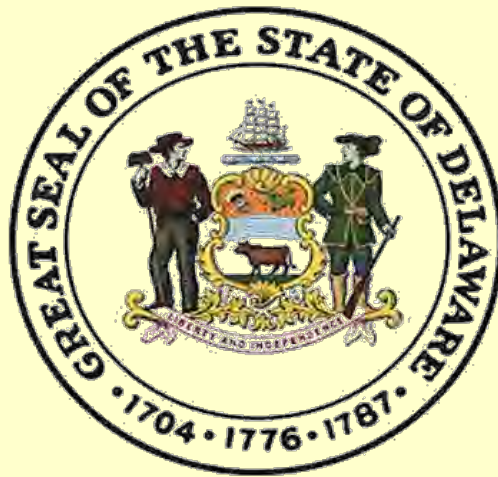


State of Delaware

State Public Integrity Commission



ANNUAL REPORT

March 1, 2012

Barbara H. Green, Chair
Wilma Mishoe, Ed.D and William D. Dailey, Jr., Vice Chairs

Commissioners

Mark Dunkle, Esq.
Jeremy D. Anderson, Esq

Lisa Lessner
Andrew Gonser, Esq.

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Mission:

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

☑ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonal; (over 48,000); non-legislative elected officials; and State Board and Commission appointees (In 2011, over 300 Boards and Commissions)

☑ **1993 – Local Ethics:** All 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they adopt a PIC approved Code (As of 2011, only 7 have a Code, leaving PIC with 50 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; candidates for State office; Cabinet Secretaries, Division Directors and equivalents. (In 2011, 340 officers and candidates).

☑ **1996 – Lobbying:** All State lobbyists register; file authorizations from represented entity; and file quarterly expense reports (In 2011, 366 lobbyists; 964 organizations; 3,856 expense reports).

☑ **2000 – Ethics:** School Districts and Boards of Education

☑ **2001 – Ethics:** Charter School Boards of Education

☑ **2010 – Organization Disclosure:** Elected officials and candidates for State office must disclose private organizations if they are a Board or Council member.

☑ **2010 – Newark Housing Authority:** Although covered by a local government approved Code of Conduct, the General Assembly changed the law to make it a State agency so PIC would have jurisdiction.

**Commission
Structure
Appointments,
Qualifications and
Compensation**

Seven (7) Citizens are the "Public Eye" on Government Ethics and are nominated by the Governor; confirmed by the Senate.

Generally appointed from all three Counties.

They cannot be an elected or an appointed Official – State or Federal, Holder of Political Party Office; An officer in a political campaign.

The term of each is one full 7-year term; may serve until successor is appointed and confirmed.

Vacancies filled just as original appointments

The Commission elects their own officers.

They are entitled to \$100 each official duty day; reimbursement of reasonable and necessary expenses.

In 2011, a significant turnover occurred with 3 of 7 Commissioners becoming new members, all within a short time of each other. Commissioner Wayne Stultz had been appointed to finish approximately 2 years of the term of a prior Commissioner. He was not reappointed to serve his own 7 year term. He was replaced by Wilma Mishoe, Ed. D. Former Commissioner Patrick Vanderslice resigned after less than a year to run for election on a local school board. Commissioners may not run for or hold elected office. He was replaced by Andrew Gonser, Esq. Former Chair Bernadette Winston's 7 year term expired and she was replaced by Jeremy Anderson, Esq.

Initially, the terms of Commissioners were staggered so that only one would leave in a given year. However, after a 4-7 turnover in 2004, due to the death of two Commissioners, one Commissioner moving out of State, and one Commissioner's term expiring, there has been a continuous situation of several Commissioner's leaving in a single year.

While this tends to lessen the "corporate memory," it also seems to invigorate the experienced Commissioners in assisting new members in understanding its past work, especially as it is to strive for consistency in its opinions, and brings a continuing fresh prospective to the Commission.

In 2012, the Commission will lose two Commissioners who have the most experience. Barbara Green was initially appointed in 2004 to complete one year of the term of a prior Commissioner. She then was reappointed to serve her own seven year term, giving her 8 years on the Commission. The other Commissioner, William Dailey, will have served his 7 years.

II. Biographies of Commissioners and Staff

Chair Barbara H. Green

Appointed in June 25, 2004 to complete the term of Paul E. Ellis, with the term expiring July 8, 2005, Chair Green 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 their Vice-Chairs, and twice as its Chair.

Ms. Green graduated from the University of Delaware with a bachelor's degree in Medical Technology, a minor in Biology. She previously worked for Dade Behring, (now Siemens) a global medical diagnostics 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, creating new medical diagnostic tests for DuPont chemistry analyzers. The bulk of her career was in management, mainly in the medical products manufacturing environment. More recently, she was with Dade Behring as a 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, throughout the US and in Europe.

Ms. Green retired from corporate life, and is currently a real estate sales agent, and a resident of Rehoboth Beach, in Sussex County.

Vice Chair William W. Dailey, Jr.

In 2007, William W. Dailey, Jr., was appointed to serve until November 8, 2012. He has been twice elected by the Commissioners as Vice Chair.

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 a legal expert in the field, and has given expert testimony.

Mr. Dailey's 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 Chair, President and Vice President of the Red Clay Kiwanis Club. Although retired, he still consults for VanDemark & Lynch.

He resides in Sussex County with his spouse, in Millsboro.

***Vice Chair Wilma Mishoe,
Ed.D.***

Dr. Mishoe was confirmed as a 7-year appointee to the Public Integrity Commission on March 15, 2011. Her term will expire in 2017. She was elected as the Vice Chair for Procedures during the first full year of her term.

Dr. Mishoe earned her doctorate at Temple University where her dissertation was on the preferred learning styles of learning disabled adults at post-secondary institutions. She earned both her Masters and Bachelor Degrees from Howard University, Washington, D.C.

Dr. Mishoe retired from Delaware Technical and Community College at the end of 2010, after serving as Dean of Student Services followed by Dean in Office of Instruction. She also had been Dean of Students and Director of Financial Aid at Wilmington College (now University). Before that employment, she worked for The Brookings Institution in Washington, D.C.

She remains active in educational and community activities. She is presently a Board member of Wilberforce University in Ohio, where she serves as Board Secretary and also Chairs the Academic, Student Affairs and Compliance Committee. She is on the Board of Directors for Children and Family First, and is a member and Treasurer of the Dover Rotary Club. She presently is the Vice President of the Dover, DE Chapter of The Links, Incorporated. Founded in 1946, it is one of the oldest and largest volunteer service organizations of women who are committed to enriching, sustaining and ensuring the culture and economic survival of African

Americans and other persons of African ancestry.

Dr. Mishoe has also held the position of Vice President, Dover Alumnae Chapter, Delta Sigma Theta Sorority, and is the Board of Stewards Pro Tem for Mt. Zion A.M.E Church. She has received numerous honors and awards for her community leadership and work in education. Most recently, the Delmarva Black Chamber of Commerce awarded her its Leadership and Service Award in Education. In past years, she received the Citizen of the Year Award from Psi Iota Chapter, Omega Psi Phi Fraternity, Inc.; Employee of the Year Award from DelTech (Terry Campus); and Super Stars in Education Finalist from the Central Delaware Chamber of Commerce. She is a Certified Mediator by the Center for Community Justice, and received the First Line Leadership Certification from the State of Delaware.

She co-chaired the Mid-Eastern Association of Education Opportunity Program Personnel Student Leadership Conference; and through the National Council of Education Opportunity Association's Legislative Policy Seminar, she gave a presentation to Delaware's congressional assistants on the Title IV Federal TRIO program funding. TRIO is a compilation of Federal outreach and student services programs designed to identify and provide services for individuals from disadvantaged backgrounds.

Dr. Mishoe resides in Dover, Kent County, Delaware.

Mark F. Dunkle, Esq.

Mr. Dunkle was confirmed for a 7 year appointment to the Commission on June 30, 2009. His term will expire on June 30, 2016.

Mr. Dunkle is an Attorney/Director in the law firm of Parkowski, Guerke & Swayze, P.A., which has offices in all three counties. He has been a Director in this firm since July 1996.

Before receiving his law degree from Emory University School of Law in Georgia, he graduated with distinction from the University of Virginia with a degree in history.

Upon completion of his law degree, he was admitted to the Georgia Bar, and three years later was admitted to the Delaware Bar. Aside from his admission to practice in all Delaware State Courts, he is admitted to practice in Pennsylvania, the U.S. District Court, District of Delaware, and the United States Supreme Court.

Mr. Dunkle is well-published in, and has made presentations on, land use law. Among his publications and presentations are: "Municipal Annexation Law in Delaware," "Delaware Land Use Law," "Delaware Condemnation Law," and "Eminent Domain Law in Delaware."

His presentations have been through the auspices of the Delaware Urban Studies Institute, the National Business Institute, and the Delaware State Bar Association. Also, in the area of land use, he was a member of the Kent County Comprehensive

Development Plan Update Committee, and a member of the Kent County Transfer of Development Rights Committee. In the area of publications, he also was a co-editor of *In Re*, the Journal of the Delaware State Bar Association.

He chaired the Governor's Magistrate Screening Committee for over ten years. Presently, he is a member of the Delaware Board of Bar Examiners Character and Fitness Committee and serves by appointment of the Delaware Supreme Court on the Preliminary Investigatory Committee of the Court on the Judiciary. He also has served on the Executive Committee of the Delaware State Bar Association.

Mr. Dunkle has been active in the community of Dover and surrounding areas by serving as President of the Capital City Rotary Club and as a member of the Greater Dover Committee and the local Chamber of Commerce.

Mr. Dunkle recently moved from Dover to Frankford, Sussex County, Delaware.

Lisa Lessner

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a 7-year term, expiring in 2017.

For 14 years, Mrs. Lessner actively worked as a community volunteer for various non-profits. During that time, one of her key focuses was as a founder and board member of the Delaware Children's Museum. Volunteering more than 1,000 hours a year, she chaired its Marketing and

Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Her efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she also was a Board member of Albert Einstein Academy (2001-2007), and in 2009 became a Delaware Theatre Company Board member, although she subsequently stepped down as a member of that Board.

Mrs. Lessner's business acumen began with a University of Delaware Bachelor of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used

her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner, and her family, reside in Wilmington, New Castle County, Delaware.

Andrew W. Gonser, Esq.

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2017.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He also handles Hague Convention proceedings in Federal Court.

For two years while working on his law degree at Widener University School of Law, he was on the school's law journal, Delaware Corporate Law. After graduating *cum laude* in 2004, he clerked for the Honorable Jan Jurden, Delaware Superior Court. He also was a judicial extern in the U.S. District Court for the Honorable Sue L. Robinson. He is admitted to practice in all Delaware Courts, the U.S. District Court (Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster care system. Each June, he sponsors and organizes a Five K Walk/Run with the University of Delaware Men's Soccer Team to benefit "Prevent Child Abuse Delaware." He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington, New Castle County, Delaware, with his Wife and five children.

Jeremy D. Anderson, Esq.

Mr. Anderson was confirmed for a seven-year appointment to the Commission on June 30, 2011. His term will expire on June 30, 2017.

Mr. Anderson received his law degree from Georgetown University Law Center, in Washington, D.C., where he was the Senior Editor for Law and Policy in International Business. Mr. Anderson was admitted to the Delaware Bar in 2004. He earned a Bachelor of Arts degree in English from Brigham Young University (*cum laude*).

Mr. Anderson is Of Counsel at Fish & Richardson, PC. He represents clients in a variety of areas including corporate litigation, commercial litigation and patent litigation.

Beyond litigation, Mr. Anderson advises corporations, directors and shareholders on their rights and obligations under Delaware law, including mergers and acquisitions, corporate governance, appraisal and indemnification. He also lectures on the Delaware Corporate, Limited Liability Company, and Limited Partnership

Mr. Anderson is a member of the American Bar Association, Delaware Bar Association, Federal Bar Association and Hermann Technology Inn of Court. He also chairs the J. Reuben Clark Law Society, Delaware Chapter, and is a Barrister in the Richard S. Rodney Inn of Court. Mr. Anderson is also certified as a Mediator in the Delaware Superior Court.

Mr. Anderson resides in Hockessin, New Castle County, Delaware.

Staff

Commission Counsel Janet A. Wright

As an independent agency, the Commission appoints its own attorney. [29 Del. C. § 5809\(12\)](#). Ms. Wright was appointed in 1995.

Ms. Wright's undergraduate degree is in English (summa cum laude) from Widener University. She graduated from Widener University School of Law (cum laude), and 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 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 and federal jurisdictions, and in Canada and Mexico.

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. The National Business Institute (NBI) selected her "Land Use Planning and Eminent Domain in Delaware" class for its on-line training. She also gave CLE training on "Managing Ethical Issues in Your Day-to-Day Practice." She provided training to the Institute for

Paralegal Education members, discussing the difference between Ethics and Professionalism. M s. Wright was recognized in the American Bar Association's Newsletter of ABA Government and Public Sector Lawyers Division, "How Green is Your Gov?" for the office's efforts in recycling and reducing paper consumption. M s. Wright is a Certified Mediator in the Superior Court.

Administrative Assistant Jeannette Longshore

Jeannette Longshore was hired 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 has further trained in MSAccess.

She performs the day-to-day administrative functions, including updating the database of Lobbyists' registration, their employers' authorization forms, their quarterly reports, and Public Officers' financial disclosure filings. She also provides direct technical support to the lobbyists and public officers on their filings.

Ms. Longshore is responsible for administrative support in managing and budgeting the Commission's financial transactions. She has completed the State Budget and Accounting Course; the Project Management course; and the First State Financial class. She also has she attended leadership courses offered through the State's Office of Management and Budget Training office: Moving Into Supervision; Growing Into Leadership; and Leadership Skills for Women. She increased her general knowledge through courses on Knowledge Transfer; Know Your State Government; Conflict Resolution; and The Fish! Philosophy. "The Fish Philosophy equips attendees to create a work culture of stronger relationships resulting in better teams, better communication, extraordinary service, higher retention rates, and the ability to face challenges more effectively. "

Rounding out her direct knowledge on administrative skills, she attended: Managing Records Created on P ersonal Computers/Electronic Mail; Grammar for the Work Place; Cyber Security; Minutes for Meetings; and Making the Most of Your Time with Outlook. In addition, she attended the Administrative Assistants' Conference hosted by Skill Paths Seminars.

20th Year of Service on Less than a Penny Per Person Operating Budget

The State Public Integrity Commission was created as an independent agency 20 years ago (1991) with initial responsibility of administering the State Ethics Law for the Executive Branch. It had no dedicated staff, and the 7 appointees used their own resources for not only administrative work (e.g., typing) but also for legal work. Fortunately, two appointees were attorneys and willingly dedicated many hours to insure the legal matters were properly covered and that the Commission had a work ethic reputation of fairness.

Their efforts apparently paid off because in 1993, the General Assembly decided it should also administer the Ethics laws for the 57 counties, municipalities and towns, unless those entities adopted their own Code of Conduct, which the Commission must approve as being as stringent as State law.

They continued to work without a dedicated staff, until the law was rewritten in 1994 and significant changes occurred. First, the Commission would have to offer training. Second, it would have to assume responsibility for administering the Financial Disclosure Law (1995), the Dual Compensation Law (1995) and the State Lobbying Law (1996). Previously, three different State offices handled the financial disclosure reports, and the General Assembly's Legislative Council was responsible for lobbying registration, authorization and expense reports for persons who lobbied the General Assembly. The new lobbying law required registration not only of those lobbying the General Assembly, but also any State agencies. The Auditor's office and the Attorney General's office had handled the dual compensation law. None of those offices, except the Attorney General's office, could issue advisory opinions. No training had ever been given on those laws. Third, it was authorized to hire its own independent attorney beginning in January 1995, with an administrative assistant added six months later. It gave its first training class on Financial Disclosure to the Governor, and his Cabinet, one week after it hired its attorney.

As training in ethics was offered, the Commission saw an 86% increase in the number of requests for advisory opinions. It was given an operating budget of \$40, 100 to perform its duties. At that time, there were more than 58,000 employees, officers and appointees to Board and Commissions at the State level. It also was responsible for all employees, officers, and appointees to 54 local governments because only 3 had adopted an approved Code. The bottom line was that just for those at the State level, it had to operate on less than a penny per person.

In the ensuing years, its jurisdiction expanded. Added jurisdiction covered School districts, Public School Boards of Education, and Charter School Boards of Education. During this time, the operating budget held steady at \$40,100 for 5 fiscal years—through FY 2000. It then began to drop with an initial cut of 2.5% beginning in December 2000. It continued to decrease by similar percentages of 2 to 2.5 % through

FY 03, leaving an operating budget of only \$39,097. During that time, it was able to obtain more visibility through its Internet site, and also reduce some costs of publications. Because it was an independent agency, the State's Technology Department said it could not create, or assist PIC in maintaining, its website. To make that happen, the Commission's Counsel took a course on developing websites, and created the site. Counsel maintained the website until approximately 2004, when the State Department determined that it could maintain the site.

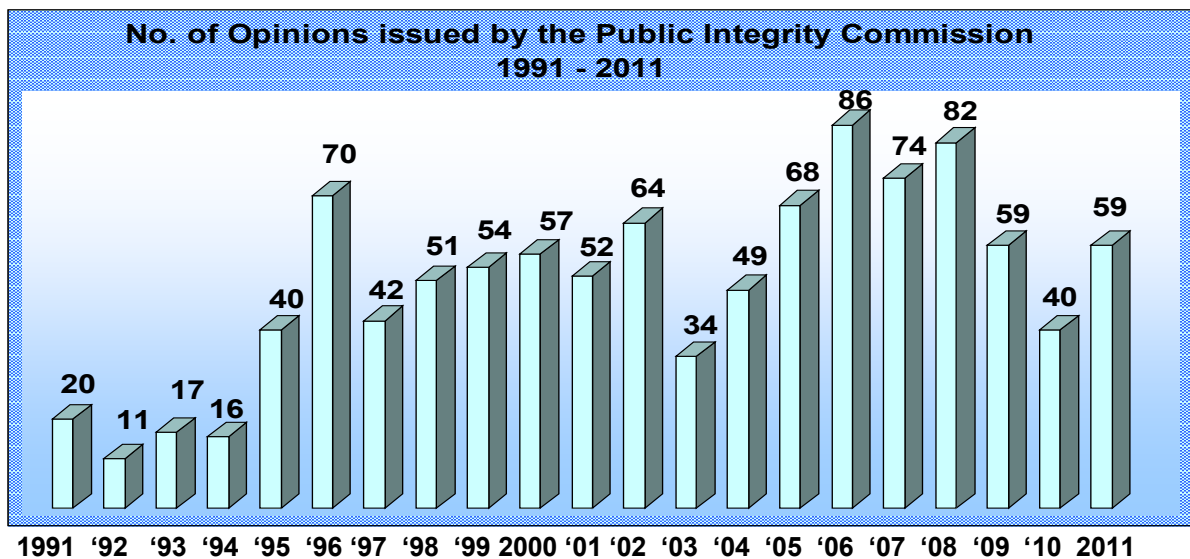
Despite a decreased operating budget, during that time PIC was able to offer on-line filing for lobbyists in 2002—one of the first States to do so. That was the result of PIC's efforts in securing an e-government grant.

The operating budget continued to be cut after that, with cuts ranging from 2-2.5% through 2006. Again, despite cuts, PIC expanded its on-line filing capability to include financial disclosure reports, that interfaced with the lobbying database. For example, the system took information on gifts from the lobbying reports, and integrated it with the financial disclosure reports so each individual public officer received notice of any gifts reported as given to them by a lobbyist. It found the resources to create the database by tightly managing its funds in anticipation of the expansion, and eliminating costs through such measures as cancelling its cell phone, which was \$28 a month, making a savings of \$336 a year--nearly 1% of its operating budget.

In 2008, with the State's introduction of secure e-mail, the confidential package for the Commissioners to review before meeting--all requests for advice, waivers, or complaints, Counsel's legal memorandums—began to be e-mailed to save paper and shipping costs. The staff is also recycling paper printed only on one side through the copier, the fax, and the printer, whether created by PIC or incoming from other agencies, if the document is not a needed record. PIC's recycling efforts were recognized in 2008 by the American Bar Association's publication of Public Sector Law Offices. Beyond that, some Commissioners declined travel reimbursement and the \$100 stipend for an official duty day. By law, they are entitled to both. It continued its recycling and costs reduction efforts by publishing some documents, such as the Annual Report, only on line, which saved paper and printing costs.

More drastic cuts occurred in more recent years, with cuts of 14% to more than 17%. For example, PIC's actual FY'09 appropriated operating budget funds were later reduced by more than 17% by the Department of State's Finance office. PIC was not consulted.

It now has an operating budget of \$30,600, and has legislation pending that would increase its responsibilities, and also require a completely new on-line filing database. PIC will continue its 20-year effort to provide its services at minimal costs.



During the past 20 years, the Commission issued 1,045 opinions. Only three decisions have been appealed. In 2008, a local Mayor who wanted to appoint his brother to a local government Board was advised it would be a conflict, as officials may not review or dispose of matters where they have a personal or private interest. He appealed to the Superior Court. The Commission moved to dismiss for several reasons, including that advisory opinions cannot be appealed. The Court agreed. [Post v. Public Integrity Commission](#), C.A. 07A-09-08, J. Witham (Del. Super. April 30, 2008). A few months later, another local official appealed an advisory opinion after the Commission ruled he could not participate in decisions about a development when he had personally opposed the development, which conflicted with his duties as a member of the Town's Planning Board which would have to hear the developer's request for a variance. He withdrew his appeal after PIC filed its motion to dismiss. [King v. Public Integrity Commission](#), C.A. No. 08A-02-002 ESB (Del., Super. Ct., 2008) [NOTE: Click on above link; search by names DAVID S. KING or DELAWARE STATE PUBLIC]. At present, the third case is pending. The Commission ruled that a local official violated the Code by participating in an ordinance decision that created a legal defense for her to a developer's personal lawsuit against her alleging she had a conflict when she voted to deny the developer's variance request. It also ruled that she violated the Code because of her personal and private property interest as she told the press the developer was competing against those who rented properties, that the development would lower property values, and her properties were almost directly across the street. *Commission Op. No. 10-31*. She filed an appeal. [Hanson v. Public Integrity Commission](#) Briefs were filed. [Appendix A](#); oral arguments heard; and the opinion is expected to be issued in June 2012. {For current status: Click on the case name above, then you may search by name. DIANE HANSON or DELAWARE STATE PUBLIC INTEGRITY and then docket entries.]

A. Subchapter I, Code of Conduct

2011 carried with it a 45% increase in actions over 2010—59 vice 34. Most opinions, 29, focused on outside employment—concurrent and post. Most others, 25, dealt with local officials' conduct.

Aside from the Hanson case¹ mentioned above, two other cases dealing with “personal or private interest” were of note.

One complaint alleged a co-Commissioner of Ms. Hanson's had a conflict in deciding not to indemnify her for litigation in her matter. The complaint was dismissed for various reasons. *Commission Op. No. 11-10*. [Appendix B](#). Normally, decisions are confidential if no violation is found. [29 Del. C. § 5810\(h\)](#). However, the official authorized release. Complainant opposed, but the Commission held that the official authorized release, and release would serve a valid public purpose. [Appendix C](#).

Another case dealt with nepotism. *Commission Op. No. 11-03*, [Appendix D](#). When a School Superintendent's son was hired to work in her direct chain of command, the Commission was assured that the Assistant Superintendent had always supervised that position. Based on that, and other facts, the Commission granted a waiver to let the Assistant supervise her son. She was to recuse; and her Assistant was to go to the School Board on issues pertaining to her son.

Later, the Commission learned she was not properly recusing; it was not “always” the Assistant's job to supervise the position—it was her's; her son earlier applied for basically the same job, etc. Based on those, and other facts the Commission revoked Op. No. 11-03, and issued a new one. *Commission Op. No. 11-19*, [Appendix E](#). It found she did not act in “good faith,” nor “fully disclose.” Presently, the Commission is reviewing information from her that it sought in its second decision.

In a 2008 Court decision, the Court upheld the Commission's procedure of allowing one official to seek an advisory opinion on the conduct of another. [Post supra](#). In 2011, the Commission clarified when that could occur. It held that the requestor must have sufficient information to constitute “full disclosure.” *Commission Op. No. 11-13*. (citing [29 Del. C. § 5807\(c\)](#)). In *Post*, the requestor had Town minutes showing the Mayor planned to appoint his brother to a Town position. Those were the only facts needed to show the Mayor had a personal or private interest. However, in its 2011 opinion, the Commission found the requestor could not provide “full disclosure,” especially as some events allegedly occurred in Executive Session, and the requestor was not present. *Id.*

¹The complaint was filed in 2010, but due to an extension of time when Ms. Hanson was changing attorneys, and with an intervening Motion to Stay, which was denied, [Appendix G](#), the final opinion was issued in 2011.

B. Subchapter II, Financial Disclosure

In 2011, an amendment expanding the disclosure requirements, took effect for some filers. Originally, the law only required disclosure of financial interests--assets, creditors, income, and gifts, for public officers in the Executive, Legislative and Judicial Branches, and Candidates for State Office. It now requires that all Elected Officials and Candidates for State Office disclose information that would not necessarily create a financial interest. Specifically, they must now report if they are a Board or Council member of any private organization.

Identifying the interests helps the public officer recognize potential conflicts between official duties and financial or organization interests that may require recusal or ethical guidance. If any interest raises conflict issues in day-to-day functions, the laws for the particular officer would be applied: [Legislative Conflicts of Interest](#), 29 Del. C., Ch. 10; [Code of Judicial Conduct](#); and the [State Code of Conduct](#), 29 Del. C., Ch. 58, for Executive Branch officials.

Implementing the new law required a change to the Commission's existing data base of more than 300 "public officers" in the Executive, Legislative, and Judicial branches who must file reports within 14 days of becoming a public officer. and on March 15 each year thereafter. As State Candidates must also file, the number of filers varies depending on the number of candidates in a given year. Because the new disclosure provision only applies to Elected Officials in the Executive and Legislative Branches, and Candidates for State Office, a program that would incorporate the new filing, but also cull through those to whom it would not apply, had to be written. The cost was \$1,800, or 5.8% of PIC's operating budget. It would have been less expensive if the law had applied to all filers.

In 2011, only 46 public officers filed hard copies. To encourage on-line filing, the new requirement is only on the on-line form, not hard copy forms. As a consequence, more officers are filing on-line, which saves the costs of publishing printed forms; postage, envelopes, etc.

Despite the change to the law, no requests were made for opinions interpreting the new language. In fact, in 2011, as in the past few years, no requests for interpretations of the Financial Disclosure Law have been made. The decline was expected. Before PIC administered the law, there were few decisions from the Attorney General's office. After PIC began training, more opinions were requested, and after synopses of those were published and distributed, more requests for opinions occurred. In the beginning year, 1995, and for the next two years, a significant number of requests to interpret the law were received. As the substantive law has not changed, except for this amendment, most issues concerning the law appear to have been addressed.

C. Subchapter III, Dual Compensation Policy

In 2011, as in every year, the Commission enter an agreement with the State Auditor to conduct a review of the time cards of State officials who hold dual government positions. [Auditor's Report](#).

The audit monitors employees and officials holding dual government jobs to prevent “double-dipping.” The law bars them from receiving pay from two tax-funded agencies for the same hours. It applies to elected or paid appointed State or local government officials with a second government job—either State or local.

“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. The Supervisor must verify the time the individual left the first job.

The report noted that in a few instances, some officials had received pay from two sources for overlapping hours. In all cases, they were made to repay the earnings to which they were not entitled.

Discrepancies may be referred 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.

In 2011, as all funds were recovered, no matters were referred to the Commission.

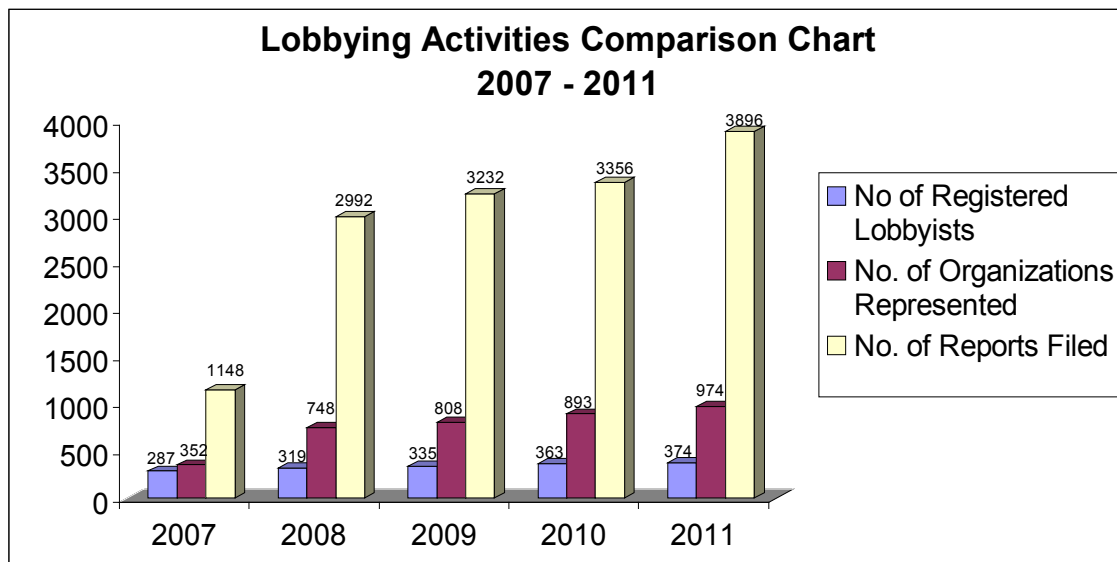
At present, the only officials audited are elected members of the General Assembly who also hold a second government job. The State Auditor's office is considering expanding the audit to cover other local or State officials who hold dual positions. The statute would not need to be changed because current law applies to those persons. The problem is the difficulty in identifying those who hold positions at the local and the State level, since there is no consolidated source that would identify those persons.

No requests for advisory opinions or complaints were submitted pertaining to this subchapter in 2011.

D. Subchapter IV, Lobbying

In 2011, 374 lobbyists, representing 974 organizations, filed 3,896 expenditure reports with the Commission. Lobbying registration and reporting informs the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” *United States v. Harris* 347 U. S. 612 (1954).

During the past 5 years, the number of registered lobbyists increased gradually, but the number of organizations represented has more than doubled.



In 2011, legislation was introduced to create a Lobbying Ethics Study Group to review the Lobbying Law for changes. [H.J.R. 4](#). It passed the House, and is pending in the Senate. At the same time, legislation was introduced in the Senate that was basically a total rewrite of the Lobbying law. [S.B. 141](#). It was assigned to the Senate Executive Committee. The Commission has expressed its concerns about that legislation in a letter to the sponsors and to Committee members. [Appendix F](#). See the section on legislation, which follows, for more information, and a link to this, and other, legislation.

