney General  
The Honorable Russell Larson, Controller General  
Frank N. Broujos, Deputy Attorney General  
Lawrence W. Lewis, State Solicitor

Jennifer D. Olivia, Deputy State Solicitor

08-08



JOSEPH R. BIDEN, III  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

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February 21, 2008

The Honorable R. Thomas Wagner, Jr.  
Auditor of Accounts  
401 Federal Street  
Townsend Building, Suite 1  
Dover, Delaware 19901

**ATTORNEY-CLIENT PRIVILEGED  
AND CONFIDENTIAL**

**RE: Legislative Committee Meetings**

Dear Mr. Wagner:

Chief Administrative Auditor Stacey Wynne has asked this office whether time should be "docked" from a State legislator who remains at his or her State job and does not attend a simultaneously scheduled meeting of a legislative committee of which the legislator is a member.<sup>1</sup> We conclude that the relevant statute does not authorize the legislator's State job pay to be docked under your scenario.

The General Assembly's findings on dual employment are recited in the State Compensation Policy (the "Policy") at 29 Del.C. §§ 5821(b)<sup>2</sup> and 5821(c)<sup>3</sup> (the "Findings"). The Findings convey the General Assembly's expectation that so-called "double-dipping" should not occur under any circumstances. The provision that implements the Findings states in pertinent part:

*Any person employed by the State ... who also serves in an elected ... position ... shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected ... position which requires the employee to miss any time which is normally required of other employees in the same or similar positions.*

29 Del.C. § 5822(a) (Emphasis added).

<sup>1</sup> It is my understanding from your Office that State legislators are paid a stipend for committee membership and that no dollar amount is allocated per meeting.

<sup>2</sup> "The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday."

<sup>3</sup> "The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole ... are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday."

08-08



STATE OF DELAWARE  
OFFICE OF AUDITOR OF ACCOUNTS

R. THOMAS WAGNER, JR., CGFM, CFE  
AUDITOR OF ACCOUNTS

PHONE: (302) 739-4241  
FAX: (302) 739-2723

August 7, 2008

Terry Massie  
Chairman  
Public Integrity Commission  
Margaret O'Neill Building, Suite 3  
410 Federal Street  
Dover, DE 19901

RECEIVED  
AUG 12 2008  
PUBLIC INTEGRITY COMMISSION

Dear Chairman Massie:

Title 29, Del. C. §5823 authorizes the Auditor of Accounts to perform an annual audit of time records to determine whether or not an employee was paid from more than one tax-funded source for working coincident hours of the day. The State Auditor is mandated to report any discrepancy found to the Public Integrity Commission for investigation and/or the Attorney General for possible prosecution.

In addition, Title 29, Del. C. c. 29 authorizes the Auditor of Accounts to perform post audits of all the financial transactions of all State agencies. The law requires that the audits be made in conformity with generally accepted auditing principles and practices. Such principles and practices are established by two standard setting bodies: the American Institute of Certified Public Accountants (AICPA), which has issued *Generally Accepted Auditing Standards* (GAAS), and the U.S. General Accountability Office (GAO), which has issued *Generally Accepted Government Auditing Standards* (GAGAS).

Based on the aforementioned Code requirements, the Dual Employment audit is structured with the Public Integrity Commission as the auditee/client. As auditors, the above standards require that the Office of Auditor of Accounts (AOA) maintains its independence from auditees/clients.

GAAS general standards state that *"The auditor must maintain independence in mental attitude in all matters relating to the audit . . . The auditor is required to be independent to perform an audit. For users to believe the audit findings dependable, the auditor should be without bias . . ."*

GAGAS independence and objectivity requirements are noted below (these are excerpts from Chapters 2 and 3 of the *Governmental Auditing Standards* (The Yellow Book), which is the issued document detailing all GAGAS requirements:

*2.10 The credibility of auditing in the government sector is based on auditors' objectivity in discharging their professional responsibilities. Objectivity includes being independent in fact and appearance when providing audit and attestation engagements, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest. Avoiding conflicts that may, in fact or appearance, impair auditors' objectivity in performing the audit or attestation engagement is essential to retaining credibility . . . .*

Chairman Terry Massie  
Page 2  
August 7, 2008

*3.02 In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be free from personal, external, and organizational impairments to independence, and must avoid the appearance of such impairments of independence.*