In 2011, the registrations of approximately 15 lobbyists were cancelled for failure to file the required reports. They cannot lobby until all reports are filed.

No requests for advisory opinions, or complaints, were submitted on this law in 2011.

Delaware Public Integrity Commission



Legislation of Interest - 146th General Assembly (2011-2012)

Click
For Status

Senate

[S. B. 19](#)

➤ **Lobbying:** Bars lobbyists from performing official duties for State government to avoid conflicts.

[S.B.141](#)

➤ **Lobbying:** Comprehensive lobbyist reform, including additional financial reporting requirements. Adds conflict of interest prohibitions and limitations on unethical conduct making such conduct illegal. PIC Comments: [Appendix F](#).

[S.B. 175](#)

➤ **Budget:** Governor's Recommended Budget for FY ending June 30, 2013. Public Integrity Commission - \$188.5

House

[H.J.R. 4](#)

➤ **Lobbying:** Establishes a Study Commission on Lobbyist Ethics to examine Delaware's ethics laws as they relate to regulated lobbyists.

[H.B.4](#)

➤ **Lobbying:** Bars General Assembly members from being lobbyists for 1 year after the end of a term. Substituted by [HS 1 to HB 4](#)

[H.B. 5](#)

➤ **FOIA:** Agencies to respond to Freedom of Information Act Requests in 15 days.

[H.B. 24](#)

➤ **Lobbying:** Restricts General Assembly members, heads of State agencies, Cabinet Officials, and Governor's Executive Staff from lobbying for one (1) year after their term of office ends or State employment ends. Note: Executive Branch already has a 2 year post-employment restriction. [29 Del. C. § 5805\(d\)](#).

[H.B. 25](#)

➤ **Budget:** Governor's Recommended Budget for FY ending June 30, 2012.

[H.B. 190](#)

➤ **Budget:** Appropriations for FY ending June 30, 2012. PIC - \$185.9

[H.B. 233](#)

➤ **Lobbying:** Lobbyists to disclose to the Public Integrity Commission the name of all nonprofit and community associations, and trade groups, incorporated in the State and/or having activities in Delaware if they are a council or board member.

VI. Training: The Tool for Promoting Ethics

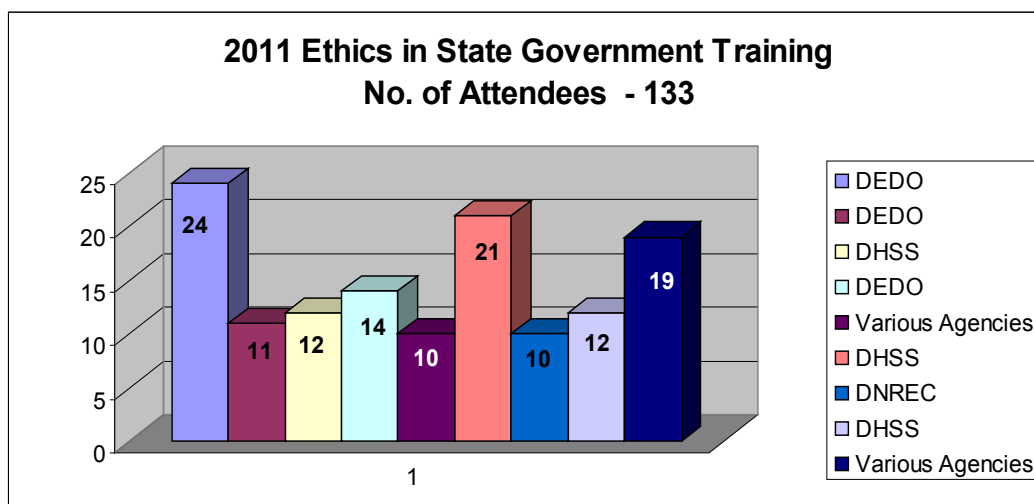
In 1991, when the Commission was created, the law did not address training. The State Personnel Board, with legal assistance from the Attorney General's office, had administered the law since 1984, and had no duty to provide training.

In 1994, the law was rewritten, and among other things, it required that Commission Counsel assist the Commission in giving training seminars.

In 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. Since then, education was, and remains, the Commission's primary focus.

In 2007, a survey was conducted to see how many State employees would use electronic media, instead of the hard copy handouts. The survey showed that electronic access to the documents was rarely used by trainees. However, due to budget constraints in 2008, the Commission had to reduce the number of hard copy publications distributed to trainees. It also has reduced printed copies for the public, referring them to the Commission's website.

In 2011, education remained the Commission's primary focus. While it is required to offer training, no law requires attendance. However, some agencies have made it mandatory. The Commission continues to work with agencies to set up training, and offers classes through the State Training Office. Regrettably, in the passed few years, the number of attendees has declined.



VII. Publications

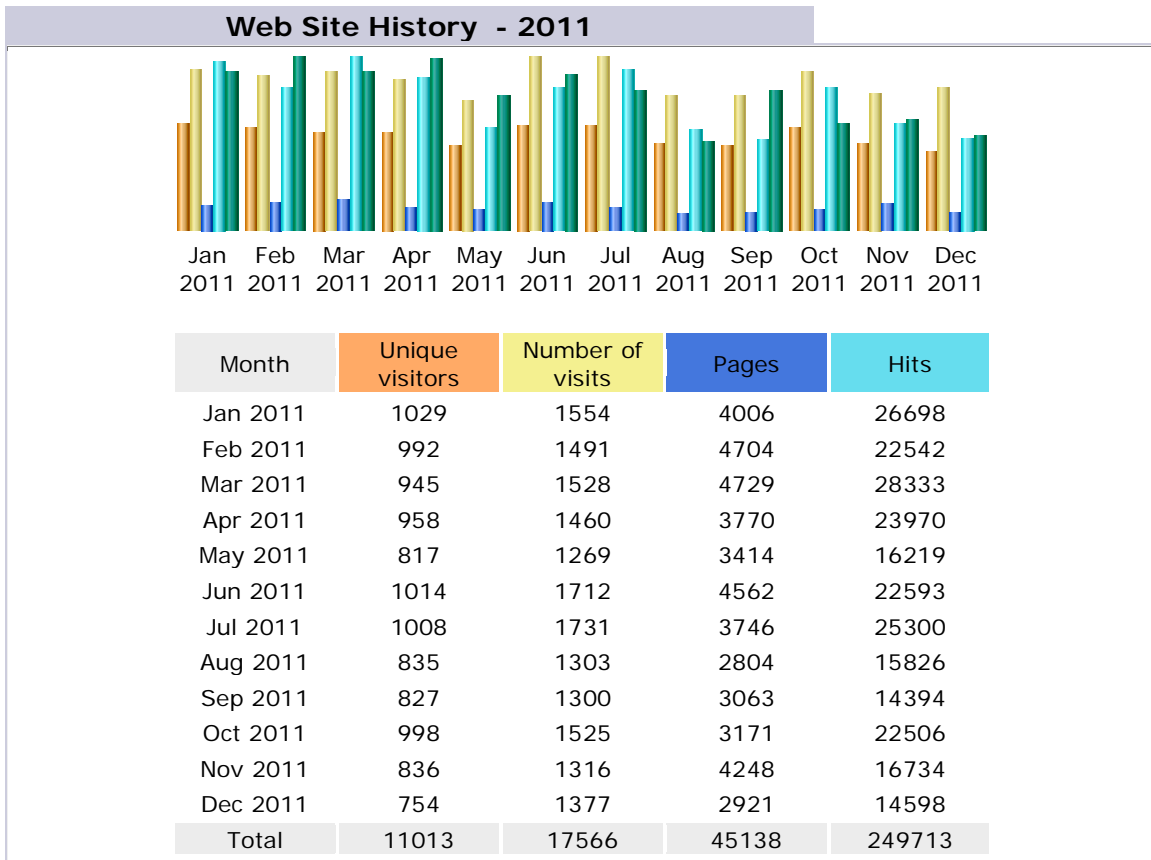
In 2011, the Commission began putting the training dates, location and agency, on its website's [Calendar of Events](#). Although most training is scheduled with a particular agency, the Calendar also gives dates for training that is open to persons from any agency, with a link to the registration site.

Another means of out reach, not only to those subject to the Code, but also to the public is through non-confidential publications on the Commission's web site. www.depjc.delaware.gov Previously, synopses were added annually to the website after all synopses for a particular year were completed. Now, they are filed on the Commission's Calendar of Events, as part of the Commission's minutes. Thus, synopses of the most recent cases are posted within 5 workdays after the Commission approves the minutes.

This insures those subject to the law, and interested members of the public are current on the Commission's activities and decisions. The website 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 they are drafting legislation for their clients. It includes links to related laws such as the Legislative Conflicts of interest Law and the Judicial Code of Conduct.

As noted earlier, the Commission has tried to make effective use of its website to present information to those under its jurisdiction, and to the public. It also has established on-line filing systems for Lobbyists and Public Officers. The charts that follow show the hits of the two sites.

2011 Web Site Hits, except for the Lobbying and Financial Disclosure on-Line filing hits, which follow.



Hits on the Lobbying/Public Officer On-Line Filing Databases

Date: 2011 - Lobbying & Financial Disclosure Database Hits	
Total Sessions	14,548.00
Total Page views	71,849.00
Total Hits	169,357.00
Average Sessions Per Day	39.86
Average Page views Per Day	196.85
Average Hits Per Day	463.99
Average Page views Per Session	4.94
Average Hits Per Session	11.64
Average Length of Session	00:03:36

VIII. Commission's 2012 Goals

(1) Continue emphasizing training in all four areas of the law. If the legislation changing the lobbying law is passed, it could result in increased training in that area.

(2) Work to improve access to services through an improved database program, if funds are available.

(3) Work to achieve an on-line training program.

IX. Funding and Cost Savings Efforts

For FY2012, the Legislature appropriated \$30, 600 for PIC's operating budget. The Commission operates with this small budget by tightly managing its funds, and staggering goals over fiscal years to provide more services. For example, on-line training will have to be staggered over fiscal years with modules added when funds are available.

In 2011, although there was little room, PIC continued to reduce costs. As the copier contract expired at the end of the year, it downsized to a small copier for the upcoming year as the copiers are not needed as much with the office's shift to e-mailing directly from the computer. The smaller copier, while slower, costs \$65 per month as opposed to the prior \$176 per month—a savings of \$111 per month; \$1,332 yearly.

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

DIANE HANSON,)	
	)	C.A. No. S11A-06-001-ESB
Appellant,)	
	)	APPEAL FROM THE UNDATED
v.	)	DECISION OF THE PUBLIC
	)	INTEGRITY COMMISSION IN
DELAWARE STATE PUBLIC	)	COMPLAINT NO. 10-31
INTEGRITY COMMISSION,)	ISSUED MAY 13, 2011
)	
Appellee.)	

OPENING BRIEF OF APPELLANT DIANE HANSON

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Dated: August 2, 2011

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NATURE AND STAGE OF THE PROCEEDINGS

On or about October 1, 2010, Complainant Joseph W. Nelson filed a Complaint with the Public Integrity Commission ("PIC") alleging that Diane Hanson, at the relevant time a Town Commissioner of Dewey Beach (and subsequently elected Mayor of Dewey Beach), had a conflict of interest and should not have participated in a vote on Town Ordinance 682.¹

On or about November 22, 2010, PIC issued a Preliminary Hearing on Complaint. This decision was rendered without any input from Mayor Hanson. PIC determined that it had jurisdiction over the case and that there was cause to believe that there had been a violation of 29 Del. C. §§5805(a)(2)(a) and (b), 5805(a)(1) and 5806(a). That same day, PIC issued a notice of a hearing on the complaint.

On February 7, 2011, Mayor Hanson filed a Motion to Stay Proceedings. PIC denied that motion on February 28, 2011.

Mayor Hanson filed a Response to the Preliminary Hearing on Complaint on March 8, 2011, asking that the complaint be dismissed. PIC held a hearing on the motion to dismiss on March 15, 2011.

¹

In PIC's Denial of Respondent's Motion to Dismiss and Final Disposition Opinion ("PIC OP"), PIC characterized the Complaint as "sworn." (PIC Op. at 1). Although the letter from Mr. Nelson was notarized, nothing in the letter indicates that it was submitted under oath.

PIC issued an undated Denial of Respondent's Motion to Dismiss and Final Disposition Opinion on or about May 13, 2011, PIC essentially determining the case without a merits hearing, and finding that Mayor Hanson violated the State Employees', Officers' and Officials' Code of Conduct. (Ex. A).

Mayor Hanson filed a Notice of Appeal with this Court on June 1, 2011.

STATEMENT OF FACTS

On October 1, 2010, PIC received a letter from Joseph Nelson, who owns land in Dewey Beach, accusing Dewey Beach Mayor Hanson (then-Commissioner Hanson) of violating Delaware's Code of Conduct and requesting her censure. Mr. Nelson accused Mayor Hanson of "intentionally withholding information to mislead the public regarding passage of a Dewey Beach Ordinance; by failing to reveal conflicts of interest and failing to recuse herself in a matter in which she had obvious conflicts of interest; and by taking actions in violation of the public trust that reflect unfavorably upon the State and its government."

The action sparking Mr. Nelson's outrage was Mayor Hanson's vote upon a motion to pass Dewey Beach Town Ordinance 682, an amendment to clarify the meaning of "relaxed bulk standards" in Dewey Beach's Comprehensive Development Plan. The Ordinance passed on a 3-2 vote.

After a hearing on a motion to dismiss the complaint, PIC issued a Denial of Respondent's Motion to Dismiss and Final Disposition Hearing, determining that there were no material issues of fact. PIC found that Mayor Hanson had a conflict of interest arising from (i) the fact that she was named as a defendant in a lawsuit in the U.S. District Court for the District of Delaware, (ii) the fact that she owned rental property in the area, and (iii)

the conclusion that her vote was affected by her views on the "quality of life" in the area.

This appeal followed.

STATEMENT OF ISSUES PRESENTED

I. Whether PIC lacked jurisdiction over Mayor Hanson as the statutory definitions expressly exclude municipalities and their officers.

II. Whether PIC abused its discretion in finding a conflict of interest arising from Mayor Hanson being named as a defendant in a federal lawsuit when no one submitted any evidence demonstrating that her vote would have benefitted her defense in that lawsuit and PIC did not identify any such evidence in its decision.

III. Whether PIC abused its discretion in finding a conflict of interest arising from the fact that Mayor Hanson owned land in Dewey Beach when no one submitted any evidence demonstrating that she would actually benefit economically from her vote, or that any benefit affected her differently from other landowners in Dewey Beach and PIC did not identify any such evidence in its decision.

IV. Whether PIC exceeded its statutory jurisdiction by finding a conflict of interest based on grounds not included in the applicable conflict of interest statute and by relying on "common law" conflicts of interest and a general "appearance of impropriety" standard.

ARGUMENT

I. PIC LACKED JURISDICTION TO ADJUDICATE A CLAIM AGAINST THE MAYOR OF A MUNICIPALITY.

This is an appeal of the decision of PIC finding a violation of the Delaware Prohibitions Relating to Conflicts of Interest statute, 29 Del. C. §5805, by Diane Hanson, the Mayor of Dewey Beach. However, Section 5805, and indeed Chapter 58 of title 29, does not apply to Ms. Hanson or the Town of Dewey Beach, and so PIC had no subject matter jurisdiction and no right to pass judgment over her. For this reason, the decision of PIC is void and of no effect, and should be vacated.²

Section 5805 of Title 29 prohibits action by a "state employee, state officer or honorary state official." A "state officer" is defined by 29 Del. C. §5804(13) as "any person who is required by subchapter II of this chapter to file a financial disclosure statement," with certain enumerated exceptions. Subchapter 2 of Title 29 includes a requirement that "public officers" file financial disclosure statements. 29 Del. C. §5813(a). The list of "public officers" is set forth in 29 Del. C.

²

Issues of subject matter jurisdiction of a government agency are not subject to waiver, and may be raised at any stage of the proceeding. *Jackson v. Pennsylvania Board of Prohibition and Parole*, 885 A.2d 598, 600 (Pa. Cmmwlth. 2005); *Ross v. Planning and Zoning Commission of Town of Westport*, 982 A.2d 1084, 1087 (Conn. App. 2009); *Brunsvold v. State*, 864 P.2d 34, 36 (Wyo. 1993).

§5812(n)(1), and does not include the Mayor of Dewey Beach or any other elected official of Dewey Beach.³

An "honorary state official" is defined as "person who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses)." 29 Del. C. §5804(6). As demonstrated below, Mayor Hanson is not a "member, trustee, director or the like of any state agency."

3

The following are listed in Section 5812(n)(1): "a. Any person elected to any state office; b. Any person appointed to fill a vacancy in an elective state office; c. Any candidate who has filed for any state office; d. The Research Director and Controller General of the Legislative Council; The Chief Justice and Justices of the Supreme Court; f. The Chancellors and Vice-Chancellors of the Court of Chancery; g. The President Judge and Judges of Superior Court; The Chief Judge and Judges of Family Court; i. The Chief Judge and Judges of the Court of Common Pleas; j. The Chief Magistrate and justices of the peace; k. The State Court Administrator and the administrators of Superior Court, Family Court, the Court of Common Pleas, and the Justice of the Peace Courts; l. The Public Guardian, the Executive Director of the Victims' Compensation Assistance Program, the Executive Director of the Child Placement Review Board; m. All Cabinet Secretaries and persons of equivalent rank within the Executive Branch; n. All division directors and persons of equivalent rank within the Executive Branch; o. The State Election Commissioner and the Directors and Deputy Directors of the Department of Elections; p. The State Fire Marshal and the Director of the State Fire School; q. The Adjutant General of the Delaware National Guard; and r. The Alcoholic Beverage Control Commissioner and the members of the Appeals Commission, pursuant to § 306(c) of Title 4."

Lastly, Section 5805 applies to a "state employee," which is defined as someone, with certain exceptions not relevant here, "1. Who receives compensation as an employee of a state agency; 2. Who serves as an appointed member, trustee, director or the like of any state agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses); or 3. Who is an elected or appointed school board member." 29 Del. C. §5804(12)(a). As with an "honorary state official," status as a "state employee" depends on whether one works for a "state agency."

The phrase "state agency" is defined as follows:

any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly or of the Constitution of the State, *excepting only political subdivisions of the State, their agencies and other public agencies not specifically included in this definition which exist by virtue of state law, and whose jurisdiction: a. Is limited to a political subdivision of the State or to a portion thereof; or b. Extends beyond the boundaries of the State.*

29 Del. C. §5804(11) (*italics added*).

"Thus, it is clear that the General Assembly did not intend to include political subdivisions within the meaning of state agency." *Malinoski v. State Conservation District*, C.A. No. 94C-12-019, 1998 WL 960757, WL Op. at *2, Terry, J. (Del. Super. July 15, 1998). (Ex. B). Dewey Beach is a municipality. *Gibson v. Sussex County*

Council, 877 A.2d 54, 73 n.63 (Del. Ch. 2005). A municipality is a political subdivision. *C&D Contractors, Inc. v. City of Wilmington*, C.A. No. 6377, 1981 WL 15096, WL Op. at *1, Hartnett, V.C. (Del. Ch. Mar. 18, 1981, *reh'g denied*, Apr. 6, 1981); *Jones v. Buford*, 365 A.2d 1364, 1367 (N.J. 1967). (Ex. C).

It cannot be seriously argued that Dewey Beach is not a political subdivision. Dewey Beach exists by virtue of state law, specifically Title 22 of the Delaware Code.⁴ The jurisdiction of Dewey Beach is limited to its borders. *Dewey Beach Charter* §2 (Ex. D hereto).⁵ As such, Dewey Beach clearly satisfies the requirements of Section 5805.

4

Although Title 22 does not specifically name Dewey Beach (or any other municipality for that matter), any doubt is dispelled by the legislative activities of the General Assembly authorizing amendments to the Dewey Beach Charter, as shown on the website of the Delaware General Assembly: <http://legis.delaware.gov/LIS/lis145.nsf/Legislation?SearchView&q=DeWey+Beach>. (Ex. E hereto). This Court can take judicial notice of the contents of government websites, *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir.2005) (holding that district court could take judicial notice of state agency website); *Cali v. E. Coast Aviation Servs., Ltd.*, 178 F.Supp.2d 276, 287 (E.D.N.Y.2001) (taking judicial notice of documents from Pennsylvania state agencies and Federal Aviation Administration), and Mayor Hanson asks the Court to do so.

5

The Dewey Beach Charter is available online at <http://www.ecode360.com/?custId=DE2129>.

In its Preliminary Hearing On Complaint, PIC assumed jurisdiction pursuant to 29 Del. C. §5802(4). Section 5802(4) provides that:

It is the desire of the General Assembly that all counties, municipalities and towns adopt code of conduct legislation at least as stringent as this act to apply to their employees and elected and appointed officials. This subchapter shall apply to any county, municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation by January 23, 1993. No code of conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of this subchapter unless the code of conduct has been submitted to the State Ethics Commission and determined by a majority vote thereof to be at least as stringent as this subchapter. Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter.

Notwithstanding this general language, Section 5804(11) specifically excepts municipalities from the definition of a "state agency." Where an Act contains a general provision and specific provisions which appear to conflict, the specific provisions control over the general provision. *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1131 (Del. 2009); *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 494 (Del. 2000). This rule applies equally where specific language conflicts with a statement

of legislative findings. See *People v. Superior Court*, 15 Cal. Rptr. 3d 921, 926 (Cal. App. 2004).

Where the General Assembly has defined a term, the Court is bound by that definition. *Chrysler Corp. v. State*, 457 A.2d 345, 349 (Del. 1983); *Stiftel v. Malarkey*, 384 A.2d 9, 21 (Del. 1977). See also *Bank of Balboa v. Benneson*, 9 P.2d 540, 541 (Cal. App. 1932) (noting "the well-settled doctrine that a special definition and an exception controls the general...").

Dewey Beach, as a municipality, is specifically excluded from the statutory definition of a "state agency." Consequently, Mayor Hanson is not a state employee, and not subject to the requirements of Section 58 of Title 29. Therefore, PIC did not have jurisdiction over her and did not have the power to pass judgment over her. In the absence of subject matter jurisdiction, the ruling of PIC is void and must be vacated. Any failing of the statutes is a matter for the General Assembly, and not this Court, to correct.

II. PIC ERRED BY FINDING A CONFLICT OF INTEREST PER SE FROM THE FACT THAT MS. HANSON IS A DEFENDANT IN A LAWSUIT IN THE ABSENCE OF ANY EVIDENCE THAT SHE BENEFITTED IN HER DEFENSE OF THE LAWSUIT BY VOTING FOR THE ZONING ORDINANCE.

PIC first determined that Mayor Hanson had a conflict of interest because she is a defendant in a federal lawsuit relating to the same subject matter as the challenged vote. In that

lawsuit, the plaintiff seeks compensatory and punitive damages from Mayor Hanson, among others.

Assuming, for the sake of argument, that in some circumstances the naming of an elected official in a lawsuit can create a conflict of interest⁶, there is no basis for concluding that such circumstance is a conflict of interest *per se*. Further, there is no evidence in the record that Mayor Hanson's vote would, in fact, have materially aided in her defense to personal liability in the federal lawsuit, such that the circumstances of this case evidence a conflict of interest.

PIC, in its ruling, notes that Mayor Hanson's lawyer in the federal lawsuit, Mr. Walton, discussed with her whether the clarifying ordinance could have an impact on her defense regarding qualified immunity. Mr. Walton testified "I'm sure we spoke of it, yes." (PIC Op. at 15). However, Mr. Walton did not testify that the clarifying amendment would, in fact, aid materially in Mayor Hanson's defense in any way to which she was not already entitled,

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In the case relied upon by PIC, *Aronowitz v. Planning Board of Township of Lakewood*, 608 A.2d 451 (N.J. Super. 1982), the conflict did not arise because the town officials had been parties to a lawsuit. Rather, the conflict arose because the town officials had signed settlement agreements in which they obligated themselves not to oppose the rezoning. This contractual predetermination of their positions impaired their ability to make an independent decision on the merits, and so created the conflict. No such impediment was present in this case.

or, to put it another way, that without the clarifying amendment her defenses were demonstrably weaker. Nor did any other witness. When Mr. Walton "spoke of it" with Mayor Hanson, he could have advised her that it would not make a material difference. Thus, there is no evidentiary foundation for the conclusion that adoption of the ordinance materially benefitted Mayor Hanson.

To the extent that PIC was relying on the legal skills of its one lawyer-member (Mr. Dunkle) or the legal skills of Commission Counsel (Janet Wright) in making this assessment in the absence of expert testimony in the record, such action is inappropriate, procedurally and substantively.

A government tribunal may not sit as silent witnesses when expert testimony is required to establish an evidentiary basis for its conclusions. *Langlitz v. Board of Registration of Chiropractors*, 486 N.E.2d 48, 53 (Mass. 1985). If the decision of PIC was based on legal opinions of the lawyer-member or Commission Counsel, the decision is void because (i) the lawyer-member and/or Commission Counsel (to the extent they can be qualified as experts in federal civil rights law, a fact also not in the record) acted beyond the scope of their responsibility, (ii) they did not give advance notice that they would be providing expert evidence on federal civil rights law and what their opinions would be so that Mayor Hanson could prepare a response, and (iii) they did not make

themselves available for cross-examination on their reasoning and conclusions. See *Feinson v. Conservation Comm'n of Town of Newton*, 429 A.2d 910, 914 (Conn. 1980) ("[i]f an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings").⁷

While a tribunal may apply its institutional expertise in evaluating conflicting evidence, it may not, under that guise, create evidence. Rather, its findings must be supported by competent evidence, not supposition. *United Water Delaware, Inc. v. Public Service Commission*, 723 A.2d 1172, 1176 (Del. 1999). See also *Pundy v. Dep't of Professional Regulation*, 570 N.E.2d 458, 464 (Ill. App. 1991) ("members of an administrative tribunal may not rely on their own expertise in making factual determinations...Rather, the decision must be based on evidence presented at the hearing").

7

Of course, it would be a conflict of interest for Mr. Dunkle and/or Ms. Wright to serve as an expert witness for the proceeding while also serving as a member of the PIC board or Commission Counsel, respectively, passing on that evidence.

For a conflict of interest to exist, the conflict must be concrete, direct and immediate. A remote or speculative financial interest is insufficient. *State ex rel. Thomson v. State Bd. of Parole*, 342 A.2d 634, 639 (N.H. 1975). See also 29 Del. C. §5805 (statute defines a conflict of interest as being where an action "would result in a financial benefit or detriment..." not when it "might" result in a financial benefit or detriment⁸) (italics added).

Here, there is no testimony or other evidence demonstrating that Mayor Hanson's vote had any actual effect on her defense in the federal lawsuit. A conflict of interest has to be more than contingent, theoretical or speculative. *Bluffs Development Co., Inc. v. Board of Adjustment of Pottawattamie County, Iowa*, 499 N.W.2d 12, 15 (Iowa 1993); *Haggerty v. Red Bank Borough Zoning Bd. of Adjustment*, 897 A.2d 1094, 1101 (N.J. Super. A.D. 2006).

In the absence of any evidence in the record (expert or otherwise) demonstrating that, at the time of the vote on the clarifying ordinance, (i) Mayor Hanson was vulnerable to liability in the federal lawsuit, and (ii) her vote materially benefitted her

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In this case, the word "would" is used as a "defective verb," connoting the past tense of the word "will." *The American Heritage Dictionary of the English Language* 1478 (1969). "Will" indicates a mandatory requirement. *Del Pharmaceuticals, Inc. v. Access Pharmaceuticals, Inc.*, C.A. No. 314-N, 2004 WL 1631355, WL Op. at *8 n.32, Strine, V.C. (Del. Ch. July 16, 2004).

defense to personal liability in the federal lawsuit, there was no basis in fact or law for the conclusion that there existed a conflict of interest. In the absence of any such evidence, the decision of PIC was arbitrary and capricious, and should be vacated.

III. PIC ERRED BY DETERMINING A CONFLICT OF INTEREST PER SE FROM THE FACT THAT MS. HANSON OWNS RENTAL PROPERTY IN DEWEY BEACH IN THE ABSENCE OF ANY EVIDENCE THAT THE VOTE ON THE CLARIFYING AMENDMENT WOULD HAVE ACTUALLY BENEFITTED HER FINANCIALLY.

PIC found that Mayor Hanson had a conflict of interest because she owns rental properties in Dewey Beach and that the clarifying amendment "would more specifically benefit her properties." (PIC Op. at 21). However, there is absolutely no evidence whatsoever in the record to support this conclusion, and indeed PIC cites to none in its ruling.

The effect of zoning decisions on the ability to market rental properties and potential increases or decreases in revenue or property values is not a matter within the expertise of the average person, and so requires expert testimony. There was no such testimony here. There was no basis, beyond pure speculation, from which PIC could determine that Mayor Hanson's vote would have an actual, material and direct personal pecuniary impact. A violation of Section 5805 must be based on an actual conflict, not a theoretical conflict.

Further, Section 5805(a)(2) only applies where the benefit or detriment accrues to the official "to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." There is no evidence that the effect of the ordinance on property values would not be the same for all Dewey Beach property owners, or that the effect on rental units would not be the same for all landlords in Dewey Beach. The record is silent on this.

The utter and total absence of evidence renders PIC's decision arbitrary and capricious, and it should be vacated.

IV. PIC EXCEEDED ITS STATUTORY AUTHORITY WHEN IT HELD THAT MAYOR HANSON HAD A "COMMON LAW" CONFLICT OF INTEREST NOT INCLUDED IN THE STATUTORY DEFINITION.

PIC found that Mayor Hanson had a conflict of interest because she wanted to preserve the quality of life in Dewey Beach as it existed. (PIC Op. at 21-24). In so finding, PIC exceeded its statutory grant of authority, and so its ruling is void and should be vacated.

PIC is an administrative board, as it is charged with administering and implementing provisions of Chapter 58 of Title 29 of the Delaware Code. As PIC is a creature of statute, its powers are limited to those granted by statute. *Maxwell v. Vetter*, 311 A.2d 864, 865 (Del. 1973); *State ex rel. Clarke v. Cook*, 134 N.E. 655 (Ohio 1921); *People ex rel. Mosco v. Service Recognition Board*,

86 N.E.2d 357, 363 (Ill. 1949). A corollary of this is that administrative boards have no common law powers. *Little v. Conflict of Interest Commission*, 397 A.2d 884, 886 (R.I. 1979); *Vehslag v. Rose Acme Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. App. 1985); *Sioux City Community School Dist. v. Iowa Dept. of Education*, 659 N.W.2d 563, 568 (Iowa 2003); *State ex rel. Anderson v. State Bd. of Equalization*, 319 P.2d 221, 226 (Mont. 1957).

The Delaware Code empowers PIC to prosecute (through Commission Counsel) violations of "this chapter" (Chapter 58). 29 Del. C. §§5809(3), 5810(a). See also 29 Del. C. §5810 (permitting appeal to this Court when "the Commission finds that any person has violated any provision of this chapter..."). The repeated references to "this chapter" (Chapter 58) makes abundantly clear that PIC's jurisdiction is limited to prosecuting alleged violations as set forth in Chapter 58. Conflict of interest transactions are specifically defined in Section 5805. They involve circumstances where a decision would result in a financial benefit or detriment. 29 Del. C. §5805(a)(2). Section 5805 does not define conflicts of interest to include psychic benefits like "quality of life." As such, PIC acted in excess of its statutory authority.⁹

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For support, PIC cited several cases where courts referred to
(continued...)

In addition to being legally insupportable, PIC's position is simply nonsensical. Almost all zoning decisions are tied to the quality of life in the affected area. No matter how one votes, it can be argued that the vote reflects the official's interest in the quality of life as he or she believes it either has been or will be. To accept PIC's position would be to make all members of zoning boards and commissions immediately subject to challenge for a conflict of interest every time they vote.

As PIC exceeded the statutory limits of its authority, its ruling is void and should be vacated.

V. TO THE EXTENT PIC RELIED ON THE "APPEARANCE OF IMPROPRIETY" AS A SEPARATE GROUND FOR FINDING A CONFLICT OF INTEREST, PIC EXCEEDED ITS STATUTORY AUTHORITY.

PIC appears to rely on the general rubric of "appearance of impropriety" as a separate ground for finding a violation of the Code of Conduct. (PIC Op. at 25). To the extent this is so, it exceeds PIC's statutory authority because "appearance of

⁹(...continued)

or relied on common law conflicts of interest. PIC, however, is not a judicial court, and the scope of its jurisdiction is not the same. See *Rommell v. Walsh*, 15 A.2d 6, 9 (Conn. 1940) ("[a]dministrative boards differ radically from courts because frequently in the performance of their duties they are representing [public] interests, whereas courts are concerned with litigating the rights of parties with adverse interests who appear before them"). In any event, just as courts have to stay within their jurisdiction as set forth by statute, so does PIC.

impropriety" is not the standard set forth by Section 5805.¹⁰ Rather, there must be an actual financial benefit or detriment.

As explained above, PIC has no powers other than those granted by statute. Section 5805 does not authorize PIC to determine whether an "appearance of impropriety" exists, only whether an actual conflict of interest, as defined by statute, exists. As such, PIC's action is void and should be vacated.

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PIC cites 29 *Del. C.* §5811 in support of its position. (PIC Op. 25). Section 5811, however, appears in a separate subchapter of Chapter 58 of Title 29, which is not at issue in this case. Indeed, 29 *Del. C.* §5812(n)(2) expressly excludes municipalities from the operation of that subchapter.

CONCLUSION

PIC has exceeded its statutory authority and has attempted to substitute unestablished covert expertise for established overt expert evidence. PIC has no evidence supporting its conclusions and so has employed an "appearance of impropriety" standard, disregarding the statutory standard. In so doing, PIC has acted contrary to law and abused its discretion, thereby denying Mayor Hanson due process of law.

WHEREFORE, for the foregoing reasons, Mayor Hanson respectfully requests that the Court reverse and vacate the decision of PIC.

Respectfully submitted,



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Dated: August 2, 2011

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

DIANE HANSON,)	
	)	C.A. No. S11A-06-001-ESB
Appellant,)	
	)	APPEAL FROM THE UNDATED
v.	)	DECISION OF THE PUBLIC INTEGRITY
	)	COMMISSION IN COMPLAINT
DELAWARE STATE PUBLIC)	NO.10-31 ISSUED MAY 13, 2011
INTEGRITY COMMISSION)	
)	
Appellee,)	

ANSWERING BRIEF OF APPELLEE

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Dated: August 19, 2011

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NATURE AND STATE OF THE PROCEEDINGS

On or about October 1, 2010, Joseph W. Nelson filed a complaint with the Public Integrity Commission ("PIC") alleging Dewey Beach Town Commissioner Diane Hanson, ("Appellant"), had a conflict, and should not have voted on Town Ordinance 682.¹

On October 15, 2010, PIC held a hearing, where it was required to consider all facts alleged by Complainant as true. As it must, by law, assume those facts as true, Appellant was not a participant. It concluded two allegations may state a Code violation and dismissed the remainder. PIC's opinion, dated November 22, 2010, said, assuming all facts as true, some allegations were dismissed, and two, if true, may be a Code violation. It provided its findings of facts and identified applicable law. It also issued a notice to respond within 20 days. A request for an extension of time was made, and granted. Subsequently, Appellant obtained another attorney, and another extension was granted.

On February 7, 2011, Appellant filed a Motion to Stay. PIC denied the motion on February 15, and issued its written decision on February 28, 2011.

On March 8, 2011, Appellant filed a Motion to Dismiss and Response to the Preliminary Hearing. A hearing was held March 15, 2011. Appellant said she would stand on the written motion to dismiss, but would call witnesses on her response to the preliminary hearing. Appellant and two witnesses testified.

On or about May 13, 2011, PIC issued its denial of Appellants notice to dismiss, and issued a final opinion based on her response, in writing, and by testimony, on the conflict issues, as there were no genuine issues of fact on either matter.

Appellant filed her Notice of Appeal in the Superior Court on June 1, 2011. She filed her Opening Brief on August 2, 2011. This is Appellee's Answering Brief.

¹ Appellant notes that Mr. Nelson's letter was notarized, but said nothing suggests it was under oath. If Appellant is trying to raise this as an argument, this was never raised below.

STATEMENT OF FACTS

On October 1, 2010, PIC received Joseph Nelson's complaint against Dewey Beach Commissioner (now Mayor), Diane Hanson. It alleged she had a conflict of interest when she participated in a decision on a Town Ordinance 587. The ordinance, retroactive to 2007, was to define and express the intent of the drafters of the Town's 2007 Comprehensive Development Plan (CDP) that the phrase "relaxed bulk standards," was not intended to include buildings above 35'.

At the time the ordinance was passed, Dewey Beach Enterprises (DBE) had filed a suit in federal court alleging the Town improperly denied its request to build a hotel to 68'. It also sued Ms. Hanson individually, alleging she had a conflict in participating in the denial decision because of her rental properties. The Court had denied Ms. Hanson's motion to dismiss the personal suit.

Complainant alleged the same conflict regarding her rental properties. He also alleged she had a conflict because she was a named defendant in the lawsuit, and DBE was the only property owner affected by the retroactive ordinance. He alleged other violations such as the Ordinance 587 was unconstitutional; that Ms. Hanson withheld information from the public and Town Commissioners regarding her discussion with the State Planning Office pertaining to changes to the CDP.

At its October 15, 2010 meeting, PIC reviewed the complaint. As all facts in the complaint had to be assumed as true, Ms. Hanson was not a participant at that stage. PIC dismissed all allegations except those related to her rental and her status as an individually named defendant in the lawsuit. PIC issued a written opinion, dated November, 22, 2010, detailing its findings of facts and the applicable law. It found her conduct may violate the "personal or private interest" provision; the "financial interest" and "financial benefit" provisions; and the appearance of impropriety standard.

Ms. Hanson filed a Motion to Dismiss and Response to the Preliminary Hearing Decision. She did not dispute jurisdiction. She agreed she owned rental properties that PIC found were across the street from DBE's proposed development, but denied she had any financial interest from her rentals because of the costs associated with ownership. She testified it was not finances, but the "quality of life," that would be affected if DBE built to that height. She called two attorneys as witnesses who testified that the retroactive ordinance was intended as a defense to the lawsuit, and that she was informed of its impact on her qualified immunity defense in the federal suit. She did not dispute the application of the appearance of impropriety standard.

PIC found that she did have conflicts of interest arising from her properties, and because she was a named defendant in the federal lawsuit. It also found she had violated the appearance of impropriety standard.

Ms. Hanson appealed, and filed her opening brief. This is PIC's response.

STATEMENT OF ISSUES PRESENTED

I. PIC has jurisdiction over local government officials.

II. PIC did not find a conflict of interest per se because it based its decision on the particular facts of appellant's case, and its decision is supported by substantial evidence.

III. PIC did not make per se ruling that appellant had a conflict arising from her rental properties, no expert was required, and its decision was supported by substantial evidence, and grounded in law.

IV. PIC acted within its statutory authority by applying applicable law to its findings.

V. PIC properly relied on the "Appearance of Impropriety" Standard.

I. PIC HAS JURISDICTION OVER LOCAL GOVERNMENT OFFICIALS

PIC has jurisdiction over local officials based on clear statutory language:

"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 Commission¹ 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." 29 Del. C. § 5802(4)(*emphasis added*).

First, Appellant never raised personal jurisdiction at any stage of the proceedings. She now argues she is not a "State employee," "State officer," or "Honorary State Officials," as those terms are defined. *Opening Brief of Appellant Hanson*², pp. 6-8. 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 given." *Standard Oil v. Superior Court*, 44 Del. 538 (Del., 1948). Jurisdiction is appropriate when persons waive defenses to personal jurisdiction by their conduct. *Hornberger Management Company v. Haws & Tingle General Contractors, Inc.*, 768 A.2d 983 (Del. Super., 2000). The record reflects Appellant never raised the personal jurisdiction issue. Thus, this argument should be dismissed on that basis.

Even if she can now raise that issue, the Delaware Supreme Court has held that: "when a statute is unambiguous, and there is no reasonable doubt as to its meaning, the Court is bound by the statutory text." *Cede & Co. And Cinerama, Inc., v. Technicolor, Inc.*, 758 A. 2d 485 (Del., 2000).

¹ The State Ethics Commission was renamed and reestablished as the State Public Integrity Commission. 29 Del. C. § 5808(a).

² Hereinafter "OB."

Where a Town had no Code of Conduct, Delaware Courts have asserted jurisdiction over local government officials under the Code of Conduct. *Post v. Public Integrity Commission*, C.A. No. 07-09-008-WLW, J. Witham (April 30, 2008).³

Here, Dewey Beach is a municipality. *OB*, p. 8-9. Appellant is the Mayor. *Id.* at 6. She does not dispute that Dewey Beach does not have a PIC approved Code. *10-31 Preliminary Hearing Decision*⁴, p. 2. In fact, pursuant to 29 Del. C. § 5802(4), Dewey Beach submitted a Code to PIC, but it was not as stringent as State law. *Commission Op. No. 07-42*, p. 2, fn. 6. That is the only means of exemption. 29 Del. C. §5802(4). As the Town has no Code comporting with the exemption requirement, she remains subject to Subchapter I. Appellant argues that 29 Del. C. § 5802(4) is “general language,” *OB* at p. 10, and it was not the General Assembly’s intent to make local governments subject to Subchapter I. *Id.* at p. 8. While the plain language says they are subject to Subchapter I, absent a PIC approved Code, if she is arguing the statute is ambiguous, the legislative history shows the General Assembly intended for local officials to have a Code of Conduct--either a PIC approved one, or the State law. Assuming ambiguity, Courts also look to the legislative history to aid in deciding legislative intent. *Cede, supra*.

The 135th General Assembly asked the Delaware State Bar Association’s Special Committee on Public Officials’ Code of Conduct to assist in drafting ethics legislation. *DSBA, Special Committee on Public Officials’ Code, June 7, 1990, Tab 1*. Its report said: “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

³ The Court did not specify the statutory basis for jurisdiction. PIC argued both 29 Del. C. § 5802(4) and that he had waived jurisdiction by not raising that issue. The Court did identify the basis for concluding that a local official who requested an advisory opinion was a “public officer.” *Post* at p. 3. However, that citation is an error in law because it based that on the definition in Subchapter II, and those provisions do not apply to local officials. 29 Del. C. § 5812(n)(2).

⁴ Hereinafter “PH.”

the rules we proposed in 1986 for the members of the General Assembly.” *Tab 1, p. 1 ¶ 3; and p. 2 ¶ (B)(emphasis added)*. The report noted that elected and appointed officials of political subdivisions...are not “public officers” within the meaning of the financial disclosure law. *Id. at p. 2, PART III, ¶ 2(emphasis added)*. The draft legislation, spoke specifically to a “Code Conduct Legislation for Local Government Officials,” *Id. at p. 3 § 2*. It said it was the desire of the General Assembly that all local governments adopt code of conduct legislation similar to this. *Id.* When the law was enacted, it had that same language. *Id. at p. 4, 67 Del. Laws, c. 417 § 2*. It also directed the Commission to report to the General Assembly in 2 years on local legislation and make a recommendation with respect to legislation to be adopted and to cover such officials. *Id.*

Subsequently, in adopting the “Public Integrity Act of 1994,” the Legislators went beyond their “desire” that local officials adopt a Code similar to the initial statute. *67 Del. Laws, c. 417 § 2*. This time it mandated that, if not, they were subject to State law. *Tab 1, p. 5, S.B. 406, 69 Del. Laws, c. 467*. To make a statute effective for a local government, there must be concurrence of two-thirds of the member of each House. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991), p. 7. It passed with an amendment stating that it applied to all municipalities and towns, and required a 2/3 majority vote on the legislation. *Tab 1, p. 6, Senate Bill 198, amendment 1(emphasis in original)*. Thus, the language that requires local governments to have an approved Code, or else they are subject to Subchapter I is not “general language.” It is a statutory mandate. *Tab 1 at p. 7*.

Appellant relies on certain definitions to say local officials are not governed by Subchapter I. *OB*, pp. 6-8. She argues she is not a “State employee,” “State officer” or “Honorary State Officials” as those terms are defined. 29 Del. C. § 5804 (6), (12) and (13). *Id. at pp. 6-8*. Appellant acknowledges that PIC never asserted jurisdiction over her as a “State employee,” “State officer,” or “Honorary State official.” *OB, p. 10*.

In arguing she is not a "State officer," she turns to Subchapter II on financial disclosure. Subchapter II clearly exempts "elected and appointed officials of political subdivisions of the State," 29 Del. C. § 5812(n)(2). If local officials were not subject to Subchapter I, why would the Legislators need to exclude them from Subchapter II?⁵

While the Code Revisors put the provision in the "Findings" provision, it was enacted as law. *Tab 1, p. 7*. It stands on its own, separate and apart from the definitions Appellant cites. The clear language of 29 Del. C. § 5802(4) identifies the persons to whom it applies—"Subchapter I...shall apply to any...municipality or town...and the employees and elected and appointed officials... (emphasis added). As those words are clear, there was no reason to separately define them as they did "State employee," "State officers," and "State Honorary officials." When the language is clear and unambiguous, the words must be given their plain meaning. *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, 492 A.2d 1242, 1248 (Del., 1985).

Appellant also asserts that because the term "State agency" excludes political subdivisions, it is evidence the General Assembly did not intend to make local officials subject to the Code, and because political subdivisions are excluded from that definition, PIC lacks subject matter jurisdiction.⁶ *OB*, p. 11. First, that conclusion from a definition is contrary to the expressed intent in the language itself, and in the legislative history. Second, PIC did not apply the term "State agency" to her in any aspect. It

⁵ Looking at the Chapter as a whole, the General Assembly specifically said Subchapter I would apply to local officials without an approved Code. 29 Del. C. § 5802(4) In Subchapter II they were specifically exempted. 29 Del. C. § 5812(n)(2). Subchapter III, the Dual Compensation law, applies to those holding dual government positions in the State, "and other jurisdictions of government within the State." 29 Del. C. § 5821. Similarly, in Subchapter IV, the Lobbying Law, registration of lobbyists is required if they lobby the "General Assembly" or a "State Agency." 29 Del. C. § 5831(a)(5). It then explicitly exempts from registration "Persons appearing pursuant to their official duties as employees or elected official of the State, or any political subdivision thereof..." 29 Del. C. § 5831(b)(2). Thus, reading the statute as a whole, the General Assembly uses clear language when it wishes to specifically include, or specifically exempt local officials.

⁶ Appellant argues subject matter jurisdiction can be raised at any point in the proceedings. *OB*, p. 11. However, her argument is actually that PIC has no personal jurisdiction over her because she is not a "State employee, State officer or Honorary State official." *OB*, pp. 6-8.

applied 29 Del. C. §5802(4)—“Subchapter I shall apply to any... municipality or town and the employees and elected and appointed officials thereof which has not enacted such legislation....”, and the record reflects it was her official conduct, pertaining to passing a town ordinance, that was at issue. *PH; and Denial of Respondent’s Motion to Dismiss and Final Disposition Opinion*.⁷ Further, “State agency,” is a definition. It is not a provision establishing jurisdiction over individual local officials. A separate provision does that. 29 Del. C. § 5802(4). Where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference of intention by the legislature. *Norman v. Goldman*, 173 A.2d 607,610 (Del. Super., 1961). The General Assembly affirmatively applied Subchapter I to local government employees and elected officials. It negatively designated Subchapter II as applying to such persons.

As far as Appellant’s reference to 29 Del. C. § 5812, it, too, is a definition. This time in a separate Subchapter. It exempts “elected and appointed officials of political subdivisions of the State....” 29 Del. C. § 5812(n)(2). PIC did not assert jurisdiction under that law, and no provisions of the financial disclosure law were considered by PIC.

Subchapter II deals with a completely different subject—financial disclosure reports—not conflicts of interest as in Subchapter I. It identifies the specific persons who must file reports. Citing definitions in Subchapter II does not overcome the clear language that “Subchapter I” applies to local government officials, absent a PIC approved Code of Conduct. Again, to accept Appellant’s argument would negate the clear words of 29 Del. C. § 5802(4). Implied repeals are not favored in 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).

Beyond the plain language and legislative history, Appellant’s interpretation would lead to an absurd result. It would mean local governments could ignore the

⁷ Hereinafter “FO.”

General Assembly's "desire" that they have their own Code of Conduct because it was not mandated, and then, under her interpretation, they would not be subject to the State Code. In other words, they would have no conflict of interest law.⁸ That is contrary to the plain language, and to the General Assembly's expressed intent that they must have a Code—either a PIC approved one, or the State Code. 29 Del. C. § 5802(4). The law has only one means of exemption, and it is not by the means Appellant suggests. *Id.*

An interpretation of a statute should not lead to a result so unreasonable or absurd that it could not have been intended by the legislature. *Synder v. Andrews*, 708 A.2d 237 (Del., 1997). Appellant's interpretation would lead to an absurd result because it does not consider: (1) the substantive law in Subchapter I that clearly says it applies; (2) the General Assembly's clear, expressed intent in the statute itself; (3) the legislative history to include local officials;⁹ and (4) rules of construction that implied legislative repeal is not favored at law. Appellants argument would effectively repeal § 5802(4) and override legislative intent. "[The] unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." *Coastal Barge, supra at 1242*.

As Appellant never raised the issue of personal jurisdiction, this argument should be dismissed on that basis. Alternatively, it should be dismissed on the basis that under the clear statutory language, PIC had jurisdiction.

II. PIC DID NOT FIND A CONFLICT OF INTEREST PER SE BECAUSE IT BASED ITS DECISION ON THE PARTICULAR FACTS OF APPELLANT'S CASE, AND ITS DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

⁸ Only 7 of 57 local governments have adopted their own Code of Conduct. Under Appellant's theory, the majority of the employees and elected and appointed officials in 50 local governments would have no Code of Conduct.

⁹ This same issue was discussed in Commission Op. No. 07-47, which is part of the certified record and provided to Appellant with the Commission's decision on her motion to dismiss.

On appeal of a PIC decision, the "Court's review, in the absence of actual fraud, shall be limited to a determination of whether the Commission's decision was supported by substantial evidence on the record." 29 Del. C. § 5810(A). "The burden of proof in any such appeal shall be on the appellant." *Id.*

"Substantial evidence" is "more than a mere scintilla, but less than a preponderance of evidence." *Parke v. Sunrise Assisted Living, Inc.*, No. 82, Del. Supr., 2005 (June 29, 2005). Only if no satisfactory proof exists in support of a Board's factual findings will its decision be overturned. *DuPont Hosp. for Children v. Pattie*, C.A. No. 00A-09-012-WCC, J. Carpenter, (Del Super. Ct., May 24, 2001), *aff'd*, 784 A.2d 1080 (Del. 2001). The Court does not sit as trier of fact to weigh evidence, determine credibility, nor make its own factual findings and conclusions. *Id.* at p. 3, ¶ 2.

Appellant argues PIC's holding that she violated the Code by participating in a decision on an ordinance when she had been personally sued in by Dewey Beach Enterprises, Inc. (DBE), on the same subject matter as the ordinance, was a per se ruling that if an official is named in a law suit they must always recuse. *OB*, p. 2.

PIC bases its opinions on the particular facts of each case. It said: "the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *PH*, p. 11(citing *Prison Health Services Inc. v. State*, Del. Ch., C.A. No. 13,010, V.C. Hartnett III (July 2, 1993); *FO*, p. 9. The record shows the particular facts applied pertained to Appellant. Thus, it was not a per se ruling that any, and all, officials personally named in a lawsuit must always recuse. In fact, PIC t considered a case cited by Appellant where officials named in a lawsuit were not required to recuse. *FO*, p. 17. However, Appellant's particular situation was distinguishable. *Id.* at 17-18.

Appellant also argues there is "no evidence in the record that Mayor Hanson's vote would, in fact, have materially aided in her defense to personal liability in the federal

suit, such that the circumstances evidence she would materially benefit in her defense of the lawsuit by voting for the zoning ordinance.” *OB*, p. 12.

A material benefit is not an element of the applicable law. The applicable law is that she may not review or dispose of matters if there is a personal or private interest which may tend to impair judgment. 29 Del. C. § 5805(a)(1). PIC expressed at length why that provision applied, found the ordinance could make her defense stronger, and said the provision goes beyond monetary benefits. *PH*, pp. 10-12 and *FO*, pp. 15-18. The Delaware Supreme Court upheld a finding that conflicts can require recusal even where no “material benefit” was shown under this specific provision, 29 Del. C. § 5805(a)(1). *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff’d., Del. Supr., No. 304 (January 29, 1996)(*official should have recused from the outset, even though his comments were “neutral” and “unbiased,” without finding any material benefit would accrue to the official*). See also, *Prison Health, supra* (no ruling of any actual benefit to the State employee or his spouse, when contract was awarded to her employer, but his participation, although indirect and insubstantial, was “undoubtedly improper”).

As a “material benefit” is not an element, it should not be grafted onto the statute. Where the legislature is silent, additional language will not be grafted onto the statute. *Goldstein, supra* (citing *State v. Rose*, 132 A. 864,876 (Del. Super., 1926)), pp. 4 & 8.

Appellant was put on notice in the Preliminary decision of the findings that the ordinance could make her defense in the federal lawsuit stronger. *PH*, at p. 12. She did not raise the issue in her “Response to the Preliminary Hearing on Complaint,” nor at the hearing on her Motion to Dismiss and Response. An issue not raised at a board hearing cannot be considered by the appellate court. *Camas v. Delaware Board of Medical Practice*, C.A. No. 95A-05-008, J. Graves (Del. Super., Nov. 21, 1995)(*Doctor was provided with findings of fact and recommendation by hearing panel, and notified of the*

hearing where the Board would decide if it would adopt those facts and recommendations). Moreover, even after the final decision, which reached that same conclusion, Appellant could have filed for reconsideration. *PIC Rules, IV. Hearings and Decisions* ¶ (P). Aside from the rules, Appellant was notified she could seek reconsideration. *Tab 2*. Where plaintiff was on notice of the findings, the issue cannot be raised on appeal. *Camas, supra; Langlitz v. Board of Regis. Of Chiropractors*, 486, A.2d N.E.2d 48, 54 [14] (Mass., 1985).

Even if the Court concludes Appellant can now raise this issue, substantial evidence exists in the record to support PIC's findings. Appellant says her private attorney in the federal civil suit only testified he was sure he spoke to Appellant about the impact on her qualified immunity defense in the federal suit. *OB*, p. 12. She argues he did not testify the ordinance would aid materially in Mayor Hanson's defense. *Id.* "Nor did any other witness." She says: "He could have advised her that it would not make a material difference." *Id.* at p. 13. Aside from the fact that what his testimony "could have" been, was not raised below, an appellant court reviews the factual findings to see if they are supported by substantial evidence, it does not weigh evidence and determinate questions of credibility. *Parke, supra*, ¶ (7). Substantial evidence is more than a mere scintilla; less than a preponderance of the evidence. *Id.*

The record is clear that PIC did not base its decision solely on her attorney's testimony that he was sure they spoke of the impact on the immunity defense. In both opinions, PIC discussed at length its findings, such as: (1) the Federal Court denied Appellant's motion to dismiss the action against her in the federal suit, which alleged she had a conflict of interest because she participated in a decision to deny DBE's request for approval of a height of 68', when she had personal properties that would be affected by if the building was that high; (2) the federal suit turned on the issue of whether DBE had a right under Dewey Beach's 2007 Comprehensive Development plan to build

above 35'; (3) the Court specifically discussed immunity defenses for the officials sued individually; (4) it denied her immunity from the personal suit at that stage; (5) the ordinance in which she participated was retroactive to that 2007 Plan, and said it was never the intent of the drafters to allow building above 35'; (6) in its preliminary decision, PIC found the retroactive change, if accepted by the Court, could assist in her defense; (7) she was notified of its findings and given the opportunity to respond; (8) she filed a response, but never denied the finding that it would make her federal defense stronger; (9) at the hearing on her motion, the Town Attorney testified the retroactive ordinance was a defense to the federal suit, which PIC found confirmed its preliminary finding that the ordinance was to act as a defense; (9) her attorney was asked if he discussed the immunity defense with her, and he was sure they had; (10) that question clearly opened the door to the issue¹⁰ and Appellant could have pursued the issue of whether it would aid her defense, but did not; (11) the lack of testimony on that finding is in sharp contrast to her vehement denial that she gets no financial benefit from the properties she rents. *Transcript*, p. 30. In fact, she specifically corrected one of the preliminary findings pertaining to her properties. *FO*, p. 18 ¶ (B). Additionally, after the final decision was issued, she had the opportunity for reconsideration, but chose not to. *Tab 2*. She now argues: "he could have said...." Aside from being speculative "testimony," had she wished to dispute the finding she could have done so.

Appellant states that if PIC relied on its attorney, or Commissioner Dunkle, who is an attorney, to reach its conclusion, they should have been qualified as experts, and testified. *OB*, p. 12-14. Appellant points to nothing in the record to support that experts were needed. In fact, if experts were needed to decide if it was a defense, Appellant did not seek to have her two attorney witnesses qualified as experts. They were fact

¹⁰ As the question was if he "advised" her, an inquiry into their conversation could have lead to the objection of Attorney Client Privilege, which was raised in earlier questioning of Appellant.

witnesses. *Transcript*, pp. 3-4. The Town attorney testified that the ordinance was a defense—the “best defense possible.” *Transcript at 55*. Her private attorney testified he discussed the impact the ordinance could have on her defense. *Transcript, p. 46*.

As indicated above, the record reflects facts sufficient that the Commissioners could reach that conclusion. No expert was needed because if all the language used in the federal suit that said “qualified immunity” were stripped away, leaving the only word “defense,” the result would be the same. The ordinance would bar heights over 35’. If the ordinance was accepted in the federal suit, it could be argued that her vote to deny the 68’ was purely ministerial—required an automatic denial of anything over 35.’ PIC’s conclusion that her argument could be made stronger was consistent with its prior ruling that a “matter” is considered “ministerial” when the duty is prescribed with such precision and certainty that nothing is left to discretion or judgment. *Commission Op. No. 00-18* (citing *Darby v. New Castle Gunning Bedford Education Assoc.*, 336 A.2d 209, 211(Del., 1975); *State ex rel. Rappa v. Buck*, 275 A.2d 795 (Del. Super.,1971)). Thus, if the matter is merely “ministerial” the presence or absence of a conflict is immaterial. *Id.* While a “ministerial matter” might be a complete defense in a PIC proceeding, PIC could not, and did not, assume it would be a *complete* defense in the Federal suit. See, *Beebe, supra* (*official should have recused, but failing to recuse did not rise to the level of violating due process*). Rather, PIC stayed within the parameters of its expertise—conflicts--and concluded the facts showed her defense could be made stronger.

Appellant cites a case where no expert was required. *Langlitz. v. Board of Regis. Of Chiropractors*, 486 N.E. 2d 48, 53 (Mass., 1985)(*Board looked at the Chiropractor’s advertisement, presented no witnesses, and concluded from looking at his advertisement that it was deceptive*). It held that an administrative agency is free to evaluate evidence in light of its experience; draw inferences regarding the legal effect of the conduct at issue; and apply a narrow set of legal standards to the facts on the

record, in light of its own general expertise and knowledge. Delaware Courts also have held that a Commission may apply its institutional expertise in evaluating evidence. *United Water Delaware, Inc. v. Public Service Commission*, 723 A.2d 1172 (Del., 1999).

Appellant agrees they can use their institutional expertise, but argues they cannot “create evidence.” *OB*, p. 14. The record is clear that the evidence used was not created. Further, this case did not require expert knowledge on civil rights defenses. It required an understanding of conflicts and defenses against alleged conflicts. The issue was whether the lawsuit created a personal or private interest that would tend to impair judgment. *PH*, p. 9; *FO*, p. 15. PIC looked at the facts in the framework of its knowledge that ministerial matters can create a defense, and added that while no Delaware case could be found where an official created their own defense to a lawsuit through an ordinance, that Courts had recognized conflicts even after officials enter a settlement agreement. *FO*, p. 16 (citing *Aronowitz v. Planning Board of Township of Lakewood*, 608 A.2d 451 (N.J. Super, 1982)).

Appellant argues that in *Aronowitz*, the conflict did not arise because the officials were parties to a lawsuit, but the conflict arose because they signed settlement agreements, and therefore it was a contractual predetermination of their ability to make an independent decision on the merits. *OB*, p. 12 fn. 6. The wording in the case is clear, it was a “settlement of a prior lawsuit.” *Aronowitz*, 608 A.2d at 453. It is unclear if they were named defendants. *Id.* Whether they were personally sued or not, and whether the end result was memorialized in a contract or some other legal document, PIC’s conclusion was that if a settlement was sufficient to create a conflict—meaning the adversarial relationship over that particular matter has ended, in a manner agreeable to both parties—then, where the official, herself was sued, and was still in an adversarial relationship, then being named personally in that law suit under the particular facts, was sufficient to require recusal. *FO*, pp. 16-17. In *Aronowitz*, the Court noted that the only

thing the officials participated in was a decision to set a hearing date for Aronowitz, and a decision on hiring a new attorney that would represent the Board in the Aronowitz matter. *Aronowitz*, 608 A.2d at 453. The officials with the conflicts did not deal with the substance of the licensing procedures that Aronowitz had allegedly violated. The Court said the most that could be said was that they participated in a discussion to establish a special meeting date, but did not vote, and nothing suggested they took part in a decision to hire special counsel to represent the board at the special meeting. *Id.* The Court found that was not enough to find an appearance of a conflict, but it would have been “prudent” for them not to have been at the meeting. *Id.*

It is undisputed that Appellant reviewed and voted on the ordinance that had as its substance, the very issue pending in Federal Court, and knew it was a defense. The *Aronowitz* officials were much more removed from Appellant’s situation, yet it would have been “prudent” for them to recuse. *Id.*

As noted above, in interpreting the same provision used by PIC, 29 Del. C. § 5805(a)(1), the Supreme Court affirmed a decision where an official participated in a discussion on an application from a company that was entering a business arrangement with his private employer, and the found his statements were “neutral” and “unbiased,” and he did not vote, but it still concluded he should have recused “from the outset.” *Beebe, supra*. Nothing suggested he would experience any benefit. Here, Appellant would benefit from her own actions by getting “the best defense possible.”