*3.03 Auditors and audit organizations must maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by objective third parties with knowledge of the relevant information. Auditors should avoid situations that could lead objective third parties with knowledge of the relevant information to conclude that the auditors are not able to maintain independence and thus are not capable of exercising objective and impartial judgment on all issues associated with conducting the audit and reporting on the work.*

*3.10 Audit organizations must be free from external impairments to independence. Factors external to the audit organization may restrict the work or interfere with auditors' ability to form independent and objective opinions, findings, and conclusions. External impairments to independence occur when auditors are deterred from acting objectively and exercising professional skepticism by pressures, actual or perceived, from management and employees of the audited entity or oversight organizations. For example, under the following conditions, auditors may not have complete freedom to make an independent and objective judgment, thereby adversely affecting the audit:*

- a. external interference or influence that could improperly limit or modify the scope of an audit or threaten to do so, including exerting pressure to inappropriately reduce the extent of work performed in order to reduce costs or fees;*
- b. external interference with the selection or application of audit procedures or in the selection of transactions to be examined;*
- c. unreasonable restrictions on the time allowed to complete an audit or issue the report;*
- d. externally imposed restriction on access to records, government officials, or other individuals needed to conduct the audit;*
- e. external interference over the assignment, appointment, compensation, and promotion of audit personnel;*
- f. restrictions on funds or other resources provided to the audit organization that adversely affect the audit organization's ability to carry out its responsibilities;*
- g. authority to overrule or to inappropriately influence the auditors' judgment as to the appropriate content of the report;*
- h. threat of replacing the auditors over a disagreement with the contents of an audit report, the auditors' conclusions, or the application of an accounting principle or other criteria; and*
- i. influences that jeopardize the auditors' continued employment for reasons other than incompetence, misconduct, or the need for audits or attestation engagements.*

If the Office of Auditor of Accounts were to use the advice/interpretations of the Public Integrity Commission in the execution of our Dual Employment audit or as the basis for any of our findings

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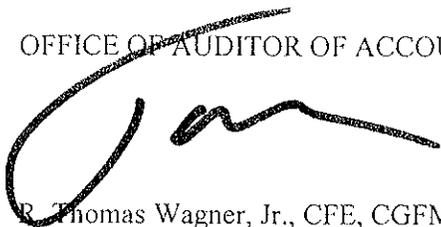
contained therein, we would be in violation of the auditing standards noted above. AOA must adhere to the independence and objectivity professional requirements of GAAS and GAGAS and seeking the counsel of the Public Integrity Commission with regard to Dual Employment issues would inhibit our ability to do so.

AOA seeks opinions from our counsel from the Attorney General's (AG) office because they are an independent third party to this audit. Therefore, by relying on AG opinions, we are not impairing our independence or objectivity, in fact or in appearance, with respect to the Dual Employment audit. Furthermore, it is AOA's standard business practice to seek the counsel of the AG's office with respect to any significant issues that impact all of our audits and investigations. We are well within our right to rely on the AG's office and intend to continue to do so, for both Dual Employment as well as our other audits. The Public Integrity Commission is free to issue interpretations and opinions with regard to Dual Employment; however, auditing standards prohibit AOA from using those documents as evidence in executing our audit, in developing our conclusions over test work performed, and in compiling our report.

Should you have any questions or concerns regarding the above, please contact me at 302-739-5055 or Stacey A. Wynne, Chief Administrative Auditor, at 302-857-3919.

Sincerely,

OFFICE OF AUDITOR OF ACCOUNTS



R. Thomas Wagner, Jr., CFE, CGFM, CICA  
Auditor of Accounts

RRW:SAW:EJM

- cc: The Honorable Joseph R. Biden III, Attorney General, Office of the Attorney General  
The Honorable Richard Gebelein, Chief Deputy Attorney General, Office of the Attorney General  
The Honorable Russell T. Larson, Controller General, Office of the Controller General  
Mr. Frank N. Broujos, Deputy Attorney General, Office of the Attorney General  
Mr. Lawrence W. Lewis, State Solicitor, Department of Justice  
Ms. Jennifer D. Olivia, Deputy State Solicitor, Department of Justice  
Janet Wright, Esq., Legal Counsel, Public Integrity Commission