Where an administrative finding is supported by some evidence, the appeals court will not substitute its judgment for that rendered by the administrative body. *In re Artesian Water Co.*, 189 A.2d 435 (Del., 1963). The record shows there was substantial evidence from which PIC could conclude she had a conflict because of her personal and private interest in the matter arising from the lawsuit. Moreover, its conclusion that it could strengthen her defense is supported by law.

Appellant's argument should be dismissed as it raises issues not raised before PIC. Even if not dismissed on that basis, substantial evidence supports PIC's decision, and there was no error in law. Thus, this argument could be dismissed on that alternative basis.

III. PIC DID NOT MAKE A PER SE RULING THAT APPELLANT HAD A CONFLICT ARISING FROM HER RENTAL PROPERTIES, NO EXPERT WAS REQUIRED, AND ITS DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND GROUNDED IN LAW.

In Appellant's heading to this argument she says PIC made a per se ruling that just because she owns rental property in Dewey Beach, she has a conflict. *OB*, p. 16 ¶ III. This issue was never raised with PIC, even though the preliminary decision pointed out the facts pertaining to her rental properties. *PH*, p. 7-8. It should be dismissed on that basis. *Camas, supra; Langlitz, supra*. Further, she cites no legal authority or factual basis for the argument. The burden of proof is on the Appellant. 29 Del. C. § 5810A. In *Langlitz*, cited by Appellant in another argument, the Court found that where an assertion was made without citation to authority or reasoned argument, it "does not rise to the level of appellate argument." *Langlitz*, 486 N.E. 2d at 50, fn. 2.

Even if it could be raised, PIC based its rulings on Appellant's particular facts. For example, it noted the exact addresses of her rentals; their very close proximity to where DBE wanted to build a 68' hotel; her own statement that the 68' hotel would affect rental properties, etc. *PH*, pp. 7-8; *FO*, pp. 18-21. Thus, it was not a per se ruling that every official owning rental properties must recuse from all their local zoning decisions.

Appellant again alleges an expert was needed to decide the effect of zoning decisions on the ability to market rental properties and potential increases or decreases in revenue or property values because it is "not a matter within the expertise of the average person." *OB*, p. 16. Appellant did not raise this argument below, and she testified to the effect on property values, etc., without calling an expert. *FO*, pp. 20-22.

Appellant cites no legal authority and no facts from the record to support her argument that an expert was needed. The burden of proof is on Appellant. 29 Del. C. § 5810A. If the Court does not dismiss, substantial evidence is in the record to show no expert was needed and PIC's factual findings are supported by that evidence, and its conclusion was grounded in law.

Appellant, who was not qualified as an expert, testified to the effect a 68' hotel would have. Regarding the impact, she told the press: "The hotel will also compete with property owners who rent their homes, or for those selling properties." FO, p. 20. She admitted the increased traffic, emergency vehicle response time, and number of added people on the beach, could affect property values. *Id.* at 22. On the value, aside from that statement, she said the market would not bear rent increases, and her rental increases were "pathetic." *Id.* The ordinance she participated in would deny DBE a height over 35'. That would solve the problems she said a 68' hotel would create regarding impact on property and rental values, property view, competition, increased traffic, etc., within striking distance of her properties.

Appellant's own facts were considered.¹¹ The ones noted above, along with all other facts, are substantial evidence to support the conclusion it would impact on her properties, which are across the street, with the most distant one 2 blocks away. See, e.g., FO, p. 20. If Appellant now regrets her own testimony and believes an expert was required on those matters, that does not change the record.

As a matter of law, no expert was required. Delaware Courts have ruled on zoning changes allegedly affecting property values of officials who voted on a zoning

¹¹ At points Appellant mentions that PIC did not call witnesses. The allegations were she owned personal properties and was personally named in the lawsuit, and both created conflicts. As she testified that she owned the properties, and the impact on them, and that she was named in the lawsuit, and the Town Attorney said the ordinance was a defense to the law suit, it is unclear who she thinks PIC should have called. In effect, she admitted everything in the complaint. That is why the Commission found no material issue of fact and issued its opinion. FO, p. 4 & 9.

issue. *PH*, p. 8 (citing *Campbell v. Commissioners of Bethany Beach*, 139 A.2d 493 (Del., 1958)). Those officials allegedly had a conflict in approving a new highway because it would increase their individual property values. No experts were used. Here, Appellant testified to the negative impact. If an expert is not needed to discuss increased values, then an expert is not needed on decreased values. Just as in *Campbell*, no expert was needed.

Appellant argues Section 5805(a)(2) only applies if the benefit or detriment accrues to the official “to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons.” *OB*, p.17. She says there is no evidence on that element.

After a lengthy discussion of the facts pertaining to her property location, etc., PIC specifically said: “It is this proximity and competition for essentially the same ocean space, and the same market that puts her in a different class than others.” *FO*, p. 20. It also found she was unique because she was the only property owner who was sued and could be affected by that suit; *FO*, p. 1; in an official position to take action against DBE, and was the only Council member who was personally sued. *FO*, p. 20. The detrimental effect on her was specifically pointed out in relationship to the proposed development. *Id.* For example, because of the location of her properties, if DBE advertised it was one block from the beach, it would be advertising the very same strip of beach she has across the street at her rental properties. *FO*, p. 20. Also, a 68’ building would be a towering obstruction clearly visible from her elevated properties, etc. *FO*, p. 11. By passing an ordinance denying DBE the 68’ height, she could avoid that effect. As she was in a class by herself, no group or class to which to compare exists.

Appellant argues a Section 5805 violation must be based on an actual conflict, not a theoretical conflict. One element of Section 5805(a)(2) requires an actual “financial interest,” as defined by the Code. That was established in PIC’s opinion. *FO*, p. 19.

After a “financial interest,” is established, the remaining part is whether that interest would “tend to impair judgment.” 29 Del. C. § 5805(a)(2). Thus, an actual conflict (would actually impair judgment) is not required. Again, this argument could have been made before PIC, but was not.

What Appellant did argue to PIC was she did not have a “financial interest” because she did not make money from her rentals due to the costs of operation, internet, etc. FO, p. 19. PIC then addressed the result if 29 Del. C. § 5805(a)(2) did not apply. FO, pp. 21-24. It applied Section 5805(a)(1) which, as discussed, requires a personal or private interest, which need not be a pecuniary interest.

The Delaware Supreme Court affirmed an interpretation of 29 Del. C. § 5805(a)(1), which did not discuss an actual, direct, financial or pecuniary interest to the official who discussed, but did not vote, on a matter where the applicant company was in the process of entering a business arrangement with his private employer. *Beebe*, *supra*. Without ever discussing if he would receive any actual financial or other benefit, if the business arrangement worked out, the Court concluded that recusal should be “from the outset,” if a personal or private interest may tend to impair judgment. Appellant had a much more direct interest than the official in *Beebe*.

Also, in *Prison Health*, the Delaware Superior Court without finding a “financial interest” or a benefit or detriment greater than for others, held that a State employee should have recused from discussing a contract when his wife was “albeit a low level employee” in the company seeking the contract. It never discussed if awarding the contract would result in a financial benefit, or any other actual benefit, to a lesser or greater extent than others, e.g., pay raise or promotion for his spouse, etc. It was enough that he was involved in a discussion of her employer’s proposed contract. The Court said his “indirect” and “unsubstantial” participation, and noted he was not on the committee that voted, but held his participation was “undoubtedly improper.” Here,

Appellant introduced and voted on an ordinance to deny DBE a height of 68, when, by her own testimony, the hotel would impact on the rental market, and she was uniquely affected because her properties were across the street, etc.

Although applied in PIC's opinion, Appellant never addresses those two rulings.

More recently, the Delaware Supreme Court found a conflict where a local official participated in a termination hearing of an employee, when the testimony was that he had asked the employee to "do him a favor," because his daughter's boyfriend wanted to be hired. *Sullivan v. Mayor & Council of the Town of Elsmere*, Del. Supr., No. 467 June 17, 2011). The Court did not identify any direct or actual financial or other benefit that the official would receive.¹² However, it concluded he should have recused.

Similarly, the United States Supreme Court upheld a decision that found a local official had a conflict when he voted on a zoning matter, and his former campaign manager was working for the company seeking the zoning action. *Nevada Ethics Commission v. Carrigan*, 131 S. Ct. 2343 (2011).¹³ No facts suggested the official would benefit from the decision. The Supreme Court still found he should have recused. Thus, it is well recognized in Delaware, and by the Supreme Court, that an official can be required to recuse even if no actual and direct benefit is found.

The record shows PIC, after applying a multitude of particular facts reached its conclusion. It applied Delaware cases; it cited a case where the facts were nearly identical, and the Court found a local official would benefit by voting on a decision to deny a building over 35' high. *FO*, p. 19 (citing *Clark v. City of Hermosa Beach*,¹⁴ 48 Cal. App. 4th 1152 (2nd Dist., 1996), cert denied, 570 U.S. 1167. It pointed out in both opinions how it concluded she was uniquely situated to benefit by passing the ordinance.

¹² The Court applied the common law conflict of interest. However, as noted, 29 Del. C. § 5805(a)(1), is the codification of the common law. *FO*, p. 10, (citing *Commission Op. No. 00-18*).

¹³ When Appellant filed her Motion to Stay, the U.S. Supreme Court had not yet ruled. She relied on the factual situation as being very similar to her case. *Motion to Stay, Transcript*.

¹⁴ PIC recognizes that is a California case and not binding.

Its finding was not “pure speculation,” as Appellant argues. It was factually established by more than a scintilla of evidence. *Parke, supra*. Where an administrative finding is supported by some evidence, the court will not substitute its judgment for that of the administrative body. *In re Artesian, supra*.

In summary, the new issues raised by Appellant that could have been raised below should be dismissed on that basis. For all allegations, the record reflects substantial evidence, and Appellant has not met the statutory burden that is on her, especially where she cites no legal authority, or facts in the record to support her argument when she has the burden of proof. 29 Del. C. § 5810A.

IV. PIC ACTED WITHIN ITS STATUTORY AUTHORITY BY APPLYING APPLICABLE LAW TO ITS FINDINGS

In finding Appellant had a conflict of interest arising from ownership of rental properties, PIC applied the statutory provisions to Appellant's particular facts. It addressed her conflict under 29 Del. C. § 5805(a)(2) and 29 Del. C. § 5805(a)(1). *FO*, p. 19 and p. 21. Appellant argues PIC concluded she had a common law conflict “which is not included ‘in this chapter.’” *OB*, p. 18. It bases that on the section addressing “Quality of Life.” *Id.* (referring to *FO*, p. 21).

Appellant argues 29 Del. C. § 5805(a)(1) is a definition, and the conflicts in the Code of Conduct require a financial interest, or financial benefit or detriment. *OB*, p. 18. That argument ignores the plain language, and the statute as a whole. The Code of Conduct has a specific definition section. 29 Del. C. § 5804. Appellant's own cited case recognizes that a definition section is different from substantive law. *Little v. Conflict of Interest Commission of Rhode Island*, 397 A.2d 884, 889 (R.I., 1979)(Court said it would not expand the “apparently limited purpose of this definitional section” to include what was not there). Separate and apart from the definition section is the substantive law identifying the necessary elements to establish a conflict. Section § 5805(a)(2)(a)

requires a “financial benefit or detriment”, which is not defined. Section 5805(a)(2)(b) requires a “financial interest” which is defined in the definition section. Section § 5805(a)(1) does not include a reference to any type of finances.

PIC specifically addressed that 29 Del. C. § 5805(a)(1) is not a definition. *FO*, p. 10 ¶ 1. It provided a Delaware decision which applied only that provision, which was affirmed by the Delaware Supreme Court. *Id.*, and *PH*, p. 11. (citing *Beebe*, *supra*). Appellant ignores that decision. It also cited *Prison Health*. (Court did not identify specific provision; only cited Ch. 58. *PH*, p. 11; *FO*, e.g. p. 9. However, as “financial interest” and “financial benefit or detriment” were not addressed, the only logical conclusion is that it applied 29 Del. C. § 5805(a)(1)). Appellant ignores those decisions, and never made the argument below even though she was on notice from the preliminary opinion. It should be dismissed on that basis. *Camas*, *supra*; *Langlitz*, *supra*.

Appellant alleges that applying that law to her “quality of life” argument is improper because there was no finding of a financial interest or financial benefit. PIC addressed her financial situation under 29 Del. C. § 5805(a)(2), in its preliminary decision. *PH*, p. 7. It addressed it again in its final opinion. *FO*, p. 19. Appellant argued she had no financial interest because she does not make money from her rental properties because of the costs involved in upkeep, providing internet service to renters, etc. *FO*, at pp. 19 and 21.

PIC considered her argument but pointed out that “financial interest,” as defined by the statute, did not include the costs associated with ownership. *Id.* at p. 20. However, it went further and considered her argument that she had no financial interest. *Id.* at 21. As it was not considering a “financial interest,” or “financial benefit or detriment,” § 5805(a)(2)(a) and (b) would not apply. Accordingly, it applied the remaining substantive provision--29 Del. C. § 5805(a)(1). That provision recognizes that

not all conflicts arise from a specifically defined “financial interest” or an undefined “financial benefit.” *Beebe, supra*.

PIC made it clear it would apply 29 Del. C. § 5805(a)(1). *PH*, p. 9-10; *FO*, at 21. It said the statute was the codification of the common law. *Id.* The General Assembly never abrogated the common law. *Commission Op. No. 00-18*. Thus, as an aid to interpreting the statute, it relied on *Beebe* and *Prison Health*, which applied the statute, but also cited to a common law case where a pecuniary interest was not required. *FO*, p. 21.

It used a common law case to illustrate, that like 29 Del. C. § 5805(a)(1), conflicts could arise from non-pecuniary interests. It noted: “At common law,” Delaware Courts had recognized that “personal interests” could “arise from more than just pecuniary interests, which are specifically referred to in Section 5805(a)(2).” *PH*, p. 10., and *FO*, p. 21 (citing *Shellburne, Inc. v. Roberts*, 238 A.2d 331(Del. Super., 1967)(*complaint alleged “personal interest” of local official in zoning decision where he allegedly based his decision on a desire to assist his coreligionists; a close attorney-client and business relationship with the attorney for the civic association seeking rezoning; and his colleague whose wife was a Church member*). Appellant, like Roberts, is a local official, and participated in a land use decision, where she had a “personal interest,” that was, according to her, not a financial interest. PIC did not create a new or different rule—it applied 29 Del. C. § 5805(a)(1)—the “personal or private interest” law.

Under the rules of statutory construction, interpretations of one law can be used to interpret another if the language of one is incorporated in another or both laws are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat., Constr.* § 45.15, Vol. 2A. The common law cases dealing with personal or private interests were used by PIC to aid in interpreting Delaware’s statute.

In a case cited by Appellant, the Board did go beyond the express statutory terms, but even then its rule was upheld. *People ex rel. Mosco v. Service Recognition Board*, 86 N. E. 2d 357 (Ill., 1949)(statute provided for payment of Veterans' benefits to the spouse, children, parents or siblings; the Board had statutory authority to create rules; it created a rule that if the spouse remarried they could not receive the benefits; the statute did not address the effect on benefits if a spouse remarried; the Court read the dictionary definition of "widow," which applies until "remarried," and upheld the Board's rule, even though it was argued that the Board had exceeded its powers).

Appellant argues that administrative boards have no common law powers. Again, PIC did not apply common law powers, it applied a specific statute, cases interpreting that statute, and used the common law as an aid to interpret. None of Appellant's cited cases deal with an administrative board's use of common law to interpret a statute.

The Delaware Supreme Court reversed a board's decision when it did not apply a common law standard. *Brice v. State, Dept' of Correction*, 704 A.2d 1176 (Del., 1988)(unpublished opinion, Del. Supr., No. 320, 1997 (January22,1998)). Mr. Brice asked the Merit Employee Relations Board to order the Corrections Department to pay his attorney fees after the Board found its hiring practice improper. He argued: (1) the plain language of the statute would permit it; or (2) it would be permitted under common law. The Board looked only at the plain terms of the statute and concluded it did not have express authority to award the fees. The Superior Court agreed with the Board, but the Delaware Supreme Court reversed and ordered the payment. It pointed out that under common law Mr. Brice was entitled to an exception to the "American Rule"¹⁵ under common law, and that the Board had authority to apply that exception. The Supreme

¹⁵ That "doctrine" provides that "prevailing litigants are responsible for the payment of their own attorney fees." *Brice* at p. 2 ¶ 5.

Court said the Board has equitable ancillary jurisdiction to invoke that common law exception. The Court said: "It is well-established in the jurisprudence of Delaware that 'the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy.'" *Id.*

Just as in *Brice*, PIC can use common law to interpret its statute. In fact, to ignore the entire body of common law on conflicts of interests would be absurd, especially when the General Assembly did not abrogate that law. *PH*, p. 10 (citing 63C *Am. Jur. 2d Public Officers and Employees* § 253 (1997) (conflict of interests statutes generally do not abrogate common law conflict of interest principles)).¹⁶

That is especially true in light of the purpose of the law which is to instill public confidence in government officials. 29 Del. C. § 5802. If conflicts were limited only to financial interests or financial benefits or detriments, the officials would feel free to act in matters when they had a conflict, as long as no financial interest existed. As noted above, a local official who participated in a termination proceeding after he had asked the employee to "do him a favor" and hire his daughter's boyfriend, should have recused. No facts suggested he would financially benefit. *Sullivan, supra*.

Under Appellant's reading that 29 Del. C. § 5805(a)(1) is just a definition, it would mean officials brought before the Court under the common law, such as *Sullivan*, could have a conflict without a financial benefit, but officials that are just like them, but come before PIC, or are brought before the Court on alleged statutory conflicts, would never have a conflict unless it was financial, which would create an inequity in the law.

Appellant's interpretation would also mean the nearly identical Constitutional provision for Legislators who are to recuse if they have a "personal or private interest" would have no meaning. *Del. Const. art. II § 20*. It provides that a General Assembly

¹⁶ Ironically, while arguing that PIC cannot apply common law, Appellant argued that she acted in her "legislative capacity," and therefore no inquiry could be made into her motives. *FO*, p. 10 ¶ V. That is the common law standard. *Id.* (citing Commission Op. No. 00-18).

member “who has a personal or private interest in any measure or bill pending in the General Assembly shall disclose the fact to the House of which he or she is a member and shall not vote.” *Id.* PIC applied the nearly identical provision—that officials “may not review or dispose of matters in which they have a personal or private interest.” 29 Del. C. § 5805(a)(1).

An interpretation of a statute should not lead to a result so unreasonable or absurd that it could not have been intended by the legislature. *Snyder, supra*. An unreasonable result produced by one among alternative interpretations is a reason to reject that interpretation in favor of another which would produce a reasonable result.” *Coastal Barge, supra at 1242*. Further, it is presumed that when the General Assembly enacted the nearly identical provision that they were aware of the existing similar language in their own Constitutional provision. See, e.g., *State ex rel. Milby v. Gibson*, 140 A.2d 774 (Del., 1958)(it must be assumed the General Assembly was cognizant of existing law, when it used the same terms in another statute).

In applying 29 Del. C. § 5805(a)(1) to Appellant’s particular facts, PIC pointed to a decision with nearly identical facts, where it was found that the type of personal or private interest was sufficient, as a matter of law, to require recusal. *FO*, p. 22-24 (citing *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (2nd Dist., 1996), cert. denied, 570 U. S. 1167; 117 S. Ct. 1430 (1997)).

Appellant argues that PIC is empowered only to prosecute violations of “this Chapter.” (Chapter 58). *OB*, p. 18. The section referred to, 29 Del. C. § 5805(a)(1), is “in this chapter.” To apply the provisions “in this chapter,” it must apply not only § 5805(a)(2)(a) and (b), but also § 5805(a)(1), when appropriate. It is specifically designated as a separate section, yet Appellant does not want to give any of those words meaning. All words in a statute shall be given meaning. *Goldstein, supra at p. 8*. PIC applied the law “in this Chapter.” Again, this argument was not made below.

Aside from applying a provision from “this chapter,” the record is supported by substantial evidence that shows why it concluded “quality of life” was a “personal or private interest.” For example, it relied on Appellant’s testimony that she bought in Dewey Beach, as a private citizen, because of the 35’ height limit, etc. *FO*, p. 22. As it in no way related to an “official interest,” it was a personal or private interest. Whether that interest, based on the particular facts, was sufficient to require recusal was supported in law. See, e.g., *FO*, p. 21 (citing *Beebe* and *Clark*). It found *Clark*, a California case, to be nearly identical on the facts. *Id.* at pp. 23-24. The U. S. Supreme Court denied cert on appeal. PIC recognizes California law is not binding, but the factual situation, and the conclusion on the conflicts were appropriate and reasonable, not arbitrary.

Appellant argues PIC’s decision is “non-sensical” because almost all zoning decisions are tied to the quality of life in the affected area, and that no matter how one votes, it can be argued that the vote reflects the official’s interest in the quality of life as he or she believes it either has or will be. *OB*, p. 19. In effect, Appellant is again alleging it was a per se ruling. That was addressed in Argument III, *supra*. There is substantial evidence in the record that the decision was based on the particular facts related to Appellant. Thus, it was not a per se ruling.

As Appellant did not raise this argument below, it should be dismissed on that basis, but if not, it should be dismissed because there is substantial evidence in the record, and there was no error in law.

V. PIC PROPERLY APPLIED THE “APPEARANCE OF IMPROPRIETY” STANDARD

The Code of Conduct mandates that officials “endeavor to pursue a course of conduct that will not raise suspicion among the public that they are engaging in acts in

violation of the public trust.” 29 Del C. § 5806(a). PIC interpreted this mandate as precluding “an appearance of impropriety.” *PH*, p. 12-13; *FO*, p. 25.

Appellant argues that PIC relied on it as a separate ground for finding a violation, and exceeded its statutory authority because that provision is not in Section 5805, which Appellant again alleges requires an actual financial benefit or detriment. *OB*, pp. 19-20. First, this argument was not made below even though Appellant was on notice from the preliminary decision that this provision would be applied. *PH*, p. 12-13. Second, an actual financial benefit or detriment need not be found under 29 Del. C. § 5805(a)(1). *Beebe*, *supra*, and *Argument IV*, *supra*. Nor does this provision include any reference to finances. Thus, it could be dismissed on those grounds.

Appellant also says again that administrative boards have no common law powers. That issue was addressed in *Argument IV*, *supra*. Moreover, PIC was not using common law powers. It applied the statute on appearances of impropriety.

Assuming it is not dismissed, Delaware Courts, in interpreting the Code of Conduct, have held that even if no financial interest exists, it can be “prudent” for the official to recuse. *FO*, p. 21 (citing *Harvey v. Zoning Board of Adjustment of Odessa*, C.A. No. 00-04-007CG, J. Goldstein, (Del. Super. November 27, 2000) aff’d, 781 A.2d 697 (Del., 2001)(rule of necessity applied because if they recused, no decision could be made).

The only mention of appearances occurred at Appellant’s Motion to Stay hearing. It was not argued that PIC had no authority to apply the appearance of impropriety standard. Rather, it was noted that “the Judicial Code of Conduct and the Public Integrity Commission are the last two bastions of the appearance standard,” which the American Bar Association stopped 20 or 30 years ago. *Motion to Stay Transcript*, p. 4, lines 122-132. PIC pointed out the difference between the Judiciary and PIC rules as

compared to rules for private lawyers because government decisions must entail an element of fairness in the process in which an official participates. *Id.* at lines 133-153.¹⁷

Delaware Courts have long recognized the concern of appearances of impropriety as it pertains to public officials. See, e.g., *In re Ridgley*, 106 A.2d 527 (1954).¹⁸ In *Ridgley*, even the public officer said he did not engage in a particular act because "it might not appear proper." *Id.* at 473. The Court spoke of the "unseemly appearance" of his conduct. *Id.* at 475. In response to one of his arguments, the Court said it had logical force but it would not help his case, rather, it would "suggest the impropriety" of the conduct. *Id.* at 477. It went on to say, that "in many cases the line between propriety and impropriety is hard to draw." *Id.* at 479.

In another common law decision, the Court found that a Cabinet Secretary's policy decision not to accept a contract with a Board member of his agency was not arbitrary, even though it lamented there was no State statute on conflicts, and found no actual impropriety. *W. Paynter Sharp & Son, Inc., v. Heller*, 280 A.2d 748 (Del Ch., 1971); 1971 Del. Ch. LEXIS 124. The Court said:

¹⁷Similar language is used in 29 Del. C. 5806(b). It deals with accepting other employment, gifts, payment of expenses, compensation, or anything of monetary value. One of four criteria that must be applied is that acceptance may not result in: "any adverse effect on the public's confidence in its government." 29 Del. C. § 5806(b)(4). Courts have interpreted that as an appearance of impropriety restriction. *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct., 12 Cl. Ct. 56 (1987) 1987 U.S. Cl. Ct. LEXIS 44 (1987) (*Court interpreted Executive Order barring federal employees from engaging in action which "might result in" conduct "affecting adversely the confidence of the public in the integrity of the Government."* When a federal employee represented a private company before his own agency, which was a violation, the Court found the Executive Order to be a "meaningful restriction" because "taxpayers...must believe in the integrity of their government...and every officer and employee must work diligently to maintain that confidence." *Id.* at 62. The Court then said: "The general rule is to avoid strictly a conflict of interest or even the appearance of a conflict of interest..." It found his conduct violated the federal criminal conflict provision and was barred by the Executive Order restriction on conduct "affecting adversely the confidence of the public in the integrity of the Government."

¹⁸ *Ridgley* was a State prosecutor also engaged in private practice. Although it was alleged he violated the lawyers' canons, the Court said: "We think it unnecessary to determine whether this case falls within the language of the canons..." "his private interest must yield to the public one." *Id.* at 470. Thus, it only addressed the conflicts as they pertained to his duty as a public officer.

I cannot say that his "opinion" was arbitrary or capricious or otherwise without foundation in law. The award of contracts for public work has been suspect, often, because of alleged favoritism, undue influence, conflicts and the like. In my view it is vital that a public agency have the confidence of the people it serves and, for this reason, it must avoid not only evil but the appearance of evil as well. There is nothing whatever in this record, as the Secretary concedes, to show that either plaintiff or Mr. Sharp secured the contracts as the result of anything other than submitting the lowest responsible bid. But confidence in the Department is vital and, while \$9,000 is a lot of money, I refuse to say, as a matter of law, that the Secretary was without authority to act upon his opinion that it was in the State's best interest to spend that additional amount on these contracts." *Id.* at 752.

Subsequently, the General Assembly, without abrogating the common law, passed a conflicts law. It included restrictions on outside employment, 29 Del. C. § 5806(b), and contracting with the State. 29 Del. C. § 5805(c). Beyond that, it included a specific provision on conduct that may raise public suspicion. 29 Del. C. § 5806(a). Moreover, it said:

"The General Assembly finds and declares:

In our democratic form of government, the conduct of officers and employees of the State must hold the respect and confidence of the people. They must, therefore, *avoid conduct* which is *in violation* of their public trust *or* which creates a *justifiable impression* among the public that such trust is being violated." 29 Del. C. § 5802(1) (*emphasis added*).

When statutory language is both clear and consistent with other provisions of the same legislation and with legislative purpose and intent, a court must give effect to that intent because it is for the legislature, and not the courts, to declare the public policy of the state. *Seth v. State*, 592 A.2d 436 (Del., 1991))(citing *Ames v. Wilmington Housing Authority*, 233 A.2d 453, 456 (Del., 1967).

The Delaware Supreme Court still recognizes, and applies appearance standards to public officers. *Sullivan, supra*. Appellant's argument would eliminate the appearance of impropriety standard, making the entire provision meaningless. The rules of statutory construction require that all words of a statute be given meaning. *Goldstein, supra*, p. 8. Moreover, her position means government employees, officers and officials charged under the Code of Conduct would not have that restriction on their conduct, but

those who are brought before the Court under the common law conflict of interest would be subject to that provision, creating an inequity in the law.

The Delaware Supreme Court has long held that "the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." *Brice, supra*.

The Delaware Supreme Court has also recognized that an appearance of impropriety can be argued as a separate ground for recusal, but they must go hand-in-hand. *Seth, supra*.¹⁹ It said: "Absent the existence of a conflict," it would not bar concurrent private employment and part-time work as a prosecutor "on an unarticulated concern for the "appearance of impropriety." Here, there was an articulated concern: that based on the totality of the circumstances—the public may suspect Appellant used her public office for personal gain or benefit, which is barred by the Code. *FO*, 25.

Appellant has not met her burden of proof. PIC properly applied the law, and there is substantial evidence in the record to support its findings, thus, this argument should be dismissed.

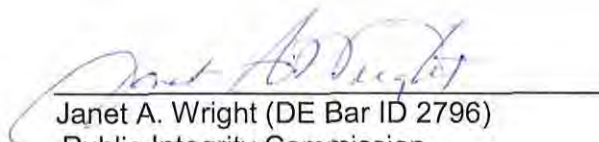
¹⁹ In *Seth*, the alleged improper appearance arose from a private attorney who also worked part-time as a State Prosecutor, in the Lend-A-Prosecutor program.

CONCLUSION

Many of Appellant's arguments were never raised below; some cite no legal or factual basis, and she did not meet her burden of proof. The record shows substantial evidence as the basis for PIC's factual findings and there is no error in law.

WHEREFORE, for the foregoing reasons, Appellee respectfully request that the Court dismiss this appeal.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Janet A. Wright", is written over a horizontal line.

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Dated: August 19, 2011

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

DIANE HANSON,)	
	)	C.A. No. S11A-06-001-ESB
Appellant,)	
	)	APPEAL FROM THE UNDATED
v.	)	DECISION OF THE PUBLIC
	)	INTEGRITY COMMISSION IN
DELAWARE STATE PUBLIC	)	COMPLAINT NO. 10-31
INTEGRITY COMMISSION,)	ISSUED MAY 13, 2011
)	
Appellee.)	

REPLY BRIEF OF APPELLANT DIANE HANSON

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Dated: September 1, 2011

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ARGUMENT

I. PIC LACKED JURISDICTION TO ADJUDICATE A CLAIM AGAINST THE MAYOR OF A MUNICIPALITY.

A. THE ISSUE IS SUBJECT MATTER JURISDICTION, NOT PERSONAL JURISDICTION.

In her opening brief, Mayor Hanson noted that the issue of subject matter jurisdiction is not subject to waiver and can be raised in this appeal. (Opening Brief of Mayor Hanson ("HOB") 6 n.2).

PIC argues, in response and without any precedential or analytical support, that the issue is not subject matter jurisdiction, but personal jurisdiction, which is subject to waiver and should be deemed waived. (Answering Brief of PIC ("PAB") 5). This argument is frivolous.

In the administrative context, as in the judicial context, personal jurisdiction relates to a tribunal's authority over an individual party, irrespective of the type of matter before it. Subject matter jurisdiction relates to an agency's power to hear and determine the general class of cases to which the particular case belongs, irrespective of its power over an individual. *Wabash County v. Illinois Mun. Retirement Fund*, 946 N.E.2d 907, 915 (Ill. App. 2011); *O'Toole v. Bd. of Trustees of South Dakota Retirement System*, 648 N.E.2d 342, 345 (S.D. 2002); *Kraft v. Moore*, 517 N.W.2d 643, 645 (N.D. 1994).

Mayor Hanson is not arguing that this is a case within the subject matter jurisdiction of the PIC but that there is some reason PIC may not exercise authority over her personally. Mayor Hanson's argument is that PIC does not have the power to adjudicate the class of claims against municipal officers. As such, the issue is subject matter, and not personal, jurisdiction.

**B. WHERE, AS HERE, THE STATUTES DIRECTLY CONFLICT, ANY DOUBT MUST
BE RESOLVED AGAINST THE EXERCISE OF JURISDICTION.**

Administrative agencies exercise a limited jurisdiction, and such jurisdiction is strictly construed. Any doubt as to the existence of authority must be resolved against the exercise thereof. *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962); *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001).

In her opening brief, Mayor Hanson demonstrated that there is a direct conflict between 29 Del. C. §5802(4), where the General Assembly stated its intent that the subchapter apply to municipal officers, and 29 Del. C. §§5804 & 5805, which expressly exempt municipal officers from the application of the subchapter.¹ Mayor Hanson demonstrated that, under established principles of statutory construction, the conflict must be resolved against the exercise of jurisdiction over municipal officers.

In response, PIC first argues that Section 5802(4) is unambiguous (PAB 5-7). Assuming that to be the case, it is nonetheless beside the point. Sections 5804 and 5805 are also unambiguous. All of the statutes in the subchapter must be construed together. The question is whether the conflict can be resolved, and if so, how.

PIC attempts to resolve the conflict by arguing that the definitions contained in Section 5804 stands apart from the findings in Section 5802. (PAB 8). However, the fact that they are in separate sections does not elevate any one section above another. Statutory definitions are part

¹

PIC makes an argument based on Subchapters II and IV of Chapter 58. That argument is misplaced, because each of those subchapters has their own definitions unique to each subchapter, which are not in conflict with any other provisions of their respective subchapters.

of the law, entitled to equal dignity and, as noted in Mayor Hanson's opening brief (and not refuted by PIC), such statutory definitions are binding on the courts. *Chrysler Corp. v. State*, 457 A.2d 345, 349 (Del. 1983); *Stiftel v. Malarkey*, 384 A.2d 9, 21 (Del. 1977). See also *Bank of Balboa v. Benneson*, 9 P.2d 540, 541 (Cal. App. 1932) (noting "the well-settled doctrine that a special definition and an exception controls the general..."). A court may not avoid finding a conflict simply by ignoring the statutory definitions.

PIC next argues that a statutory definition "is not a provision establishing jurisdiction over individual local officials." (PAB 9). This is incomplete. The applicability (and hence jurisdictional reach) of the Act is set forth in Section 5805. However, the terms of that statute are mandatorily defined in Section 5804.

PIC's argument ultimately is that the statutory definitions must be read out of the Act. But PIC offers no authority for this position. Nor does PIC offer any method of reconciling the conflict to give effect to all statutory terms. PIC also does not offer any authority contradicting Mayor Hanson's authority that specific language (including definitions) control over general language when there is a conflict between the two.

PIC asks this Court to make a policy decision that is more appropriate for the General Assembly to address. Given the limited authority granted to administrative agencies in general, and PIC in particular, in this instance the uncertainty created by the conflicting statutes must be resolved against PIC's jurisdiction over claims against municipal officers such as Mayor Hanson.

**BEFORE THE STATE PUBLIC INTEGRITY COMMISSION
IN AND FOR THE STATE OF DELAWARE**

In Re: JAMES PRYZGOCKI)
)
Respondent.)
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)
)

Complaint No. 11-10

Hearing and Decision by: *Barbara Green, Chair; William Dailey, Vice Chair; Commissioners Mark Dunkle, Esq., Lisa Lessner, Wilma Mishoe, PhD.*

The Public Integrity Commission reviewed the sworn complaint and exhibits filed by Donald Gritti against Dewey Beach Town Commissioner James Przygocki. (*Tab 1*). The complaint is dismissed based on the following law and facts.

I. Standard of Review

To state a claim under the Code of Conduct, the complaint “shall specifically identify each portion of the Code of Conduct Respondent is alleged to have violated and facts upon which each alleged violation is based.” *Public Integrity Commission Rules, IV (C)*.

The Commission may dismiss any complaint it determines is frivolous or fails to state a violation. 29 Del. C. § 5809(3). In considering if a complaint states a violation, the Commission assumes all facts as true as presented by complainant, and at least a majority of the Commission must decide if there are reasonable grounds to believe a violation may have occurred. 29 Del. C. § 5808A(a)(4) and (5).

Based on the following law and facts, this complaint is dismissed for failure to state a violation of the Code of Conduct.

II. Allegations, Analysis, and Disposition

(1) Mr. Pryzgocki allegedly violated Delaware’s Code of Conduct because he violated the Dewey Beach Code against the advice of town counsel by refusing to vote in favor of paying the legal fees of a fellow commissioner (Diane Hanson) for defense of a Public Integrity Commission complaint as required by the Town Code. *Dewey Beach Town Code Chapter 22, Exhibit 1.*

This Commission’s jurisdiction is limited to allegations of violations of “this

chapter”—chapter 58, title 29, Del. C. 29 Del. C. § 5810(a); 29 Del. C. § 5809(3). No Code of Conduct provision is identified as the provision allegedly violated by his conduct in voting to deny Ms. Hanson indemnification. Rather, the allegation is that he violated a local ordinance. That ordinance is not part of “this chapter.” The Code does not give this Commission authority to interpret local ordinances.¹ Where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law. Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, 132 A. 864, 876 (Del. Super., 1926)).

Even assuming the Commission had jurisdiction, and assuming all facts as true—that Mr. Pryzgocki violated the ordinance by acting “against the advice of Town Counsel,” the substance fails to state a claim.

For an alleged conflict to be sufficient to require an official to recuse, the claim cannot be merely conclusory. Shellburne, Inc. v. Roberts, 238 A.2d 331(Del., 1967); Camas v. Delaware Board of Medical Practice, Del. Super., C. A. No. 95A-05-008, J. Graves (November 21, 1995)(conclusory allegation of bias or conflict insufficient). “We have held that claims cannot be based on suspicion and innuendo. There must be hard facts.” Commission Op. No. 00-18(citing CACI, Inc-Federal v. United States, Fed. Cir., 719 F.2d 1567(1967)).

This allegation is conclusory. It assumes that just because Mr. Pryzgocki voted “no,” he acted against Counsel’s advice and violated the ordinance.

The Town Code provides “Conditions for indemnification.” Dewey Beach Code § 22-1. It also provides for “determination of indemnification.” Id. at § 22-3. Indemnification “shall be made by the Town only as authorized in the specific case upon a determination that indemnification of the Town Commissioners, Mayor and/or Town officials is proper in the circumstances because he or she met the applicable standards of conduct set forth.” Id. (emphasis added). Those standards include “if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Town.” Id. at § 22-1(emphasis added).

First, the plain language requires the Town Commissioners to make a “determination” of whether certain “conditions” are met. The plain meaning of those terms is to settle or decide by choice of alternative possibilities. Webster’s Collegiate Dictionary, pp. 315 and 240 (10th ed., 1994). The ordinance does not mandate that under all circumstances an official “shall” be indemnified. Thus, the allegation that he violated that provision just because he voted “no” is not supported by the plain language of the law. Moreover, at the time of the “determination,” at least one fact was public that the Town Commissioners would have known—the Federal Court had denied Ms. Hanson’s motion to dismiss Dewey Beach Enterprises’ (DBE) personal claim against her that she had a conflict of arising from her properties. Dewey Beach Enterprises, Inc. v. Town of Dewey Beach, et. al., C.A. No. 09-507-GMS, J. Sleet (July 30, 2010). What was

¹ Exception: It can review local government Code of Conduct ordinances. 29 Del. C. § 5802(4).

not known to the public at the time of the indemnification decision in early 2011,² was that this Commission, in November 2010, issued an opinion to Ms. Hanson stating it had found probable cause to believe she may have violated the Code. *Commission Op. No. 10-31, Preliminary Hearing Decision*. For the Town Commissioner's to be fully informed in making the decision, that information and the substance of the complaint, were presumptively discussed. One claim in the PIC complaint was the same as in the Federal case—she had a personal interest because of her property, and the Federal Court did not find that claim frivolous. The other claim was she had a conflict because she was individually sued by DBE in that case.³ That information indicates at least some negative facts they likely considered. Further, according to the exhibits to this complaint, Mr. Przygocki allegedly voted against indemnification because he did not believe at times that Ms. Hanson was acting in the Town's best interest. *Exhibit 4, ¶ 6*. Again, we must assume all alleged facts as true. That is one element they had to consider. *Dewey Beach Code § 22-1*. He is entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996).

Second, even assuming the alleged facts as true--Mr. Przygocki acted against advice of counsel and thus contrary to the indemnification provision:

(a) The Code of Conduct does not address circumstances of how, or under what conditions, local officials proceed in an indemnification situation.

(b) Assuming the Town Attorney advised them to vote to indemnify, the Code of Conduct does not address circumstances under which an official is mandated to follow advice of Counsel. Again, the plain language of the ordinance requires officials to “decide” in the particular circumstances whether to indemnify. That logically means it could entail a vote for or against.

(c) This Commission has no authority to intervene in the attorney-client privilege to discover what advice was actually given. Moreover, no facts suggest complainant is personally knowledgeable of the particular advice, as it was given, and the consideration occurred, in executive session. Thus, that information would be presumptively confidential. Accordingly, that makes the allegation speculative, rather than supported by hard facts.

(d) The Code does not address, nor do we believe any law mandates, that a legal advisor can dictate how an official votes. That is why it is called “advice.” Again, this Commission cannot intervene in a presumptively protected conversation between an attorney and client, or resolve any dispute between them, assuming one exists.

Disposition: This allegation is dismissed for failure to state a claim because: (1) the Commission lacks jurisdiction to interpret local ordinances; and (2) assuming all facts as true, it does not state a claim under a Code of Conduct provision.

² The decisions were on January 15, and February 5, 2011. *Tab 2, “A Personal Letter to the Property Owners of Dewey Beach from Mayor Diane Hanson,” February 12, 2011, ¶ 8*.

³ Subsequently, the Commission held that she had a conflict arising from both interests. *Commission Op. No. 10-31, Denial of Motion to Dismiss and Final Decision*.

(2) Mr. Pryzgocki allegedly violated Delaware’s Code of Conduct by his failure to recuse in spite of his “obvious bias” against Mayor Hanson.

The complaint says Mr. Pryzgocki’s participation in the indemnification decision resulted in “raising suspicion of the public and creating an adverse effect on public confidence in the government of Dewey Beach.” This is language from parts of two Code provisions: 29 Del. C. § 5806(a) and § 5806(b)(4).

The latter provision, § 5806(b)(4), is one of 4 criteria that must be applied in deciding if the restriction on accepting “other employment, any compensation, gift, payment of expenses or any other thing of monetary value...” was violated. No facts suggest Mr. Przygocki was offered “other employment, any compensation, gift, payment of expenses, or any other thing of monetary value.” Thus, no claim is stated under that provision.

The first provision, § 5806(b)(4), on conduct that may raise public suspicion is basically an appearance of impropriety test. *Commission Op. No. 00-18*. In deciding if an appearance of impropriety exists, the Commission considers the totality of the circumstances. *Id.* However, those circumstances must be within the framework of a Code provision. *Id.* That is, it must be alleged the conduct “appeared” to violate a specific provision of the Code of Conduct. *Id.*

His alleged “obvious bias” arises from the “sexual denigration of Diane Hanson,” and he was censured by the Town Commissioners,⁴ “to prevent his further harassment of her.”

Here, details on the “sexual denigration” and “harassment” are in news articles of an incident where an unidentified witness said they did not know who created a poster announcing the “wedding of Hanson and town employee Mike Koston.” *Exhibit 5*. The unknown witness said Mr. Przygocki came to town hall and presented Koston with a gift of a box of condoms with a card that, according to the unidentified witness’ paraphrasing was: “Please wear these when you consummate the marriage so you don’t propagate the species.” *Id.* After that, at a public meeting, the Town Commissioners discussed if Mr. Przygocki should be censured, forced to resign, or urged to resign. *Exhibits 5-7*. At those discussions, former Mayor Pat Wright purportedly said practical jokes have precedence in Town Hall. *Exhibit 7*. Mr. Przygocki said it was meant as a simple joke, but he then recognized it was inappropriate. *Id.* He was censured by Town Commissioners, with one abstention based on a concern that the Town Commission did not have authority to censure its members. *Exhibit 6*.

Aside from any hearsay problem arising from an unidentified witness, this Commission has no jurisdiction over sexual denigration or sexual harassment of elected officials in the work place. They are not in any Code of Conduct provision, and other laws may not be grafted onto the Code. *Goldstein, supra*.

⁴ The exhibits show Ms. Hanson brought the matter before the Town Commission and participated in the discussion and voted. *Exhibits 5-7*. We do not decide if Ms. Hanson should have recused because of a personal or private interest in the matter.

Even assuming sexual denigration or harassment could be grafted onto the Code of Conduct, Courts have noted that “[S]poradic use of abusive language, gender-related jokes, and occasional teasing” are “the ordinary tribulations of the workplace.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). Simple teasing, offhand comments and isolated incidents (unless extremely serious) will not establish discrimination. *Id.* Here, a singular event, months ago, no matter how inappropriate or distasteful, for which Mr. Pryzgocki expressed regret and said it would not occur again, based on that law would be insufficient to establish discrimination or “obvious bias” arising from sexual denigration or harassment, even if they were in the Code.

Further, assuming all facts as true, the Town Commissioners publicly censured him. As it pertains to elected officials, this Commission may not remove an elected official. It may censure or reprimand them. 29 Del. C. § 5810(d)(1). Thus, assuming all facts as true, and assuming he violated a Code of Conduct provision, his own colleagues have done as much as this Commission could do administratively.

It is further alleged that a former Town Commissioner said he believed Mr. Pryzgocki and Mr. Solloway, can be counted on for “jamming Diane up any way they can.” Again, for the interest to be sufficient to require an official to recuse, the claim cannot be merely conclusory. *Shellburne, supra*; *Camas, supra*; *Commission Op. No. 00-18(citing CACI), supra*. (“claims cannot be based on suspicion and innuendo. There must be hard facts.”).

Here, the only “hard facts” were the singular incident, which Mr. Pryzgocki has acknowledged was inappropriate, and would not happen again. He is entitled to a strong, legal presumption of honesty and integrity. *Beebe, supra*.

Disposition: Dismissed for failure to state a claim under a Code of Conduct provision.

(3) Mr. Pryzgocki violated the Code of Conduct by putting personal and financial interests above those of the people of Dewey Beach and furthering the interests of DBE by attacking Mayor Diane Hanson while at the same time accepting campaign support from the town businesses Political Action Committee of which DBE is a significant supporter.

While the compliant cites no Code provision, as it pertains to personal and financial interests, the Code provides that officials may not review or dispose of any “matter” if they have a personal or private interest which may tend to impair judgment. 29 Del. C. § 5805(a)(1). For specifically identifiable financial interests, the Code automatically bars officials from reviewing or disposing of matters if: (1) action or inaction on the matter would result in a financial benefit or detriment to themselves to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group; or (2) they have a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like

enterprises. 29 Del. C. § 5805(a)(2)(a) and (b).

The “matters” in which Mr. Przygocki allegedly had a personal or financial interest were the indemnification decisions.

What is provided to support this allegation is a campaign flyer issued prior to the September 19, 2009 elections. *Exhibit 9*. The flyer says it was: “Paid for by Property & Business Owners United for Dewey PAC.” *Id.* It allegedly lists “support of all DBE businesses.” *Id.* Three companies on the flyer are circled as DBE businesses. *Id.* They are: Que Pasa, The Lighthouse/Cove and Books & Coffee. We will assume that all three belong to DBE. The flyer lists 38 additional businesses as PAC members. *Id.* DBE is not listed as a PAC member. The flyer identifies 4 candidates, including Mr. Przygocki, as “running independently; not affiliated with CPD.”⁵ *Id.* It identifies 2 candidates, Ms. Hanson, and another, as “financed and represented by this Washington, DC lobbying group”--referring to CPD. According to the flyer: “All six candidates agree with CPD’s mission of a 35’ height limit in town but four suffer from attacks made in CPD email blasts & newsletters.” *Id.* (*emphasis in original*). It says CPD has engaged in “attack style politics/lobbying” which was “effective in preventing the 68’ proposal” by DBE, and the “attack style politics have lead to astronomical legal fees for our town....” *Id.*

The complaint makes the conclusory allegation that Mr. Przygocki had a personal or financial interest in the indemnification decision because his name was on this flyer.

(a) Financial Interests:

(1) The law requires that the official experience a financial benefit or detriment as a result of action or inaction on the matter. 29 Del. C. § 5805(a)(2)(a). However, the law imposes the benefit or detriment arising from the decision on indemnification on the Town, not Mr. Przygocki. *Dewey Beach Code, ch. 22*. The Town would not incur the indemnification expenses if it were denied; if granted, it would mean a detriment to the Town coffers. Thus, no claim is stated under 29 Del. C. § 5805(a)(2)(a).

(2) The law requires a financial interest⁶ in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises. 29 Del. C. § 5805(a)(2)(b). “Financial interest” is specifically and clearly defined. 29 Del. C. § 5805(4). Nothing in the complaint, or flyer, suggests Mr. Przygocki has a “financial interest in a private enterprise,” as defined by law, in either the PAC or DBE. Thus, no claim is stated under 29 Del. C. § 5805(a)(2)(b).

⁵ Citizens to Preserve Dewey Beach

⁶ “Financial interest” means the person: (1) has a legal or equitable ownership interest in a private enterprise of more than 10%; (2) is associated with the enterprise and received during the last calendar year or might reasonably be expected to receive from the enterprise during the current or the next calendar year income in excess of \$5,000 for services as an employee, officer, director, or trustee or independent contractor; or (3) is a creditor of a private enterprise in an amount equal to 10% or more of the enterprise’s debt. 29 Del. C. § 5804(5). No facts suggest Mr. Przygocki has any of these “financial interests” defined by the Code.

(b) Personal or Private Interests

Although no “financial benefit or detriment” or any “financial interest in a private enterprise,” was found, the law also bars officials from reviewing or disposing of a matter if they have any other “personal or private interests.” 29 Del. C. § 5805(a)(1). This would encompass “interests” in addition to the statutory financial interests in the above provisions.

The only fact given to support the conclusory allegation is the PAC flyer. On the face of that flyer, nothing suggests a personal or private interest by Mr. Przygocki in that PAC.

What the facts show are that the Property & Business Owners PAC had an “interest” in the September 2009 election. The indemnification decision was made over a year later, in early 2011. As far as “campaign support,” the flyer expressed interest in four candidates “not supported by CPD.” *Id.* There were only 3 Council openings. *Tab 3, Notice of Election, Town of Dewey Beach.* Nothing in that flyer suggests the PAC was particularly interested in whether Mr. Przygocki was the candidate elected. The flyer does not even suggest which of the 4 non-CPD candidates to vote for. Rather, it says: “VOTE CPD CANDIDATES OFF OUR TOWN COUNCIL.” *Exhibit 9 (emphasis in original).* That is no endorsement of Mr. Przygocki, or any particular non-CPD candidate.

Beyond the flyer, Campaign Finance Reports were reviewed. As it pertains to DBE, it contributed \$600 to this PAC in 2009. *Tab 4, 2009 Campaign Finance Report, Property & Business Owners United for Dewey.* Other businesses contributed the same amount. *Id.* DBE’s contribution does not create any type of interest for Mr. Przygocki. It is DBE’s “interest” in if, or how much, it will give to PACs. Moreover, a search of the public campaign finance records on the Commissioner of Elections website do not show any contribution by DBE, or the PAC, to Mr. Przygocki in any year.⁷ Nor do the filings show any contribution from Mr. Przygocki to the PAC in any year.

It is a legal fact that DBE had been pursuing a 68’ height since 2007, and pending in federal Court at the time of the flyer was a DBE suit on that very issue—the Town’s denial of its proposed 68’ height. *Dewey Beach Enterprises, Inc. v. Town, supra* (p. 1, complaint filed July 10, 2009). When combined with the flyer’s statement that all candidates “agree with CPD’s mission of a 35’ height,” it does not suggest in any manner that Mr. Przygocki is “furthering the interest of DBE.” (*emphasis added*). If that flyer establishes an “attack,” no facts suggest Mr. Przygocki was behind it. Rather, the “attack” on the face of the flyer is against CPD’s alleged “tactics.” That does not create a “personal” or “financial interest” for Mr. Przygocki in the indemnification decision.

Nothing is unusual about what this PAC did. PACs are legitimate entities under Delaware law. 15 Del. C. § 8002 (12). The law permits expenditures on such things as advertising and publicity. 15 Del. C. § 8020(12). It allows

⁷ Campaign Finance Records for PACs and candidates are on the Commissioner of Elections website. <http://cfis.elections.delaware.gov/>

contributions, but sets statutory limits. See, e.g., § 8010(a). At the same time the Property & Business Owners' PAC was active, so was the PAC for CPD. *Tab 5, 2009 Campaign Finance Reports, Citizens to Preserve Dewey Beach PAC*. Both were accepting contributions⁸ and spending money on printing. *Tab 4, pp. 3 & 4 of 11, and Tab 5, pp. 3, 4 & 5 of 12*. What the flyer and campaign finance reports suggest is that two legitimate PAC entities were "sparring" over "political goals." That is not a personal or private interest for Mr. Przygocki.


Thus, this is a conclusory allegation. It concludes from the mere fact that Mr. Przygocki's name is listed as one of the candidates on a PAC flyer which "attacks" another PAC's "style" of "politics/lobbying," more than a year ago, that he has some personal, private or financial interest in an indemnification decision.

Disposition: Dismissed for failure to state a claim.

III. Conclusion

All allegations are dismissed based on the above law and facts. It is so ordered this 13th day of June, 2011.

For the Public Integrity Commission



Barbara Green, Chair

⁸ We note Ms. Hanson contributed \$600 to the CPD PAC. *Tab 5, p., 3 of 12*. We do not decide if she had a personal or financial interest in that PAC.

BEFORE THE STATE PUBLIC INTEGRITY COMMISSION
IN AND FOR THE STATE OF DELAWARE

In Re: JAMES PRYZGOCKI)	
)	
Respondent.)	
	)	Complaint No. 11-10
)	
)	

Release of Opinion Finding No Violation of the Code of Conduct

Hearing and Decision by: Barbara Green, Chair; William Dailey, Vice Chair;
Commissioners Mark Dunkle, Esq., Wilma Mishoe, PhD., Jeremy Anderson,
Esq., and Andrew Gonser, Esq.

James Przygocki, Town of Dewey Beach Commissioner, was charged with violating the Code of Conduct. *Gritti complaint, Tab 1*. The Commission reviewed the allegations and dismissed for lack of jurisdiction, in part, and for failure to state a claim under the Code of Conduct provisions. *Commission Op. No. 11-10, Tab 2, w/o attachments*. As no violation of the Code of Conduct was found, the proceedings would normally be confidential. 29 Del. C. § 5810(h)(1). However, an exception to the confidentiality rule allows the person charged to request public disclosure. *Id.* at § 5810(h)(1)(i). Mr. Przygocki made such a request. *Przygocki Request, Tab 3*.

Confidentiality of Commission proceedings serves not only to protect the reputation of the official, but also insures complainants, witnesses, etc., are encouraged to come forward and not fear public ridicule or retaliation for filing or coming forth, whether the charges are substantiated or not. *Commission Op. No. 10-31, Confidentiality of Complaint, Tab 4*. See also, *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients and Public Officials*, American Bar Association, P. Salkin, ed. (1999), p. 268. (*Confidentiality serves to not only protect the official's privacy, but without it, complainants could be deterred from contacting the ethics board*). Accordingly, before rendering this decision, the Commission sought input from the complainant, Don Gritti. He opposed the release for reasons discussed below. *Gritti Response, Tab 5*.

Because the complainant has opposed release of a decision finding no violation, this is an issue of first impression. The Commission weighed the need for confidentiality against the public's right to know the allegations of official misconduct in office. It is well accepted that "all ethics enforcement agencies recognize the tensions between those purposes." *Ethical Standards in the Public Sector*, p. 268. Thus, we first consider the general rule that complaints are strictly confidential so that false or malicious reports do not become publicly

known and somehow become more credible because they are investigated. W.J.M. Cody & R.R. Lynn, *Honest Government: An Ethics Guide for Public Services* (Praeger Publishers, 1992), p. 137. We weigh that against the principle that statutes having a public purpose are broadly construed to achieve that purpose. *See, generally*, 3A Sands, *Sutherland Stat. Constr.*, Ch. 71 (5th ed., 1992). Here, the Code recognizes that even if no violation is found public disclosure can occur, which is consistent with the Code's enacted purpose—to instill public confidence in its government. 29 Del. C. § 5802(1).

(1) Confidentiality considerations:

(a) confidentiality to protect investigations. As the investigation is complete and the opinion issued, that purpose no longer exists.

(b) confidentiality to protect official's reputation. An unsubstantiated complaint, as a general rule, never enters the public record and the official's reputation remains intact. *Ethical Standards in the Public Sector*, p. 269. However, sometimes the official, "perhaps in response to media attacks, wants to waive confidentiality." *Id.* Most jurisdictions provide for some variation of the confidentiality requirements. *Id.* A board may then determine that confidentiality is not otherwise required. *Id.*

That is how Delaware's law works. 29 Del. C. § 5810(h). It allows the official to request release, and the Commission decides if confidentiality is no longer necessary. One reason for Mr. Przygocki's request was that the media was contacting him indicating they had heard a complaint was filed. Tab 2. The media had also contacted PIC's office asking about a complaint against him, even though the proceedings were supposed to be confidential.¹ Mr. Przygocki also said several members of the community apparently were aware of a complaint against him, and "rumors have been flying." Unfortunately, someone brought the matter to the media's attention, leaving Mr. Przygocki without the ability to protect his reputation ..

(c) confidentiality to protect complainants: We addressed in our prior opinion concerns about public disclosure of a complainant's name. *Commission Op. No. 10-31, Confidentiality*, Tab 4. Here, Mr. Gritti does not oppose having his name released. If so, we would have considered redacting it. Rather, he opposes release because he believes it "would give Mr. Przygocki reason to trumpet that he got away with his actions." Tab 5. We address those concerns next.

(2) Public Purpose Considerations. It is always the rule that if a violation is found that the proceedings are no longer confidential. 29 Del. C. § 5810(h). That openness is consistent with the Code's purpose of instilling the

¹ This office will neither confirm nor deny if a complaint has been filed while the proceedings are confidential.


public's confidence in its government. 29 Del. C. § 5802(1). Making the information public informs the public that charged violations are acted on and that the penalty imposed by law is carried out. Further, releasing the opinion gives them an understanding of how the law is applied, and the reasons for the conclusions. Allowing an official to request public release of the opinion if no violation is found, serves that same purpose—the public is better informed. That brings us to Mr. Gritti's concern that Mr. Przygocki would have "reason to trumpet that he got away with his actions." By releasing the opinion in its entirety, the public will be informed about the basis for the Commissions' decision. This public information becomes more important in the context of a situation, such as here, where the media has contacted the official about an alleged complaint when it is supposed to be confidential, and "rumors are flying."

Conclusion

Based on the facts and law above, we find that confidentiality is no longer required, and that a release would serve to benefit the public.

It is so ordered this 2 day of August , 2011.

FOR THE PUBLIC INTEGRITY COMMISSION



Barbara Green, Chair



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
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February 24, 2011

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Deborah D. Wicks, Superintendent
Smyrna School District
82 Monrovia Ave.
Smyrna, DE 19977

11-03 – Personal or Private Interest – Nepotism

Hearing and Decision By: *Barbara Green, Chair; William Dailey, Vice Chair;
and Commissioners: Mark Dunkle, Bernadette Winston and Lisa Lessner*

Dear Superintendent Wicks:

The Public Integrity Commission reviewed your request for advice on the hiring of your son, George Wicks, as the Supervisor of Facilities Operations for the Smyrna School District. Based on the following, we find an appearance of impropriety because: (1) your presence at the Board's meeting when it approved hiring your son should not have occurred; and (2) you plan to delegate supervision of your son to your Assistant Superintendent. However, we grant a waiver for that delegation, and provide guidance for complying with the law.

I. Facts

Patrik Williams, Assistant Superintendent, is responsible for facilities operations, and the facilities supervisor reports to him. He explained why, and how, the job of Supervisor of Facilities Operations was created. He said the head of facilities retired in June. At that time, only one person supervised all facilities and their operations. At the time he retired, he had been working seven days a week; 12-16 hours daily. He thought the job needed another person. Mr. Williams, as part of his duties related to facilities, considered his input in the context of the District's expansion. Specifically, it has increased the size of Smyrna Middle School by 50%, built Sunnyside Elementary, doubled the size of Smyrna High School, built a central HVAC plant, and is now heavily involved in constructing Clayton Intermediate School. The existing and on-going expansion would continue the increased work load on a single person. He began to look at how other districts that were expanding were meeting their needs regarding supervision of facilities. He learned that districts with similar growth rates had

expanded their team to have at least two "plant" supervisors. He obtained some job descriptions from those districts. He found that Appoquinmink offered two that most closely resembled your District's needs. He modified them to more closely match that need.

You knew he was working on this, and that he was going to the School Board to see if it would approve a change to split the existing "Supervisor of Buildings/Grounds" into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations. Mr. Williams sought your counsel during this time.

On November 17, 2010, Mr. Williams made his presentation to the Board. The plan was to keep the present HVAC Supervisor in the first position, and advertise the second position. You apparently were present as you a member of the School Board and are the Board's Executive Secretary, but you cannot and did not vote. The Board told him to proceed, with a few minor modifications to the proposed posting.

He worked on the posting and discussed it with you. He said you and he sent the revised posting to the individual Board members. They did not have any suggested changes. On November 22, 2010, the new position was posted on the District's web page. You said that around the end of November, you told your son about the job. The job announcement closed on December 7, 2010.

Five people applied. Two applicants were not qualified. Mr. Williams scheduled appointments for applicants to meet the hiring panel. Mr. Williams said he did not know your son, and the first time he ever spoke to him was to set up the appointment. The hiring panel consisted of Mr. Williams; the principals of Smyrna and Clayton Elementary Schools, and Smyrna Middle School; the Chief Custodian of Smyrna Middle School because he would work for the person selected; and Human Resources Specialist Todd Seelhorst. George Wicks was unanimously rated as the top candidate. His name was presented to the Board at its December 13, 2010 meeting, a meeting you attended. The Board approved his selection.

II. Application of Law to Facts – Financial Interest

State officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). A personal or private interest automatically exists if: "Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons." 29 Del. C. § 5805(a)(2)(a).

No facts suggest your son received a financial benefit or detriment that other applicants for the job would not have received.

However, that is not the end of our inquiry.

III. Application of Law to Facts – Personal Relationships

Independent of the automatic conflict if a close relative would receive a benefit or detriment greater than others, the law separately provides that State officials may not review or dispose of matters if they have a personal or private interest. 29 Del. C. § 5805(a)(1). This allows consideration of conflicts that do not necessarily entail a financial benefit, but encompass close personal relationships. *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (1967)(*alleging official had a conflict because of his personal relationships with applicants; they were not relatives, but Court found the allegation of close relationships sufficient to raise an issue of fact*).

Delaware Courts have held that "the decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." *Prison Health v. State*, C.A. No. 13,010, V.C. Hartnett (June 29, 1993) (citing *Van Itallie v. Borough of Franklin Lakes*, 28 N.J. 258, 146 A.2d 111, 116 (N.J. 1958)).

In *Prison Health*, a State employee was not on the selection board that picked a contract applicant, but was at a meeting where the selection board's recommendation was discussed. He asked three questions, but did not vote. His wife was an employee of the company that was recommended and selected. The Court found his participation was indirect and unsubstantial, but said the conduct was improper. However, the Court did not find the conduct sufficient to set aside the decision.

Here, you did not write the job description as it was primarily adopted from existing descriptions of similar jobs in another district. You did not participate in the Board's decision to approve the split positions; or serve or participate at the hiring panel meetings; or participate in the Board's vote to approve hiring your son. However, you did discuss the position and reviewed the job description with Mr. Williams, and you were present when your son's hiring was approved.

Your participation appears to be less than that in *Prison Health*. However, we must still look at whether, at the time you discussed the position and reviewed the job description, you had a personal or private interest. The position description was worked on in November, and was posted November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd.*, Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. We also note that State employees are not barred from telling people, even a close relative, a

job is open, even if a conflict exists. That is because it would not constitute "reviewing and disposing of a matter" that would "tend to impair judgment." A "matter" is considered "ministerial" when nothing is left to discretion or judgment. Darby v. New Castle Gunning Bedford Education Assoc., Del. Supr., 336 A.2d 209, 211(1975). If a matter is merely "ministerial" the presence or absence of a conflict of interest is immaterial. *Id.* It was public knowledge that the Board had decided the jobs could be split; and that posting was to occur after some minor changes the Board requested on November 17, 2010. Telling him of an opening when it was public information is not reviewing or disposing of a matter in an official capacity, misusing confidential information, or giving him any preferential treatment.

Thus, we find no actual violation. However, the law is not limited to just actual violations. It also addresses appearances of impropriety.

IV. Application of Law to Facts - Appearance of Impropriety

State officials shall endeavor to pursue a course of conduct which will not raise suspicion among the public that the official is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government. 29 Del. C. § 5806(a). In other words, the conduct is to "instill public confidence in its government." 29 Del. C. § 5802(1).

This is basically an appearance of impropriety standard. The test for appearances of impropriety is if a reasonable person, knowledgeable of all the facts, may still believe the employee could not perform their duties with honesty, integrity, and impartiality. In re Williams, 701 A.2d 825 (Del., 1997).

We have two concerns about the appearances raised in this particular case.

First, even assuming you did not know your son was interested in the job until late November, you did know at the time of the December Board meeting. While you did not participate in the approval vote, you were present. In interpreting a federal ethics provision, it was noted that when the purpose is to instill public confidence in the government, improper conduct may include even "passive action." United States v. Schaltebrand, 11th Cir., 922 F.2d 1565 (1991). The Schaltebrand Court said that "mere presence can possibly influence government colleagues." The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse. It does not specifically state that you are to leave the room. However, had advice been sought from this Commission prior to any action, we would have advised you to leave the room during any discussion and voting. That would help assure the public that your Assistant Superintendent and the Board had the comfort and security of being able to speak freely.

Second, you want to delegate administrative responsibility over your son to Mr. Williams. We understand that the Assistant Superintendent has always handled the facilities aspect, making him the logical candidate for delegation. However, we noted in prior decisions the concerns that may arise when an official has a conflict and the responsibility for the decision is handed down to someone working for the official. Those concerns were that if the employee does not perform as the supervisor desires, there may be retaliation or conversely, there may be preferential treatment with respect to working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988))*.

The public might not understand why Mr. Williams, who works for you, is supervising your son. That is especially true because it might be read as contradicting some of our prior decisions. See, e.g., *Commission Op. No. 02-23 (holding that it would not be a sufficient cure for a conflict for a Cabinet Secretary to delegate her decisions to her Division Directors)*. That case may be factually distinguishable, but we will not attempt to do so at this point. Rather, we rely on a case decision where the Court first found that there was no "financial interest" under 29 Del. C. § 5805(a)(2)(a), just as occurred here. *Harvey v. Zoning Board of Adjustment of Odessa, C.A. No. 00-04-007CG, J. Goldstein (Del. Super., November 27, 2000) aff'd., 781 A.2d 697 (Del., 2001)*. The Court went on to find that although there was no financial interest, it would be "prudent" for the officials to recuse because close relatives were involved. Here, you are going to recuse. In *Harvey*, they could not recuse so the Court held that by "rule of necessity," they could participate. Here, only by applying the "rule of necessity," could we allow you to delegate the responsibility to Mr. Williams to supervise your son.

Because of that we discussed at length the School District's "chain of command." The bottom line was that anyone who would oversee your son has a direct connection to your position just like Mr. Williams. Moreover, that would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else selected. On the positive side, you cannot fire Mr. Williams as that must be done by the Board, so that type of retaliation if he did not do as you suggested appears remote. We combined that with the strong legal presumption that you would not engage in such conduct.

We also weighed the public concern against the Code's other purpose. It says: "It is both necessary and desirable that all citizens should be encouraged to assume public office and employment, and that, therefore, the activities of officers and employees of the State should not be unduly circumscribed. " 29 Del. C. § 5802(3).

To achieve that purpose, the law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related

to them. 29 Del. C. § 5805(a)(1). Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.

V. Application of Law to Facts - Waiver

A waiver may be granted if there is an "undue hardship" on the applicant who seeks advice or the agency. 29 Del. C. § 5807(a). "Undue" means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992).*

Here, nothing suggests any hardship on you. However, for the School District, the public purpose of encouraging individuals to seek employment with the government, in this particular case, would be nullified, if no waiver were granted. That is an extreme consequence when the actual conflict can be cured by recusal, and the only obstacle is in delegating because you are the person at the top of the chain of command. If a waiver were not granted, it could appear that this Commission is trying to graft onto the statute an exception that does not exist. The law requires recusal. 29 Del. C. § 5805(a)(1). It has no exception saying relatives of those at the top cannot seek State employment in an agency where their relative works. Where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law. *Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, 132 A. 864, 876 (Del. Super., 1926))*. Creating law is not within our purview. The General Assembly would have to make that decision.

As a result, we decided the responsibility can be delegated to Mr. Williams. However, any issue he, or others in the District, may have with your son cannot go through you for any purpose. You must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. If a matter comes to your attention, you are to refer it to Mr. Williams without comment. If at a Board meeting, staff meeting, etc., any issue arises regarding your son, you are advised not only to recuse but to leave the room to avoid even "passive action." *Schaltebrand, supra*.

Mr. Williams is to address the matters without involving you in any way. He is to go directly to the Board, minus you, on any appropriate matters pertaining to Mr. Wicks.

Additionally, you are to insure that not only Mr. Williams, but also your staff and the Board are aware of these restrictions. This insures that Mr. Williams, or any other District employee, or any Board member, have the comfort and protection to speak freely.

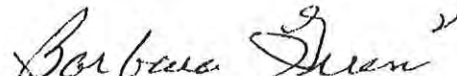
Further, as a waiver is granted, this opinion becomes a matter of public record. 29 Del. C. § 5807(b)(4). This is an additional measure toward instilling the public's confidence. It gives further assurance of compliance as the public will know of the restrictions.

Finally, we note that this opinion is limited to the particular facts of this case. 29 Del. C. § 5807(a). It is not authority for an open season on waivers for senior level officials to hire and/or supervise relatives.

VI. Conclusion

We find that your peripheral involvement of being present when the Board decided to approve your son's hiring created an appearance of impropriety that could have been avoided. We also find that delegating administration of your son's position to Mr. Williams would raise an appearance of impropriety because Mr. Williams reports to you. However, to serve the purpose of encouraging citizens to take government employment, the "rule of necessity" is applied, and we grant a waiver, allowing you to delegate to Mr. Williams the responsibility over your son, George Wicks, under the restrictions and procedures identified in this opinion.

Sincerely,


Barbara Green, Chair
Public Integrity Commission

cc: Patrik D. Williams,
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BEFORE THE STATE PUBLIC INTEGRITY COMMISSION

IN AND FOR THE STATE OF DELAWARE

IN RE: DEBORAH WICKS

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Advisory Op. No. 11-19
Supersedes No. 11-03

Decision by: *Barbara H. Green, Chair; William Dailey, Vice Chair; Commissioners Mark Dunkle, Esq., Lisa Lessner, Wilma Mishoe, Jeremy Anderson, Esq. and Andrew Gonser, Esq.*

I. PROCEDURAL HISTORY AND BACKGROUND

On or about January 13, 2011, a private citizen called the Public Integrity Commission (PIC). The concern was that hiring George Wicks in the Smyrna School District may have violated the Code of Conduct as his mother, Deborah Wicks, is the District's Superintendent. The caller was advised that a sworn complaint could be filed. *29 Del. C. § 5810(a)(any person may file a sworn complaint)*. Alternatively, PIC's Attorney would contact the District's Attorney to see if Ms. Wicks wanted to seek an advisory opinion, as that could resolve the matter faster. The complainant was more interested in having the matter resolved, and agreed to wait to see if Ms. Wicks would seek advice before filing a complaint. The District's Attorney was provided the information that day. Tab 1. Later that day, he advised PIC that Ms. Wicks would seek an advisory opinion. Her request, with information from Assistant Superintendent, Patrik Williams, was dated the next day. Tab 2 (Wicks' Request); Tab 3 (Williams Ltr). It was received January 20, 2011.

Ms. Wicks' request said her son "would be supervised by Pat Williams. I will have no role in evaluating the performance of George Wicks. I will not participate in any discussions, or decisions, involving George Wicks' compensation, continued employment, or the terms or conditions of his employment by the District." Tab 2.

On February 15, 2011, Ms. Wicks and Mr. Williams met with PIC. As background to the hiring, they said the District has a lot of construction on its schedule, both expanding existing schools and building new ones, and building a central HVAC plant, and it has had to rely on one supervisor of Buildings and Grounds to oversee every project. Tab 3, ¶ 1; Tab 4, lines 23-38. Mr. Williams said the Buildings and Grounds Supervisor, Clint Lasana, retired in May, 2010,

and had said the job was too much for one person: *Id.* Scott Holmes was hired to take his place. (cite). Mr. Williams was hired by the District in the summer of 2010. *Tab 4, lines 291-293.* He said he learned of Mr. Lasana's concern, and began looking at splitting the job into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations. *Tab 3.* Mr. Holmes would be the HVAC supervisor, and they would post a new announcement for the operations supervisor. *Tab 3; Tab 4.* Mr. Williams said Ms. Wicks gave him the flexibility to look at a second supervisory role. *Tab 4, lines 52-53.* He shared the job descriptions with her, and she gave input. *Tab 4, lines 34-36, and Tab 3 ¶ 3.* He said it was incumbent on him to make recommendations to Ms. Wicks, as the Executive Secretary of the Board of Education, and incumbent upon him to keep her apprised. *Tab 4.* He said Ms. Wicks gave him the flexibility to look at a second supervisory role, early in the fall. *Tab 4, lines 47-56.* He also made a presentation to the full Board about splitting the jobs. *Tab 4, lines 53-66.* They gave him authority to proceed with putting together a job description. *Id.* He solicited Ms. Wicks' input. *Tab 3.* Ms. Wicks said she would not normally have input to job descriptions, but certainly would be when someone like Mr. Lasana says he could not his job anymore. *Tab 4, lines 189-198.* He and Ms. Wicks' jointly shared the job description with the individual Board members. *Tab 3.* Ms. Wicks said she was present when the Board—in a workshop—"discussed having an overlap in the two jobs, so if one person was not there, the other person could carry on—while they were two different jobs—one is HVAC and the other is buildings and grounds." *Tab 4, lines 100-105.* The job description was posted on November 22, 2010, and closed after 15 days. *Tab 4, lines 173-177.* Five people applied. *Tab 4, lines 175-180.* Two were not qualified. *Id.* The three remaining applicants, including Mr. Wicks, were interviewed by a panel. *Tab 4, lines 206-215.* Ms. Wicks was not on the panel. *Tab 4, lines 204-206.* As a panel member, Mr. Williams knew it was her son. *Tab 4, lines 224-225.* The panel unanimously recommended Mr. Wicks. *Tab 3, p.2. ¶ 5.* Based on the panel's recommendation, the Board of Education approved the hiring of Mr. Wicks on December 13, 2010. *Tab 3, p. 2 ¶ 6.* The Board knew it was Ms. Wicks' son. *Tab 4, lines 271-271.* She is on the Board, and is its Recording Secretary. *Tab 4, lines 235-246.* She does not vote, but she did not recuse. *Id.*

To determine if Ms. Wicks reviewed and disposed of a matter when she had a personal or private interest, she was asked if she told her son of the job, or how he found out about it, and when did that occur. *Tab 4, lines 301-307.* She said: "I told him of the posting—it was posted at the end of November, so I told him after the posting came out." *Id.*

To preclude violations, PIC discussed how matters pertaining to her son could be handled, since she could not review or dispose of such matters. 29 Del. C. § 5805(a)(1). She wanted Mr. Williams to supervise her son. *Tab 2.* She and Mr. Williams stated that the Assistant Superintendent had always supervised that position. *Tab 4, lines 128-131 (Wicks) and lines 282-285 (Williams).*

PIC previously ruled it would be improper for an official with a conflict to delegate that duty to a subordinate. *Commission Op. No. 02-23*. It is to strive for consistency in its opinion. 29 Del. C. § 5809(3). Thus, it discussed at length the structure of the School District. *Tab 4, lines 128-163, lines 294-300; lines 308-348*.

When it issued its opinion, PIC said:

"[W]e must still look at whether, at the time you discussed the position, and reviewed the job description, you had a personal or private interest. The position description was worked on in November and posted on November 22, 2010. You said you told your son about the job in late November. You are entitled to a strong presumption of honesty and integrity. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd., Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. *Tab 5, Commission Op. No. 11-03, p. 3*. "Thus, we find no actual violation." *Id.* at p. 4.

It did find she had violated the restriction on engaging in conduct that may raise suspicion among the public that she acted contrary to the public trust, 29 Del. C. § 5806(a), by not recusing when the Board approved the hiring. *Tab 5, p.4*.

Similarly, it found that it would appear improper to allow Mr. Williams to supervise Mr. Wicks. *Tab 5, p. 6*. However, based on the statements of Ms. Wicks and Mr. Williams, PIC also said: "We understand that the Assistant Superintendent has always handled the facilities aspect, making him the logical person for delegation." *Tab 5, p. 5*. It also noted that if Mr. Williams did not supervise Mr. Wicks, "that would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else. *Id.* It noted that the public may not understand why Mr. Williams, who reports to her, was supervising her son, which might appear contrary to prior rulings, but also noted that the opinion would be made public as an additional measure toward instilling public confidence, and further assuring compliance. *Tab 5, p. 5 ¶ 4, and p. 7 ¶ 2*. Based on all of that, and other statements, the Commission granted a waiver to allow Mr. Williams to supervise Mr. Wicks. *Tab 5, p. 6*.

Beyond that, the Commission advised Ms. Wicks how to comply with the Code. In granting the waiver, it said:

"However, any issue he [Mr. Williams], or others in the District, may have with your son cannot go through you for any purpose. You must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. If a matter comes to your attention, you are to refer it to Mr. Williams without

comment. If at a Board meeting, staff meeting, etc., any issue arises regarding your son, you are advised not only to recuse but to leave the room to avoid even 'passive action.'" (citation omitted). *Tab 5, p. 4.*

It also cited the law verbatim: "State officials may not review or dispose of matters if they have a personal or private interest." *Id. at p. 4.* It later said: "The law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them." *Id. at p. 5-6.* "The statute states that you are not to 'review' or 'dispose of' matters, which means you are to recuse." *Id. at p. 6.*

It further directed that Ms. Wicks was "to insure that not only Mr. Williams, but also your staff and the Board are aware of these restrictions." *Tab 5, p. 6.*

II. CURRENT FACTS

On or about April 11, 2011, a different individual contacted PIC. The concern was that Ms. Wicks had not complied with informing the staff and Board about her restrictions; that Mr. Wicks had earlier that year applied for essentially the same job; and Ms. Wicks was participating in matters related to her son's duties. In support of the claims, the two job descriptions were provided. *Tab 6 (A) and (B).* Also, e-mails between Ms. Wicks and her son were attached. *Tab 7.*

Because of the public concern, the Commission wrote and asked that Ms. Wicks provide documented evidence that she informed the Board and her staff; and that she fully disclose the information regarding her son's earlier application for essentially the same position. *Tab 8.*

Ms. Wicks and Mr. Williams responded on or about June 20, 2011. *Tab 9 & 10.* After reviewing their responses, PIC notified Ms. Wicks that: (1) the Board had not verified that it received the entire opinion, although she said she instructed her secretary to send it; as the Board only verified receiving "the results"; (2) the information on her restrictions given to the staff and Board to post did not comply with PIC's ruling; and (3) she had not explained why she did not tell PIC about her son's earlier application for essentially the same job. It noted that Mr. William's explanation about the earlier hiring was not derived from personal knowledge because he had not been hired until after that job was announced; interviews conducted; and Mr. Holmes was hired. *Tab 11.* It advised Ms. Wicks that it would meet on September 20, 2011 to decide if the waiver should be revoked or other action taken. *Id.* Ms. Wicks was asked to attend. *Id.* She, Mr. Williams, and the District's attorney appeared. Additionally, the Board submitted a letter asking that Ms. Wicks be allowed to have "operational contact" with her son.

These are the Commission's additional findings of law and facts after those events.

(A) **Applicable Law:** Upon the written application of any State employee, the Commission may issue an advisory opinion as to the applicability of this chapter [title 29, chapter 58]. Any person who acts in good faith reliance upon any such advisory opinion shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the advisory opinion provided there was a full disclosure to the Commission of all material facts necessary for the advisory opinion. 29 Del. C. § 5807(c).

(1) Good Faith and Disclosure

In terms of disclosure, "good faith" means honesty of purpose and full and complete disclosure. *Black's Law Dictionary*, (6th ed), p. 693. It "implies honesty, fair dealing and full revelation." *Id.* "Full disclosure" means that one who participates in a transaction for his own benefit is required to fully reveal the details of such. *Id.* at p. 672. It carries an "obligation to reveal all details." *Id.* Disclosure means sufficient information so that decision makers can make an intelligent evaluation; it is deemed basic to an intelligent assessment. *Id.* at p. 464. Where "good faith" is not exercised, Delaware Courts have excluded the tainted information. *Jones v. State*, Cr. A. Nos. 16, 2010, 17, 2010 (Del., September 5, 2011). Specific behavior that Delaware Courts have found sufficient to constitute bad faith includes misleading the court, altering testimony, or changing positions on an issue. *Beck v. Atl. Coast PLC*, 868 A.2d 840 (Del. Ch., 2005).

In the context of nepotism, Courts have held that where officials failed to disclose information regarding relatives, they lose the "good faith" defense. *State ex rel. Summer v. Denton*, 382 S. 2d 461 (Miss., 1989); 1980 Miss. LEXIS 1926; *Nepotism in Public Service*, 11 ALR 4th 813.

In *Denton*, the statute, like Delaware's, provided for a good faith defense after full disclosure, in seeking an advisory opinion. It said:

"When any officer, board, commission, department, or person authorized by this section to require such written opinion of the attorney general shall have done so and shall have stated all the facts to govern such opinion, and the attorney general has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith...." *Id.* at 467.

In *Denton*, by law, it was improper for an official to knowingly vote to let any contract to, or for the employment by contract, or otherwise, of any relative of any member of the board of supervisors, or any relative of a road commissioner, related by blood or marriage within the third degree of consanguinity. *Id.* at 463.

The request to the AG for an advisory opinion said that a Board Member, Mr. Mathias, and the contractor, Mr. Jones, were married to sisters from another family. The AG concluded: the fact that two men had married sisters does not create any relationship between those two men prohibited by the statute. Mrs. Jones is Mr. Mathis' sister-in-law but that does not make Mr. Jones Mr. Mathis' brother-in-law so it did not establish a relationship between them 'by blood or marriage within the third degree,' as computed by the civil law. *Id.* at 467.

Subsequently, the State learned that the Board member's nephews-in-law were paid under that contract. *Id.* at 467. The AG and Auditor sued the Board members to recover those funds. *Id.* at 462. They sought penal damages against all of the Board members for paying funds in violation of the statute, as they all knew of the relationship. *Id.* at 462 and 463.

The AG testified that the advisory opinion did not refer to the children of Mr. Jones because the request for an opinion did not state that his two sons were also the sons of Mr. Jones' present wife—the Board member's sister-in-law. *Id.* at 467. The AG observed that "they could have been sons by a previous marriage so, not having any of that information, the question was answered solely with respect to Johnny Jones." *Id.* at 468. The Court concluded: "the opinion does not support a good faith defense because it does not refer to the relationship which existed between the Jones brothers and Supervisor Mathis" *Id.* Accordingly, the Court reversed and remanded so penal damages could be assessed against all defendants. *Id.*

Here, as in *Denton*, it was not until after the opinion was issued that PIC learned that certain information was not disclosed.

(a) Prior Application by Mr. Wicks for an Almost Identical Position

At no point in her written request, Mr. Williams' supplement to her request, or in either of their statements at PIC's meeting was it ever disclosed that Ms. Wicks' son previously applied for essentially the same job earlier that year, but was not selected. After the opinion was made public, a private citizen notified PIC of that information. PIC followed up in a letter, stating that Ms. Wicks did not disclose his earlier application for essentially the same job, and that "full disclosure" is required in order for an official to rely on the advisory opinion. It directed that she was to "fully disclose" the information regarding her son's application, and the "full details" of her "role in the review" of the applications, interviews, and selection. *Tab 8*. Her response was: "In an attached memo, Mr. Williams will address the 2010 job position that George Wicks was not hired for, as I was once again not part of that process." *Tab 9*. Mr. Williams stated: "Superintendent Deborah Wicks played no role in the selection of Mr. Holmes, nor did she play any role in the hiring or interviewing process." *Tab 10*.

That written response poses two problems:

(1) Mr. Williams also was “not part of the process.” Mr. Williams was hired in the summer of 2010. *Tab 4*. This job was announced in February 2010; interviews were conducted in March; and Mr. Scott Holmes was selected and subsequently took Mr. Lasana’s job on May 1, 2010. *Tab 10*. It is unclear why Ms. Wicks choose not to respond because she “was not part of the process,” yet had someone whom she clearly knew was “not part of the process,” respond. That is, at best, disingenuous.

(2) The documents Mr. Williams submitted are not sufficient to fully answer PIC’s question. While the documents reveal some information, such as the fact Ms. Wicks was not on the selection panel, those documents give no indication of whether she was “reviewing” or “disposing” of the matter. For example, if only documented records--such as provided here--were reviewed on the 2nd hiring, nothing would suggest that she gave input on the job description; attended workshops where the duties were discussed, did not recuse from School Board meetings when it was discussed, etc.¹

At its second meeting, PIC asked why she did not disclose the information. Ms. Wicks said she did not think PIC would be interested in the fact that he was not selected for that job. *Tab 12, lines 304-317*.

“Full disclosure” means that one who participates in a transaction for his own benefit is required to fully reveal the details of such. *Black’s, supra at p. 672*. It carries an “obligation to reveal all details.” *Id.*

The benefit Ms. Wicks would have been entitled to receive would be protection against a disciplinary action or complaint, but she did not fully disclose that information. She knew the details, and she had the obligation to reveal those details. Then, after full disclosure, the Commission decides which details are “material facts necessary for the advisory opinion.” 29 *Del. C. § 5807(a) and (c)*. Generally, in legal matters a statement is “material” when “it could have affected the course or outcome the proceedings.” 11 *Del. C. § 1235(a)*. In fact, if it were a sworn statement, it might fall within that perjury definition.

PIC relied on her statement and gave her the “strong legal presumption of honesty and integrity” regarding her disclosure. It said:

“[W]e must still look at whether, at the time you discussed the position, and reviewed the job description, you had a personal or private interest. The position description was worked on in November and posted on November 22, 2010. You said you told your son about the job in late November. You are

¹ Similarly, the letter from Former Assistant Superintendent, Clarence Lloyd, also does not address those kinds of issues. *Tab 14*. Also, the Commission asked that she answer because it is possible that she may have taken action without Mr. Lloyd’s knowledge.

entitled to a strong presumption of honesty and integrity. Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd., Del. Supr., No. 304 (January 29, 1996). Thus, we presume that when you worked with Mr. Williams on the job description you did not know if your son would be interested; if he would apply; etc. Tab 5, Commission Op. No. 11-03, p. 3. "Thus, we find no actual violation." Id. at p. 4.

It relied on her statement again when it addressed the concerns about appearances of impropriety. PIC said: "First, even assuming you did not know your son was interested in the job until late November, you did know at the December Board meeting." Id. at p.4.

The fact that her son sought essentially the same job earlier in the year reveals that she knew of his interest in the job much earlier than late November 2010. It was not a question of whether or not he got the job, it was a question of when she knew about his interest in the job.

Just like the AG in Denton, without having that information, the opinion could only address what would be a conflict based on what was disclosed. It could not be based on what was not disclosed.

Even if the importance of that fact were not clear to Ms. Wicks when she was asked by PIC about the time frame of when she knew of her son's interest, the opinion referenced that fact more than once. It was from that fact that it concluded she did not violate the Code when she worked on the job description and attended the workshops where the duties were discussed, because based on her statements it concluded she did not know of his interest when those events occurred. Id. at 4. In deciding the appearance of impropriety issue, it said: "Assuming you did not know of your son's interest until November, you knew when the Board decided to hire him. It then concluded that was conduct that appeared improper." Yet, she felt no obligation to notify the Commission, and disclose that she knew about his interest much earlier.

Beyond that, although she said she did not see why PIC would be interested in a job her son did not get, the importance of that information was intuitively obvious to the citizen who notified the Commission about the earlier job.

(2) The Status of Clint Lasana

It also was not disclosed that Clint Lasana, after retiring, was rehired as a construction consultant. PIC relied on the information from Ms. Wicks and Mr. Williams regarding the critical need for creating and filling that second job. PIC was told that Mr. Lasana had said the job was too much for one person. PIC was given detailed information about the increased construction in the District. It was told: "We have continued to rely on just one supervisor of "buildings and grounds" to oversee every project. This supervisor has been working seven days

a week, 12-15 hours daily, just to keep up, and, of course, attend to our other existing schools/operating outside the 'construction zone.' *Tab 3*. It was also told that the existing and on-going expansion would continue the increased work load on a single person. *Id.*

PIC relied on those statements. It noted all of those difficulties. *Tab 5, p. 1*. At no point did Ms. Wicks or Mr. Williams indicate anyone was available who could help with the "increased work load of a single person." Had they indicated some of the load was being decreased by having a contractor, it may not have created what seemed to be a greater sense of urgency² or "undue hardship." PIC specifically noted the "undue hardship" on the District if it could not hire someone—and in this case, that someone had already been hired—Ms. Wicks' son. *Tab 5, p. 6*. To accommodate that hiring after the fact, PIC combined that hardship with the purpose of encouraging people to seek State employment to justify granting a waiver. *Id.* Had it known about the alternative, it could have made a more informed decision.

The importance of information on alternatives to hiring relatives was demonstrated in a Court action, where the Court found that an official hired his relatives when there was sufficient labor available without doing so. *White v Gainer*, 164 S.E. 247 (W. Va., 1932). The Court found his conduct constituted "misconduct in office"³ and affirmed a judgment of removal from office. *Id.* In Delaware, monetary remedial actions were taken against the agency after an alternative to hiring a relative was not fairly considered because of a conflict of interest. *Brice v. Dep't of Corrections*, 704 A.2d 1176 (Del., 1998).

In *Brice*, a State employee's nephew applied for a job, and the uncle was on the selection committee. Another applicant learned the nephew was unanimously selected. He filed a grievance with the Merit Employee Relations Board (MERB) alleging discrimination due to nepotism. He also sought reimbursement for the costs associated with filing the grievance. MERB upheld his grievance and concluded the nephew was shown preferential treatment because of the manner in which alternatives to the nephew were treated. However, it held it could not make the agency cover his costs. *MERB Op. Docket No. 95-06-41*. The Superior Court found that it was a "blatant" case of nepotism, even though the panel members testified that they were not influenced by the uncle in their decision. However, it, too, held that MERB could not require the Department of Corrections to pay for his attorney and grievance costs. He appealed to the Supreme Court. *Brice v. Department of Correction*, 1997 Del. Super. LEXIS 329 (Del. Super. Ct. June 23, 1997). It held that the agency could

² We note, but do not decide if the rehiring of Clint Lasana was contrary to the Code of Conduct. The Code bars former employees from contracting on matters where they gave an opinion, conducted an investigation, or were otherwise directly and materially responsible for the matter. 29 Del. C. § 5805(d).

³ Delaware also has a "Misconduct in Office" provision. 11 Del. C. § 1211. PIC has no jurisdiction over that provision, so does not rule on whether it applies.

be responsible for the costs associated with the initial filing, the Superior Court action, the Supreme Court action, and costs associated with the remand to the Board to implement the payment to him. Brice v. Department of Correction, 704 A.2d 1176, 1998 Del. LEXIS 35 (Del. 1998)

Thus, Courts do not take lightly the issue of nepotism when it results in less than fair consideration of the alternatives to hiring a relative.

When asked about Mr. Lasana's hiring at the second meeting, at one point Ms. Wicks said he is still works for the District "off and on." *Tab 12, lines 104-110*. At another point she said he "does not work there now." *Id. at lines 330-331*, Ms. Wicks said they tried it for a while, and he "was charging us a huge amount." *Id. at lines 339-344*. PIC still does not know his true status. That is not "full disclosure."

Now, PIC has been told that the only responsibility the Supervisors of Buildings and Grounds are responsible for is whether the construction is on time. *Tab 12, lines 97-102*. This is in stark contrast to Ms. Wicks' and Mr. Williams' previous disclosure of the weekends, long days, etc., that a single person had to perform because of the heavy construction.

(3) Supervisory Responsibilities

In a Delaware Supreme Court case dealing with a personal or private interest, where an official did not disclose truthful information, one line in that opinion was: "There is another feature of this case that has a most unpleasant aspect." In re Ridgely, 106 A.2d 527, 532 (Del., 1954). That adequately assesses the following information.

Ms. Wicks requested that Mr. Williams be allowed to supervise her son. She and Mr. Williams said supervisory control of the Buildings and Grounds Supervisor had "always" been the Assistant Superintendent's responsibility. Again, the Commission relied on their statements. PIC said that "since it had always been handled by the assistant superintendent, it made Mr. Williams the logical candidate for delegation." *Tab 5, p. 4 ¶ 1*. PIC also noted that if the duty were given to someone else, it "would require a change to remove Mr. Williams from any duty for facilities, and impose a new duty on anyone else selected." *Tab 5, p.5 ¶ 3*.

After the Commission learned of the earlier job that Mr. Wicks applied for, it was given the two job announcements. The first job announcement, for which Mr. Wicks applied, but was not selected, said the individual would report to the Superintendent. *Tab 6(A)*. The second job announcement said the individual would report to the Superintendent and the Assistant Superintendent. *Tab 6(B)*. This demonstrates more than a lack of candor in disclosing information.

(4) Findings Regarding Good Faith and Disclosure:

We find that the failure to disclose: (1) her son's previous consideration for essentially the same job; (2) the District had in place an alternative to handle the construction; and (3) that it had not "always" been the Assistant Superintendent's responsibility to supervise the Buildings and Grounds Supervisors resulted in a skewed decision, rather than an "intelligent assessment," that would have come with full disclosure. There was not "full disclosure" as mandated by law. Thus, Ms. Wicks is not entitled to rely on the initial opinion as protection against disciplinary action or a complaint.

Moreover, in *Ridgely*, the Delaware Supreme Court explained the legal effect of erroneous statements by a public official. *Ridgely* had a personal or private interest in a matter and the Attorney General directed him to prepare a letter regarding his conduct. *Id.* at 530. Four of his statements were later found to be erroneous. *Id.* The Court held that "an adverse inference must be drawn from the erroneous statements in his letter." *Id.* at 532. It went on to say his statements may have been hastily drawn, "but it is hard to believe that they do not evidence some consciousness of the impropriety of his conduct." *Id.* at 533. It concluded that a reprimand was the appropriate sanction. *Id.*

We, too, must draw an adverse inference from the failure to disclose certain facts, and the erroneous statements made to this Commission. We reprimand the conduct and find that at a minimum, it raises the appearance of impropriety.

III. Reliance on PIC's Advice

For an official to be protected by an advisory opinion or waiver they must evidence "reliance" on the opinion. 29 Del. C. § 5807(a) and (c). Generally, "reliance" might be defined as a belief which motivates an act. *Black's, supra*, p. 1291.

(1) Advice on Ms. Wicks' Restrictions:

PIC's opinion advised Ms. Wicks to inform the School Board and the staff of the restrictions on her. *Tab 5, p. 6.*

(a) Timing of Notice of Restrictions

PIC's opinion was issued February 24, 2011. After a citizen alerted PIC to the fact that this may not have occurred,⁴ PIC asked for documented proof that they were informed. Ms. Wicks' written response, unsupported by any attestation or document, said she instructed her secretary to

⁴ The citizen also informed Commission Counsel that because of the concern, that citizen had personally sent the entire opinion to the Board.

send the entire opinion to the Board on March 1, 2011. *Tab 9, p. 1 ¶ 1*. She did attach a document signed by the Board members, attesting that they received “the results” at the March 16, Board meeting. *Id. at p. 3*. In PIC’s follow up letter, it noted that the Board did not certify that it received the entire opinion from Ms. Wicks’ office. *Tab 11, p. 1 ¶ 1*. It still does not know if a copy were sent from her office to the Board members. However, it seems logical that the Board received the same “results” that eventually were given to the staff.

Notice to the staff did not occur until June 12, 2011. *Tab 9, p. 2*. That was almost 4 months after the opinion was issued.

At PIC’s meeting, Ms. Wicks said they were not notified sooner because her husband has been sick. She said she had been “back and forth to Baltimore with her husband...” *Tab 12, lines 21-26*.

Quite frankly, that does not explain a delay of almost 4 months. Even then notice to the staff did not occur until PIC asked for documented evidence. Had PIC not been alerted by a citizen, it seems likely the notice would have been delayed even longer, or may not ever have occurred.

Ms. Wicks found time to notify the Board of “the results” on March 16. *Tab 9, p. 1 ¶ 1 and p. 3*. The following day the Monthly Administrators meeting, and Monthly Chief Custodian’s meetings were held. The custodial employees work for Mr. Wicks.⁵ *Tab 6(B)*. Ms. Wicks and the Assistant Superintendent knew of the restrictions. Even if we presume she was frequently absent due to her spouse’s illness, she never asked Mr. Williams to notify the staff. Further, again presuming she was frequently absent, since Mr. Williams presumptively acts in her absence, he did not act to inform any employees. Had PIC’s advice been followed, perhaps Ms. Wicks would not have been contacted by a School employee saying her husband had applied for a job, but had never been contacted by Mr. Wicks’ office. That employee might have known to go to Mr. Williams with “any issue” pertaining to Mr. Wicks.⁶

Ms. Wicks also said: “I didn’t realize there was a time line for that information to get out.” *Tab 12, lines 23-24*. While it is true that PIC did not put a deadline in its opinion as to when she was to notify the staff, PIC tries not to micromanage officials. It anticipated Ms. Wicks would act within a reasonable period of time.

⁵ PIC was asked if it meant to say that Mr. Wicks could not attend meetings. That is a possible solution in some situations. However, as it pertains to the custodian’s meetings, where it is important that those who are supervised by Mr. Wicks, and he also can feel free to participate, in candid discussions about the work load, the events occurring on the job, etc., then the solution is that rather than Ms. Wicks and Mr. Williams both attending those meetings, as is apparently the custom, as previously directly, Ms. Wicks can recuse and stay out of the room.

⁶ The specifics of this situation are discussed later in this opinion.

In determining what is a “reasonable time” for performance, Courts consider such factors as relationships between parties; subject matter; and the time that a person of ordinary diligence and prudence would use under similar circumstances. *Black’s, supra*, p. 1266.

The relationship between Ms. Wicks and PIC was that PIC had offered her the opportunity to avoid a complaint being filed against her for participating in hiring her son by seeking an advisory opinion. She quickly responded to that opportunity. The same day the District’s attorney was advised of the option, Ms. Wicks accepted. Her written request was dated the very next day. *Tab 2*. That was some evidence that gave PIC reason to expect she would timely respond to its advice. Yet, after she received PIC’s advice, she was not “motivated to act” for almost 4 months, and then only after PIC requested proof of notification.

In PIC’s 20 years of existence, advice on conflicts, which deal with honesty and integrity, triggers an actual and immediate response to “rely” on the advice. That is what “reliance” encompasses. The purpose of getting the advice is so the official is protected against a complaint or disciplinary action. Delaware Courts have held that where an official had a personal and private conflict of interest, “unless he was willing to resign from his office, he should have taken that action [delegating to another] as soon as the probability of conflict of interests appeared.” *In re Ridgely* at 476. Thus, as a matter of law, Ms. Wicks should have acted as soon as she received the advice on how to comply.

We find that an almost four month delay in acting is not a reasonable time, and therefore, there was no reliance on the opinion during that period of time.

(b) Content of Notice of Restrictions

The Board said it received the “results” of PIC’s opinion on March 16, 2011. *Tab 9, p. 3*. It did not detail what “the results” were. However, the letter provided to the administrators, and the Board, for posting in their buildings on June 17, 2011, said:

“Per the ruling of the Delaware State Public Integrity Commission, on February 24, 2011, I have been granted a waiver using the ‘rule of necessity’ that encourages citizens to take government employment, allowing me to delegate to Mr. Patrik Williams the responsibility of supervision of my son George Wicks in his role as Supervisor of Buildings and Grounds. I will have no role in evaluating his performance, or any discussions or decisions involving George Wicks’ compensation, continued employment, or the terms of his employment by the Smyrna School District.” *Tab 9, p. 2*.

PIC’s opinion did not limit its opinion to just those 4 areas: evaluation, compensation, continued employment, or the terms of his employment. No where in the opinion does it reflect that break down. As indicated above, it said

"any issues." PIC has previously held that: "The common and ordinary meaning of "any" includes "every - used to indicate selection without restriction" and "all - used to indicate a maximum or whole." *Commission Op. No. 95-006 (citing Webster's Seventh New Collegiate Dictionary, p. 40 (1967))*.

Aside from the plain and ordinary meaning, the fact that PIC meant the restrictions to be "all inclusive," is buttressed by the fact that in Ms. Wicks' request for an opinion, she proposed—verbatim—those very same limits. Her request said: "I will have no role in evaluating his performance, or any discussions or decisions involving George Wicks' compensation, continued employment, or the terms of his employment by the Smyrna School District."

Had PIC intended those to be the limits, it would have said so—instead it said "any issues." Moreover, PIC's conclusion was preceded by repeated references to the clear statutory language that says an official may not review or dispose of a matter where they have a personal or private interest—without any distinctions or exceptions. It said:

"State officials may not review or dispose of matters if they have a personal or private interest." *Tab 5, p. 4*. It later said: "The law does not bar relatives from State employment. Rather, their relatives may not review or dispose of matters related to them." *Id. at p. 5-6*. "The statute states that you are not to "review" or "dispose of" matters, which means you are to recuse." *Id. at p. 6*.

It also described a case which held that even "indirect" and "unsubstantial" participation is "undoubtedly improper" when a matter pertains even indirectly to a close relative. *Tab 5, p. 4*.

In a situation where an official participated in decisions about a close relative, the Court said "that if the officer was at all in doubt, which he should not have been, he could have sought an opinion from the Attorney General." *State ex. Rel. Roberts v. Buckley*, 533 S.W. 2d 551 (Mo., 1976)(official violated nepotism law was required to forfeit job). In *Ridgely, supra*, the Court noted the unfortunate consequences for an official when it "is cast upon the occupant of the office the burden of determining for himself the limits" of his conduct. *Id. at 478*. The General Assembly rectified that "unfortunate consequence" by creating an independent agency—PIC--so Ms. Wicks did not have to determine the limits. As the opinion was not couched in the limited terms offered by Ms. Wicks, if "any issue" were not clear to her, she, like the *Buckley* official, could have sought an opinion. 29 Del. C. § 5807(a) and (c).

The "unfortunate consequence" here, which could have been avoided, is that in determining her own limits—or lack thereof--Ms. Wicks reviewed and disposed of a matter related to her son's employment

PIC was provided with an e-mail from a School District teacher, who said her husband applied for a part-time substitute custodial job 5 weeks ago, but no one had gotten back to him. She said: "Couldn't someone have at least let him know they weren't interested...? It's embarrassing because I work here." *Tab 7, p. 2.*

Three minutes after receiving that e-mail, Ms. Wicks sent an e-mail to Mr. Wicks saying: "George, Please look into this email for me and see if we can get this good contact working as a sub for us!⁷ Mom." *Id. at p. 1.*

Mr. Wicks responded at length the next day saying: "Mom, Here is info on this situation". *Id.* He went into detail about doing sub interviews, and interviews, for such positions; "we are busy so we group them together to make the best of our time;" and said Mr. Goodlin has been scheduled for an interview. *Id.* He then wrote 3 paragraphs, saying five weeks is not long to wait; a lot of people would like a custodial position; if someone has a question about their application it is their responsibility to call; not the responsibility of the proposed employer to give running updates on job status." *Id.*

He said: "In my opinion, it is also a very bad idea for the wife of a prospective employee to place indirect pressure on the prospective employee's potential supervisors by sending an email like this." *Id.* He then talked about the substitute custodial shortage, saying that according to another employee, it was not the subs that were a problem, but it was the existing custodians just not doing their job. *Id.* He then went back to the School teacher's inquiry and said the decision on whether he should seek employment elsewhere was "the Goodlin's alone and we have no comment on their employment decisions. *Id.* Also as far as her feeling of embarrassment, she is in control of her own feelings and we have no responsibility in whatever feelings she has. *Id.* Scott Holmes and I are simply trying to do our jobs the best we can with the time we have allotted each day. *Id.* There is no great conspiracy here against the Goodlins. *Id.* We are trying to use the right procedures in doing our job and also use the best time management practice we can." *Id.*

Ms. Wicks clearly knew this duty belonged to her son, since she immediately wrote to him. She then received a response from him for her review which dealt with the performance of his duties—the length of time to get interviews; the way he was practicing those duties—giving sub interviews and interviews; how he dealt with "customer" concerns; his evaluation of his own work—that he's doing the best he can; we're busy, etc. Explaining what his responsibilities were not—providing information to applicants because it was their job; or responding to people's feelings, etc. He then brought up the fact that apparently some employees working for him were not performing their jobs.

⁷ We do not address if Ms. Wicks was engaging in "pre-selection," as those are personnel issues.

Those are “issues” pertaining to her son’s employment. She participated in that matter—she reviewed the e-mail from the teacher; she disposed of it by immediately directing him to “see if we can get this good contact working as a sub.” When he responded that an interview was now scheduled, he provided additional information for her to review, not only about his job performance as it related to the hiring of substitute custodians, but also about problems with his employees. That violates the restriction on “reviewing or disposing of matters where there is a personal or private interest that may tend to impair judgment in performing official duties.” 29 Del. C. § 5805(a)(1).

What is ironic is that Mr. Wicks thought it was “a very bad idea” for a family member who worked for the District to use “indirect pressure” to get an answer about their spouse’s application for a job in the District. That is especially true when his “Mom” was telling him to “see if we can get this good contact working as a sub for us! Mom.” His response to “Dear Mom” was that he had scheduled the teacher’s husband for an interview; that he’s working hard, etc.

That is the reason Courts sometimes rail against nepotism. Restricting relatives from working together is meant to allow them to perform their duties at arm’s length rather than under any possible inhibition that might exist because of an intimate relationship. *Rosenstock v. Scaringe*, 357 N.E.2d 347 (N.Y., 1976)(Court affirmed an order declaring invalid the candidacy of the wife of a school Board member for a position on the Board); *Keckeisen v. Independent School Dist.*, 502 F. 2d 1062 (Minn); *cert. denied*, 423 U.S. 833 (School Administrator hiring close relative (spouse) “was bound to have a deleterious effect on the moral of the school’s faculty; and administrator may be swayed by the close relationship). *Brice, supra* (“blatant nepotism” for uncle to sit on hiring panel when nephew sought job). *Barton v. Alexander*, 148 P. 471, (Id., 1915)(Court said nepotism was recognized as “an evil that ought to be eradicated and stamped out”).

Ms. Wicks said she “did not consider that e-mail a complaint against her son.” Tab 9, p. 1 ¶ 3. Again, she is selectively self-interpreting the restriction. It does not have to be a “complaint.” It is “any issue.”⁸

At the Commission meeting, it was pointed out that the Commission used the term “issue,” and that might be read as being limited to only certain areas about his employment. Tab 12, lines 54-63.

To clarify our meaning, then and now, “issues” means “matters.” *Webster’s Collegiate Dictionary*, p. 622. It means what the statute, as cited throughout the opinion, says: An official “may not review or dispose of matters where they have a personal or private interest that may tend to impair judgment

⁸ Again, we note that it apparently was intuitively obvious to the citizen who notified the Commission of the e-mail that this was “an issue” pertaining to George Wicks. That citizen apparently understood the restriction when she read the opinion.

in performing official duties.” To further clarify, “matter” is statutorily defined. It means “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7).

Ms. Wicks has a “personal or private interest in her son, George Wicks.”⁹ She may not review or dispose of any (all inclusive) matter (as defined, e.g., business dealing or transaction of any sort) with her son George Wicks, as long as they are both employed by the Smyrna School District.

If that is not clear, Ms. Wicks should seek further advice from this Commission before acting. If it cannot be done, then other options will have to be explored, e.g., one of them leave voluntarily; one of them be removed by the Commission if additional violations occur, 29 Del. C. § 5810(d)(2). See, *Nepotism in Public Service*, 11 ALR 826 (cases of voluntary removal to avoid conflict; cases of forfeiture of job because of conflict violation)..

We find that Ms. Wicks did not correctly inform the Board and staff of her restrictions; did not timely notify her staff that she was restricted in any way; and as a consequence failed to comply with the statute that prohibits her from reviewing or disposing of matters where she has a personal or private interest. The law requires “good faith reliance” on the advice in order to be protected against a compliant and/or disciplinary action. 29 Del. C. § 5807(a) and (c). Ms. Wicks’ acts do not constitute “good faith reliance” on PIC’s opinion.

(B) Waiver

Applicable Law: Waiver may be granted if there is an undue hardship on the State employee, official, or State agency, or if a literal application of the law would not serve the public purpose. 29 Del. C. § 5807(a).

(1) Undue Hardship

PIC previously granted a waiver based on the hardship of the agency regarding the work load as described by Ms. Wicks and Ms. Williams, and based on the Code provision that the law is meant to encourage people to accept public employment. Tab 5, p. 6. Based on the information we now have, we find that the hardship alleged for the agency was not supported by facts.

⁹ This is made more than clear by the fact that they exchanged e-mails about a School business transaction (hiring of a custodian), and in that transaction, Ms. Wicks identified herself as “Mom.” George Wicks responded with “Dear Mom.” It is clear that they are not drawing the line between their professional roles and their personal and private roles. Delaware Courts have held that when there is a personal or private interest, the “private interest must yield to the public one.” *In re Ridgely* at 531. That has not occurred.

Now, Ms. Wicks, and the School Board, asked the Commission to grant a waiver so Ms. Wicks can have “operational contact” with her son.

Ms. Wicks said: “In this letter to the Commission we’re asking for an operational contact because it’s very difficult to have one administrator in the School District I can’t speak to. *Tab 12 lines 28-35*. I know that every time you are at a meeting it’s certainly not about him, or anything that he was doing, but at a construction meeting, or at an administrative meeting, that could certainly look like I was not following your directions. *Id.* So, that’s why the Board was asking for operational contact.” *Id.* She later said: “So, we were hoping for that. That would make it easier to continue.” *Id. at line 40. See also, Tab 13, Board’s letter.*

(a) The Construction Meetings

Mr. Williams said:

“Typically when we have a construction meeting regarding the development of a school or a facility. the administrators, the contractor and the architect will be at the table to look at the progress notes, to look at change orders, to discuss possible design alterations. The construction meeting which we’re asking for is part of operational contact, we don’t engage in liability issues, we don’t engage in job performance. It’s strictly about the progress of the site and it’s about proposed design changes that we might want to consider. The two supervisors for our district, Mr. Holmes and Mr. Wicks, their responsibility is the timeliness of the project completion. They don’t bare responsibility for problems that have developed under the contractors’ watchful eye. They simply help keep an eye on those pieces, as we all do, and need to gauge whether or not the contractor has met his obligations to the district.” *Tab 12 lines 91-102.*

PIC was previously told that the Building and Grounds Supervisor was working seven days a week, 12-16 hours per day because of the construction. *Tab 3, p. 1 ¶ 1.* That was the basis of the need for the 2nd job. *Id. and Tab 4 lines 23-38.* Now, PIC has been told that the Supervisors only have responsibility for the timeliness of project completion. *Tab 12, lines 97-99.*

If they are only responsible for the timeliness of project completion, then whether the contractors are on time, or not, is something that could be gauged by the progress notes, or learned from Mr. Holmes, or passed to Mr. Williams prior to the meeting. That indicates a lack of need for Ms. Wicks “operational contact” with her son.

If we assume responsibility means more than whether the construction is on time, that responsibility could relate to Mr. Wicks’ job performance. For example, if he neglected to mention that the project was falling behind schedule, then that relates to his performance—or lack thereof. If he is excessively

overbearing on the contractors to get the work done, and the contractors contest his actions, they would want to resolve it. If Ms. Wicks had “operational contact” with him, he could argue that he was doing what she told him to do. That may not inspire confidence in the contractors that they could get the matter fairly solved because of the closeness of the familial relationship. See, Lew v. Spencer, 468 F.2d 553 (CA5 Tex, 1972)(*nepotism policies or laws discourage favoritism; prevent emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other*).

(b) The Hurricane Situation

Ms. Wicks also gave a specific example of when she contacted him when Hurricane Irene occurred and the School was being used as a shelter. *Tab 12, at lines 115-121*. “When we had the hurricane and we were open for a shelter, I depended on George [Wicks] and Scott [Holmes] to go get things, and bring in the dumpster. *Id.* Those kinds of contacts would be difficult not to have in a smaller district where you’re all working together. It’s all hands on deck.” *Id.*

When asked why Mr. Williams was not supervising the Supervisors of Buildings and Grounds, he said: “I live down by the Killen’s Pond State Park so I was not in Smyrna on Sunday.” *Id. at lines 127-128*. Apparently, it was not such an emergency that “all hands were on deck” since he was not there. Moreover, Ms. Wicks subsequently said that: “Everyday it’s an all hands on deck because we have so many different issues.” *Id. at lines 141, 142*.

When asked if she could have told Mr. Holmes and let him take it from there, Ms. Wicks said: “But its just the not having the ability to do that would make it very difficult. *Id. at lines 146-148*. So, yes, I could go through Mr. Holmes all the time but it seems so artificial¹⁰ to have one administrator that you can’t talk to.” *Id.* She said: “If I couldn’t have operational contact there would be so many times that I could not get the dumpster, or--you know--all the things you do when you’re running the School District.” *Id. at lines 132-134*.

Ms. Wicks also was given a hypothetical of how Mr. Wicks’ work performance could come into play in the case of a hurricane, if she exercised her “operational contact.” *Id. at lines 155-160*. The scenario was that a hurricane occurs, “and a week later you do a debriefing or a recap of how did everything

¹⁰ It is interesting that Ms. Wicks now finds that having someone else handled matters pertaining to her son is “artificial.” That “artificiality” was never raised as a concern when she asked to have Mr. Williams supervise her son. Additionally, now Mr. Williams also says it is “artificial” for her not to talk to Mr. Wicks. PIC recognized the essence of that artificiality when it said: “Here, you can recuse, but the delegation to your Assistant may still raise public suspicion that the conduct appears improper. As it would appear improper, we then considered whether to grant a waiver.” A waiver was granted to allow conduct that would appear improper to occur based on their statements regarding the long hours, etc. Now, the failure to disclose that Mr. Lasana was being used as a resource, and her son’s prior application, now show she was in actual violation of the Code when that waiver was granted.

go, and everything went terrible: he was late, so he didn't get it done; it didn't happen; a foundation was lost; etc. *Id.* Then what happens with that review and decision making?" *Id.*

Ms. Wicks agreed she should not make that review or decision. *Id.* at 161. Yet, by having "operational contact" it again places her in a position where his performance is at her direction. If it were not properly performed, any inquiry into his lack of performance would have to directly involve her since she gave him directions. Also, if he excelled—or she thought he did—then her appraisal of his performance could affect his evaluation—just, as it would if he did not perform.

(c) The Board's Letter

The Board gave as an example: "the fact that the HVAC system in a building is not functioning properly is an operation contact unless the problem is attributable to something Mr. Wicks did, or failed to do." *Tab 13.*

First, regarding the HVAC system, the job description for Mr. Wicks does not include the requirement for troubleshooting and determining cause of action for maintaining HVAC and electrical systems. *Tab 6-B* That duty is in Mr. Holmes job description. *Tab 6-A* Ms. Wicks and Mr. Williams made sure they distinguished those duties. Ms. Wicks said they were "two very different jobs—one is HVAC and the other is Building and Grounds." *Tab 4, lines 100-105.* Mr. Williams said after he learned about Mr. Lasana's concern about the amount of work, he "began looking at splitting the job into two positions: (1) Supervisor of Facilities—HVAC/Lighting/Controls and (2) Supervisor of Facilities—Operations." *Tab 3 ¶¶ 1 and 2.* "The current supervisor would be 're-assigned' as the HVAC supervisor, and with some minor revisions we would post for a new Supervisor of Facilities—Operations." *Id.* Mr. Holmes would be the HVAC supervisor, and they would post a new announcement for the operations supervisor. *Id.* at ¶ 2.

As Mr. Holmes is the HVAC supervisor,¹¹ Ms. Wicks does not need "operational contact" with Mr. Wicks on those matters. If Mr. Holmes needs assistance, he can work it out with Mr. Wicks and his custodians.

Moreover, the Board's distinction that it is operational contact "unless the problem is attributable to something Mr. Wicks did, or failed to do, raise the same problems that occur with the construction "timeliness" responsibility and the "hurricane" duties. If Ms. Wicks tells him to make the HVAC system a lower priority, and things go bad because he delayed when he is the one who supposedly has the maintenance knowledge, it reflects on his judgment and performance. Moreover, the "operational contact" itself could result in her reviewing matters pertaining to his job, even unrelated to the issue that caused the "operational contact."

¹¹ The HVAC duties were about the only duties that make the two jobs different. .

That is exactly what occurred regarding the hiring of a substitute custodian. She told him to: "see if we can get this good contact working as a sub." *Tab 7*. That might be called an "operational contact," just like telling him the HVAC is not working properly. The problem was he responded not only that he had scheduled the teacher's husband for an interview, but he launched into other matters that relate to his own performance, e.g., how hard his is working; how little time he has, etc. *Id.* Additionally, he told her that an employee told him that the problem with the custodians, was not the substitutes, but it is the custodians who are not doing their job. *Id.* He is "the immediate Supervisor of all the Building chief custodians..." *Tab 6(B)*. If his employees are not performing, as the Supervisor it falls on him to act. As he is supposed to be supervised by Mr. Williams, he should report problems and progress to him. As Ms. Wicks is now in possession of that information, if she takes no action, it raises issues of preferential treatment because of their personal relationship. *Brice, supra*. (*MERB found the nephew received preferential treatment because his uncle participated in decision*). If she takes action, she is reviewing and disposing of the matter when she has a personal or private interest. That is a "no-win" situation, and is the essence of a conflict—being torn between the official duties and the personal interest.¹²

When PIC granted its previous waiver, it allowed conduct to occur that could appear improper. Now, Ms. Wicks wants to engage in conduct that is improper—reviewing and disposing of matters where she has a personal or private interest because to do so would "make it easier to continue."

"Undue hardship," means "more than required" or is "excessive." *Commission Op. No. 97-18 (citing Merriam Webster's Collegiate Dictionary, p. 1290 (10th ed. 1992))*.

First, the initial waiver was granted based on statements by Ms. Wicks and Mr. Williams about the hardship on the agency because of the difficulty in obtaining assistance because of all of the construction. *Tab 5, p. 1 and 6*. Now, PIC has been told that the Buildings and Grounds supervisors are only responsible for seeing that the work is done on time. *Tab 12, lines 98-99*. That eliminates that "undue hardship" for the agency.

The Board uses the HVAC situation as an example of the need for the request. As noted above, that is not Mr. Wicks' duty, and we will not base a waiver on a hypothetical that is not even part of his duties.

Ms. Wicks wants to deal directly with her son because "it's very difficult not being able to communicate with one administrator." *Id. at line 30; see also lines 147-148 and 240-241*. That is not an "undue hardship." It is the very hardship

¹² Now that Mr. Wicks has raised the issue about the custodians not performing, his Supervisor, Mr. Williams, is the proper person to look into this matter and work with Mr. Wicks on resolving issues pertaining to such alleged lack of performance.

that the statute imposes—that she may not review or dispose of matters where she has a personal or private interest. Beyond that, Ms. Wicks has been the Superintendent for 13 years. *Tab 13*. During that time, the Supervisor of Buildings and Grounds reported to her. e.g., *Tab 6(A)*. Yet, when she and Mr. Williams asked that he be permitted to assume her duties, relative to Mr. Wicks, not a word was said about any difficulties it would create if she recused. Her statements assured PIC that she could recuse. Even after she received the opinion, she did not come back to the Commission and say it was too difficult to work around her son. It was not until she had already violated the advice, and was notified that PIC knew she was not complying, that she said it was “too difficult.” That may be, at least in part, because she was not trying to work around her son, as show in the above facts. That means she has not yet tried stepping aside, so she cannot say, with authority, that it is “too difficult” to do what the law directs.

She also says it “would be easier to continue.” *Id. at line 40*. Of course it is easier not to recuse. If a waiver were granted every time someone said it would be “easier” not to follow the law, then the Code would have no meaning. The fact that she said easier “to continue,” is also indicative that she was not trying to work around her son.

The Board mentioned that Ms. Wicks is a “hands-on” manager. *Tab 13*. Mr. Williams said that was her management style, but that he is personally aware that other Superintendents handle things differently. *Tab 12, lines 283-287*.

Her management style is not a basis for a waiver. As demonstrated with specific examples above there are ways to address those situations without her having “operational contact” with her son. Any official who is restricted from reviewing and disposing of certain matters has to change how they normally “operate”. Again, that does not make it an “undue hardship” because it is the very hardship the law imposes.

The request for an “operational contact” waiver is denied as there is no “undue hardship.” .

(2) Literal Application of the Law is Necessary to Serve the Public Purpose

Courts have noted the purposes for barring relatives from reviewing or disposing of matters pertaining to their close relatives. *Nepotism in Public Service*, 11 ALR 4th 826 (19??). It is to discourage favoritism; prevent emergence of disciplinary problems, inhibit personal and professional cliques in which the familial relatives side with each other. *Id.* (citing *Lew v. Spencer*, 468 F.2d 553 (CA5 Tex, 1972); *conformed to* (SD Tex., 369 F. Supp. 1219; *aff'd*. 490 F.2d 93 (CA5 Tex., 1973)(spouses could not teach in same College Department).

It also is to provide a wider cross section of the community served by the School District, and allows for debate of issues at arm's length rather than under any possible inhibition that might exist because of an intimate relationship. *Id.* (citing *Rosenstock v. Scaringe*, 387 NYS 2d 716 (3d Dept., 1976), *aff'd*, 357 N.E. 2d 347). Such bars, generally, tend to make for better efficiency in public office. *Id.* (citing *Backman v. Bateman*, 263 P.2d 561 (Ut., 1953). Such close relationships are bound to have a deleterious effect on the morale of other employees. *Id.* (citing *Keckeisen v. Independent School Dist.* (CA8 Minn., 1975), *cert. den.*, 423 U.S. 833); see also, *Id.* citing *Espinoza v. Thoma*, 580 F.2d 346 (Neb., 1975)(employment of family relatives by same employer could impede efficiency and cause morale problems).

Ms. Wicks now says it is "too difficult" to try to work around him. She should remember that she told him about the job; the recommendation was from a panel of persons that report to her; and the School Board, of which she is a member, approved the hiring knowing he was her son. That hiring alone was enough for a member of the public to suspect the Code was violated. Subsequently, as Ms. Wicks continued to participate in matters related to him, another citizen came forward, with documents showing non-compliance.¹³

If Ms. Wicks engaged in operational contact with him, it would defeat the public purpose that has already suffered. It is enough that she has a waiver allowing the Assistant Superintendent to have oversight of him—that, by itself, appears improper. We will go no further.

III. Conclusion

(A) Findings:

(1) We find that Ms. Wicks did not exercise good faith reliance on the Commission's opinion issued in February because she did not fully disclose material facts. 29 Del. C. § 5807(a) and (c). As a consequence, she is not only reprimanded, but she is not protected from disciplinary action or complaint regarding any conduct she engaged in from the time of that opinion until the time of this opinion.

¹³ At the 2d meeting with PIC, Mr. Williams stated: "I don't want someone sitting in an office somewhere seeing Mr. Wicks drive up, and say 'hello' to Ms. Wicks as she walks by, and then report her for some impropriety." Tab 12, lines 294-298. That has not happened in the more than 4 months since she was issued the opinion. Rather, the information PIC received was not some frivolous claim, but specific and accurate information about Ms. Wicks dealing with her son; about her not informing the staff of her restrictions, etc. When it initially granted the waiver, it specifically noted that because the opinion would be a matter of public record it would instill the public's confidence because it would know of the restrictions. Tab 5, p. 7. The fact that the information has not been frivolous is some indication that the public read and understood the restrictions.

(2) Based on the additional facts learned after the February opinion, we find that Ms. Wicks did violate the restriction against reviewing and disposing of matters when she gave input to the job description, participated in workshops where the duties were discussed, etc. That is because contrary to the original opinion, where the Commission held there was no violation because she did not know of his interest in the job, those events occurred after he had applied for, but not been accepted for a nearly identical position.

(3) Based on the additional facts learned after the February opinion, we find that the justification given for creating the position, e.g., long hours, every day, etc., because of the construction, was insufficient to establish an undue hardship on the agency, as there were other means available and being used (Clint Lasana), and the initial description of the duties involved in the construction, long hours, etc., are inconsistent with the subsequent information that the Supervisor is only responsible for timeliness.

(4) Ms. Wicks has never “fully disclosed” the information pertaining to her knowledge of her son’s interest from the time of the first job.

(5) Ms. Wicks has never “fully disclosed” the situation pertaining to the consultant contract with Mr. Lasana.

(6) The facts do not show an undue hardship on the agency that would permit Ms. Wicks to have an “operational control” waiver. It would be absolutely contrary to the public purpose to grant that waiver. Our previous waiver, that Mr. Williams is to supervise Mr. Wicks, remains in effect for the present..

(B) Advice to be followed

(1) In her official capacity, Ms. Wicks may not review or dispose of any matter pertaining to her son, George Wicks. “Any” is all inclusive. “Matter” means “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7). Any “matter” pertaining to Mr. Wicks in his official capacity should be referred to Mr. Patrik Williams. If he is not available, it should be referred to Mr. Scott Holmes. Those “matters” may not be discussed with Ms. Wicks. If the “matter” cannot be resolved, Mr. Williams is to go to the School Board if necessary. **Ex. Mr. Wicks’ e-mail to Ms. Wicks said some of the custodians are not performing their jobs. Mr. Williams is to work with Mr. Wicks to identify if that is correct, and if so, take any appropriate action, without involving Ms. Wicks.**

(2) Ms. Wicks is to provide the School Board, her staff, and all School District employees with the above restriction, without any self-interpretation. As Ms. Wicks prefers deadlines, they should be informed by e-mail **within 2 days of the date of this opinion**, with Commission Counsel copied so that PIC will know they were notified and know what information was in the notice. Her e-mail

address is: janet.wright@state.de.us Additionally, in that same time frame, she is to forward, by e-mail, to all Board members, the entire opinion because it addresses, among other things, why PIC denied the Board's request for an "operational contact" waiver.

(3) Ms. Wicks must "recuse from the outset" and not make even "neutral" and "unbiased" statements. *Beebe, supra*. Even "indirect" and "unsubstantial" participation is precluded. *Prison Health v. State*, C.A. No. 13,010, V.C. Hartnett (June 29, 1993). If a matter comes to her attention, she is to refer it to Mr. Williams without comment. If at a Board meeting, staff meeting, etc., any issue arises regarding her son, she is not only to recuse, but to leave the room because courts have held that when the purpose is to instill public confidence in the government, improper conduct may include even "passive action." *United States v. Schaltebrand*, 11th Cir., 922 F.2d 1565 (1991). The Court said that "mere presence can possibly influence government colleagues." *Tab 5, p. 4*. In the context of nepotism, it is to inhibit personal and professional cliques in which the familial relatives side with each other. **Ex: Monthly Custodian Meetings. We understand that Ms. Wicks and Mr. Williams normally attend. As the activities of the custodians are directly the responsibility of Mr. Wicks, Ms. Wicks should not participate in those meetings.**

(3) Ms. Wicks is to provide **all** details regarding the construction consultant contract with Mr. Lasana, e.g., any written contract, information on when he left State employment and when he received the contract, what matters he has worked on, what is his current status, etc. Ms. Wicks is to provide that information to Commission Counsel **within 10 work days of receiving this opinion.**

(4) Ms. Wicks is to provide **all** details of her knowledge of her son's interest in the first facilities job, including when she knew, and all details pertaining to her involvement in any manner as it relates to that job, e.g., reviewing the job description, writing the job description, discussing the position with the Board, the Assistant Superintendent or others at the time, any records of calls, any e-mails or other documents or recollection of discussions with any person regarding his application for the job; whether the members of that panel knew he was Ms. Wicks' son, whether any member of that panel is a personal friend of Ms. Wicks' or of her son, George Wicks, and the details pertaining to that relationship, and any other details she recalls regarding that position, its applicants, etc. Ms. Wicks is to provide that information **within 20 work days of receiving this opinion.**

(5) Ms. Wicks is to report back to this Commission **within 30 work days of this date of this opinion** on how she has achieved compliance through recusal.

(6) If Ms. Wicks does not understand the restrictions, or any part of this opinion, she is to seek advice from this Commission, and not self-interpret or use other sources. Under a similar statute, Courts have held that if the official seeks advice from sources other than the statutory source authorized by law to issue conflict opinions, they will not be protected against a disciplinary action or complaint. PIC Ethics Bulletin 009, ¶¶ 6, 7, 8.

FOR THE COMMISSION



**Barbara H. Green, Chair
Public Integrity Commission**

Date: November 18, 2011



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February 2, 2012

The Honorable Anthony J. Deluca
Chair, Senate Executive Committee
Legislative Hall
P.O. Box 1401
Dover, DE 19901

Senate Bill 141 – Changes to Lobbying Law

Dear Senator DeLuca:

This concerns Senate Bill 141, currently assigned to the Senate Executive Committee. If passed, it would exempt more lobbyists from registering; provide less information than is now available to officials and the public; create enforcement difficulties; and be contrary to the purpose of lobbying registration laws.

The U. S. Supreme Court ruled that the purpose of lobbyist registration is to identify “special interest groups” having contact with government officials so the public and government officials know what interests a lobbyist represents. United States v. Harriss, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954)

Because S.B. 141 eliminates registration for many special interest groups, it would deny the public and State officials that information.

At present, anyone who promotes, advocates, opposes, etc., legislative or administrative action must register if they:

(1) received or expect to receive compensation in whole or in part from any person. 29 Del. C. § 5831(a)(5)(a). At present, any compensation in connection with lobbying triggers registration. S.B. 141 sets a \$1,000 threshold per quarter in either compensation, reimbursement, or the combination thereof to trigger registration. S.B. 141, Section 5 (a)(1).

As the purpose is so officials and the public know who the special interest groups are, they would be denied information currently available on such groups

based solely on an arbitrary \$1,000 per quarter. The U.S. Supreme Court did not focus on money. It is focused on access. S.B. 141's focus seems to be on money and exemptions, not who is "having contact with government officials so the public and government officials know what interests a lobbyist represents."

The \$1,000 is arbitrary. For example, a lobbyist who received \$999 in a quarter would sit across from a lobbyist who received \$1,001, both espousing their arguments for or against an action. Yet, the State official and the public would not know one is a lobbyist, or what organization they represent, just because of a \$2.00 difference.

Further, the arbitrary \$1,000 exemption could only be enforced by an audit to know if it were met. However, under S.B. 141 they would not register so records could not be audited even if the Public Integrity Commission had staff trained as auditors. They would not know what organization to audit without attending every General Assembly and State agency meeting to see who is there, and then try to find out what organization is represented, followed by auditing the organization. The present requirement is easily enforced—either the lobbyist is, or is not, compensated. No auditing skills are required.

(2) are authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action. 29 Del. C. § 5831(a)(5)(b). S.B. 141 eliminates this category completely. It ignores the fact that most lobbyists registered in Delaware fall within this category because they volunteer to act for an organization and receive no pay, reimbursement, etc. The mere fact they are not paid does not mean they are not representing a "special interest group."¹ Presently, by requiring such registration, not only is the public informed of who is lobbying, but the records also show most lobbyists in Delaware are not paid. That information is just as important as who is paid because it reassures the public that the General Assembly, and State agencies, can be equally accessed by organizations that do not have the financial wherewithal of organizations that can afford to pay lobbyists or afford to expend funds on General Assembly members or other State officers or employees.

To the extent S.B. 141 is meant to target the "evil" of paid lobbyists, by only making them register, in interpreting a federal statute similar to Delaware's, the U.S. Supreme Court recognized that there is a class of "entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views . . . many of whom serve a useful and perfectly legitimate purpose in expressing

¹ Such organizations as the AARP, and League of Women Voters, to give just two examples, primarily use unpaid volunteers. That does not mean the organization is not a "special interest group."

the views and interpretations . . . They will likewise be required to register . . . ”
United States v. Harriss, 347 U.S. 612, 621, 74 S.Ct. 808, 814 (1954).

(3) expend any funds during the calendar year on direct expenditures on members of the General Assembly or State employees and officials. 29 *Del. C. § 5831(a)(5)(c)*. Under present law, if such funds are spent, not only must they register, but such lobbyists/organizations are not entitled to any statutory exemption. 29 *Del. C. § 5831(b)*. S.B. 141 eliminates those two mandates completely. Beyond that, current law requires lobbyists to name any official who receives a thing of value of more than \$50 from lobbyists. S.B. 141 eliminates the requirement to separately list gifts of more than \$50 and identify those officials.

Most troublesome are the exemptions that can be created by the lobbyists themselves:

(1) Appearances before a legislative committee **at the specific request of a regulated lobbyist**, if the witness notifies the committee that the witness is testifying at the request of the regulated lobbyist; and

(2) appearances before an executive unit **at the specific request of a regulated lobbyist**, if the witness notifies the executive unit that the witness is testifying at the request of the regulated lobbyist. *S.B. 141, Section 3 (c)(3)*.

If the public may already suspect State activities are taking place in “back rooms”—even when they are not—to have the lobbyists create their own exemption flies in the face of building the public’s confidence. Further, since phone calls could be made behind closed doors, it bars the ability to monitor or enforce the exemption, unless PIC has someone present at every State meeting to see who is testifying and then find out if that person asked to testify, and is entitled to the exemption. The public could suspect that lobbyists control not only whether they have to register, but also who gets to testify before the State. If they carry enough influence to convince a single official to let them testify, and at the same time avoid registration, how could the public purpose on open information about special interest groups be served?

Arbitrary and Superfluous Exemptions: S.B. 141 includes other exemptions that appear to be arbitrary. For example, it exempts any: “officer, director, member, or employee of an association engaged exclusively in representing counties or municipal corporations.” *S.B. 141 Section 3(c)(5)*. That may mean labor associations may not have to register. If those associations are lobbying for State action pertaining to tax-paid government employees, why would the public not want to know about their special interest group? Moreover, why would an association for local government employees be exempt but those for State employees would not? Similarly, it exempts any: “trustee, an administrator, or a faculty member of a nonprofit independent college or university in the state, provided the official duties of the individual do not consist

primarily of attempting to influence legislative action or executive action.” S.B. 141 Section 3(c)(7). Again, as a point of equity, why would that nonprofit be exempt when other nonprofits are not? Certainly, other non-profits would wonder why they are not exempt, as would the public.

Other exemptions are superfluous. Current law says the activity must be “in connection with lobbying” before registration is triggered. Nowhere in S.B. 141 is that phrased included. It does propose at least 2 exemptions that are not “in connection with lobbying”:

(1) “An elementary, secondary, or postsecondary school student or student organization that communicates as part of a course or student activity is not subject to the registration requirements,” S.B. 141, Section 3(c)(4) and

(2) “Actions of a member of the news media, to the extent the actions are in the ordinary course of gathering and disseminating news or making editorial comment to the general public.” S.B. 141, Section 3(c)(6).

Neither schools, or student organizations, or news media gathering and disseminating news or making editorial comment to the general public have ever been told to register. Thus, nothing suggests these are included because of some type of abuse of the registration law. However, by proposing these 2 specific exemptions, it could appear that other organizations would not be entitled to an exception, even if their conduct also is not “in connection with lobbying.”

The U.S. Supreme Court has noted that lobbying and campaign finance laws must have a connection between the conduct, and the government’s interest in what they must report. *Harriss, supra*, 347 U.S. at 619, 74 S.Ct. at 813; *cf.*, *Buckley v. Valeo*, 424 U.S. 1, 65 & 80, 46 L.Ed. 2d 659, 713 & 722(1976)(*reporting of campaign contributions must have “relevant correlation” or “substantial relation” between the government’s interest in disclosure and the information required.*)” S.B. 141 eliminates “in connection with lobbying” which seems to be a necessary phrase, and then only gives these specific exemptions for schools and the media. The law should apply equally to any group or organization whose activities are not “in connection with lobbying.”

Reporting of Expenditures: At present, the public is entitled to know if a lobbyist expends any funds on members of the General Assembly or State employees or officials. 29 Del. C. § 5835(b). If it is greater than \$50, the official must be identified. 29 Del. C. § 5835(c). Also, present law requires the lobbyist to affirm that amount with the official. *Id.* S.B. 141 eliminates the mandate to disclose the identity if the value exceeds \$50, and to affirm the cost of gifts. See, S.B. 141 §5835. *Reports by Lobbyists.*

Not only does that deny the public information it now has access to, it also may impact on a public officer’s ability to file their financial disclosure report.

If officials are not informed of the amount, they will not know if they must report that item on their financial disclosure report, as they would not know the value. Also, PIC would have no means of determining if a discrepancy exists what the lobbyist and the official report without, again, conducting an investigation and/or audit. Presently, when the lobbyist reports the name of an official who receives something of value greater than \$50, that information is compared to the public officer's financial disclosure report. When there are discrepancies, which does sometimes occur, both the lobbyists and the public officer are notified by PIC and PIC insures a resolution.

Ironically, while not required to name public officials who are given things of monetary value, under S.B. 141 lobbyists must report the names of their witnesses, and the fees and expenses paid to each. *S. B. 141 § 5835 (c) (1)-(5)*. If media reporting is any indication, the public is interested in knowing what **officials receive from lobbyists**. The present law allows the public to know this information and helps insure they know that the "pay-to-play" attitude is not prevalent in Delaware because most lobbyists do not make such direct expenditures. Of 360 lobbyists representing 962 organizations, only about 40 lobbyists have made such direct expenditures. Knowing both sides of the equation is more informative than knowing only one side.

S.B. 141 also requires lobbyists to report their private compensation; office expenses; professional and technical research and assistance; and publications and advertising that expressly encourage communication with one or more officials or employers. See, *S.B. 141 §5835. Reports by Lobbyists*.

Costs Associated with that Reporting under S.B. 141. Neither the Public Integrity Commission members nor its two person staff, could determine compliance with that information without an audit. Yet none have auditing expertise. In fact, S.B. 141 provides that PIC may conduct an annual public drawing of which organization to audit. *S.B. 141 §5837(b)*. PIC would have to hire an independent contractor to perform such work. PIC's current operating budget is \$30,100 which must be used to support its jurisdiction over more than 48,000 people at the State level, and the employees and officials of 50 local governments. That means it only has the resources to spend less than a penny per person to perform its ethics for executive branch and local government employees and officials; financial disclosure for all 3 branches; dual compensation for State and local employees and officials, and lobbying duties.

To use tax dollars for this type of audit seems like an ineffective use of funds when those costs would be incurred on information that goes beyond what the U.S. Supreme Court has identified as the purpose of registration--letting the public and officials know who represents a "special interest group." Also, some of the information could misinform the public. For example, the salary of a lobbyist, the amount they spend on research, advertising, etc., only indicates who has money, and who is willing to spend it. It does not address access. For

example, organizations that use volunteers do not pay salaries, but many times these volunteers may have more time to spend at hearings, or the ability to split up and attend a variety of hearings, which a lone lobbyist may not, even though they are paid. Thus, those volunteers could end up spending more time in direct communication with public officials, yet would never register. Moreover, the client's willingness to spend money may dictate how much time the paid lobbyist can spend in attending such hearings, regardless of salary.

The proposed language, by focusing on paid lobbyists, ignores that organizations using volunteers experience a financial benefit. That is because they are saving the costs of salaries, etc. Courts have held that a "costs savings" is a financial benefit. See, e.g., *Davidson v. Oregon Government Ethics Commission*, 712 P. 2d 87 (Ore. Supr., 1985). Yet, S.B. 141 eliminates registration of volunteers, who may have the most access, and of organizations that experience a financial benefit because of those volunteer lobbyists. Certainly, those organizations could have office costs, postage costs, etc. S.B. 141 would make taxpayers foot the bill to audit a paid lobbyist but not other special interest groups that may not pay a salary, but certainly have costs associated with their organization's lobbying efforts, and at the same time are obtaining a financial benefit.

Finally, publishing the salaries, etc., could discourage groups that do not have the same amount of resources. They may look at the salary of a paid lobbyist and think they do not have a chance against the "big guns." Presently, as no one's salary is known, the lobbyists sitting across from each other may feel more equal in their opportunity to speak. Moreover, the public may suspect the salary is indicative of the influence a particular lobbyist carries, when in fact, a lobbyist receiving a large salary from an out-of-State corporation might seldom come to Dover, which may limit their influence. Alternatively, if it were on a matter such as a health issue, the volunteer who has direct and personal experience in that field may be able to provide something that a contract lobbyist could not offer absent paying for a witness. Again, the focus should be on access, and keeping officials and the public informed of the access of special interest groups, regardless of salary, costs associated with operating of office, etc. Alternatively, if the focus is on finance, then the information should be filed by all special interest groups, including the value of the financial benefit received from using volunteers.

Other Issues:

(a) Jurisdiction and Expertise: S.B. 141 would have PIC decide if an act by a lobbyist is bribery, coercion, etc. *S.B. 141 Section 9 §5838*. Those are criminal laws. PIC has no jurisdiction for just that reason—it is a criminal law in which PIC has no expertise. It also does not have the staff resources to investigate such claims. Those laws are administered by the Department of Justice, with an elected leader who would be responsible to the public in making

decisions not only about the elements of those crimes but also about prosecution, plea agreements, etc.—not appointees to a Commission over whom the public has no input into who serves on the Commission, and could not vote them out of office if dissatisfied with their determination of such criminal acts.

(b) Conflicts of Interests for Lobbyists and Associated Costs: S.B. 141 includes conflicts of interest for lobbyists, e.g., may not lobby on the subject matter if the principal's interest are directly adverse to the interests of another principal...unless the lobbyist believes they can provide competent and diligent representation to each affected principal; provides notice to the principals; and they provide informed consent. *S.B. 141 § 5838*. That has nothing to do with the lobbying registration purposes. Lobbying registration laws are meant to **serve a public purpose**—not the individual clients of a private lobbyist. If a lobbyist does not perform pursuant to a private contract with an employer, then contractual compliance should be between the parties, not through a taxpayer-funded investigation of private business conduct.

(c) Other costs associated with S.B. 141 and effective date

The bill also would require a significant upgrade to PIC's lobbying and financial disclosure database. In fact, it would require a totally new program be created. It says: "On or before May 1, 2012, the Public Integrity Commission shall make all computerized data from financial reports required by this section available in a fully searchable, sortable, online database that the public can use to track lobbyist expenditures and activities." *S.B. 141, Section 7(b)*. At present, the lobbyists expense reports are on PIC's website, but are not searchable.

PIC is working with the Government Information Center (GIC) regarding upgrading its system, but a dollar amount has yet been ascertained. However, S.B. 141, and [H.B. 233](#) which would require lobbyists to disclose any private boards and councils of which they are a Board member, will certainly have State costs associated with those changes, whether the funds are from PIC's \$30,100 operating budget or some other State source, such as GIC. Further, based on the Governor's State of the State address, he also would like to see lobbyists include such things as the bill numbers they are lobbying on with a hyperlink to the bill. That, too, would require a database change.

One problem with the current system is that it was created in 2001 before some of the current technology that could more easily accommodate changes existed, e.g., searchable database. Over those years, it has been patched piecemeal by legislation as it was enacted. While S.B. 141 provides that the new database be in effect on or before May 1, 2012, if that date were changed to sometime after the General Assembly goes out of session, then any other legislation that gets enacted could be incorporated with the upgrade without again having to piecemeal the changes.

Summary of Concerns

S.B. 141 is directly contrary to the public purpose of lobbying registration laws. It defeats that purpose by eliminating the requirement for many special interest groups to register and decreases the information that the public and officials presently have on such special interest groups. It contains provisions that would unnecessarily cost taxpayers' dollars on investigating matters between private parties, and in conducting audits.

While this letter is lengthy, these are not all of the concerns regarding this legislation. I would be pleased to meet with you and the Committee, if you would like additional information.

Respectfully Submitted,



Janet A. Wright, Esq.
Public Integrity Commission Counsel

cc: Senate Executive Committee Members

The Honorable Patricia M. Blevins
The Honorable Margaret Rose Henry
The Honorable Harris B. McDowell
The Honorable F. Gary Simpson
The Honorable Liane M. Sorenson

Sponsors of S.B. 141

The Honorable Michael S. Katz
The Honorable George H. Bunting
The Honorable Karen E. Peterson
The Honorable David P. Sokola
The Honorable Deborah Hudson

**BEFORE THE STATE PUBLIC INTEGRITY COMMISSION
IN AND FOR THE STATE OF DELAWARE**

In Re: DIANE HANSON,

Respondent.

Complaint No. 10-31

MOTION TO STAY

Decision by: *Barbara Green, Chair; William Dailey, Vice Chair;
Commissioners Bernadette Winston, Mark Dunkle, Esq., and Lisa Lessner,*

I. Procedural Posture

A complaint was filed against Diane Hanson, Mayor and Town Commissioner of the Town of Dewey Beach (hereinafter “Respondent”). The Commission reviewed the complaint, and assuming all alleged facts as true, found probable cause to believe a violation may have occurred.¹ Respondent moved to stay the proceedings until the United States Supreme Court renders a decision interpreting a Nevada case. *Nevada Commission on Ethics v. Carrigan*, 236 P.3d 616 (Nev. 2010), cert. granted. (U.S. Supreme Court, Jan 7 2011)(No. 10-568).² She argued that decision would likely be dispositive and controlling as to the validity of Delaware’s Code of Conduct, and may obviate the need for further action in this case by finding that the type of statute at issue in her case is unconstitutional. *Respondent’s Motion to Stay*, ¶¶ 6, 7. (Tab 2).

We deny the motion to stay for the following reasons.

II. Application of Law to Facts:

The issues in *Carrigan* were:

(1) Is a vote by a local elected official protected speech under the First Amendment? Even assuming the U.S. Supreme Court finds it is, *Carrigan*³ does not say speech can never be regulated; nor does it say an elected official can never be required to recuse. In fact, it specifically says otherwise: “We do not dispute that requiring recusal under certain circumstances is appropriate and related to addressing conflict of interest concerns.” *Carrigan* at 7, fn. 5. In fact, Respondent’s Brief to the U.S. Supreme Court argues that the U.S. Supreme

¹ *In re Hanson*, Commission Op. No. 10-31, Preliminary Hearing Decision (November 22, 2010).

² Tab 1. www.supremecourt.gov case calendar.

³ Tab 3. While the reported opinion is 236 P.3d 616 (Nev. 2010), this opinion cites to the advance opinion. *Carrigan v. Commission on Ethics of the State of Nevada*, No. 51920 (Nev., July. 29, 2010) attached.

Court should not review the issue at this time, because the Carrigan decision was limited to just a part of the Nevada law, and the Court should wait until other constitutional challenges associated with the law are heard. Nevada Commission on Ethics v. Carrigan, U.S. Supr. Ct. No. 10-568, Respondent's Brief in Opposition, November 29, 2010 p. 25.⁴ As the U.S. Supreme Court decision would not be dispositive of all conflict laws regulating speech, this is not a basis for a stay. This is significant when we consider that the Nevada conflict law differs from the Delaware law in this case, as discussed in paragraph (3) below.

(2) If it is protected speech and is regulated, what standard of review should apply to determine if the regulation is unconstitutional? Carrigan used the strict scrutiny standard. Even if the U.S. Supreme Court adopts the strict scrutiny standard, this Commission could not decide that Delaware's law does not meet that standard and then conclude it is unconstitutional. This Commission has no authority to entertain constitutional issues. The statute only confers authority to administer and implement "this chapter"—29 Del. C., chapter 58. 29 Del. C. § 5809(2) and § 5810(a). Moreover, Courts have recognized that constitutional issues are within the courts' expertise, not the expertise of administrative agencies. See, e.g., Plano v. Baker, 504 F.2d 595, 599(2d Cir., 1974); Matters v. City of Ames, 219 N.W. 2d 718 (Iowa, 1974); Hayes v. Cape Henlopen School District, 341 F. Supp. 823, 833 (D. Del., 1972). At the Commission meeting, it was argued that Respondent was trying to save the Commission from going through its efforts twice, and also avoid two proceedings herself. Regardless of the U.S. Supreme Court decision, this Commission would not have another hearing to decide constitutionality as it has no authority to do so. Thus, neither this Commission nor the Respondent would suffer that consequence. As this Commission cannot decide constitutional issues, a U.S. Supreme Court decision on the constitutional standard of review is not a basis for a stay.

(3) Using the strict scrutiny standard, is the provision in the Nevada statute overbroad? The Nevada law in question is:

"A public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by...[his] commitment in a private capacity to the interest of others. Carrigan, p. 8 (emphasis by Court).

Nevada law gives the term 5 meanings. One, paragraph (e), defines it as: "Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." *Id.* (emphasis by Court).

⁴ www.scotusblog.com/case-files/cases/nevada-commission-on-ethics-v-carrigan/

Based on that provision, the Nevada Ethics Commission concluded Mr. Carrigan should not have voted on a land use decision because his “longtime professional and personal friend” who was also his campaign manager, was an advisor to the company that was seeking to develop a hotel/casino project. *Id.* at p. 3. The Carrigan Court said: “Central to this controversy is paragraph (e).” *Id.* at p.9. Under the strict scrutiny standard, the Nevada Supreme Court found: “The definition ...fails to sufficiently describe what relationships are included.” *Id.* at p. 15 (*emphasis added*). It concluded it was unconstitutionally overbroad. *Id.* That is the law the U.S. Supreme Court will decide on.

Respondent implies that the Nevada law and the Delaware law are the same “type of statute,” because the Nevada law uses the phrase “independence of judgment of a reasonable person.” *Motion* ¶ 5. It is true that Delaware law requires recusal if a personal or private interest would “tend to impair a person’s independence of judgment.” 29 Del. C. § 5805(a)(1). It is also true that the test of whether there is an appearance of impropriety uses the “reasonable” standard. *Commission Op. No. 10-31, Preliminary Hearing Decision (citing In re Williams, 701 A.2d 825 (Del., 1997))*. However, those are not the terms challenged in Carrigan. The Court was clear: “Central to this controversy is paragraph (e).” “The definition” is “overbroad.”

Respondent also suggest the cases are factually similar because in Carrigan it was a local elected official who voted on a land use issue. It is true that Respondent is a local elected official and participated in a land use issue. However, the complaint against her does not allege she was committed “to the interest of others.” In summary, it alleges she had “a personal or private interest” because of her private properties and because a developer named her individually as a defendant in a federal case, meaning she could be found personally liable. While that suit was pending, she participated in a decision that would apply retroactively to that developer’s claim in the very same suit.

As the law and facts are not the same, and the U.S. Supreme Court is *not* deciding if all conflict laws are unconstitutional, its decision would not be dispositive on the constitutionality of the Delaware provision, and therefore not a basis for a stay.

Delaware Courts have granted motions to stay until a federal case was decided, but it was an identical action between the same parties, interpreting the same law. Local Union 199, Laborers’ Int’l Union v. Plant, 297 A.2d 37 (Del., 1972). The Nevada case is not identical in law or fact; nor are the parties the same.

Respondent also argues that a stay is the most efficient means to manage the case, and the benefits of a continuance pending the U.S. Supreme Court case outweigh the costs. *Motion* ¶ 7. However, as we have noted, the U.S. Supreme Court decision would not insure a benefit for all the reasons above, and as far as costs, there would be no additional proceeding before this Commission on constitutionality regardless of the U.S. Supreme Court ruling.

Respondent also argues a stay will cause little or no harm, even if the U.S. Supreme Court reverses the Nevada Supreme Court. *Motion* ¶ 8. She argued it would not harm the public interest, and a delay will not be indefinite as any decisions will be issued by the time the U.S. Supreme Court recesses for the summer.⁵ However, at the Commission meeting, it was conceded that the time was an estimate.

The complaint against Respondent was filed October 1, 2010. The Commission held a preliminary hearing on October 15, 2010, and issued its written opinion on November 22, 2010. Respondent was given 20 days to respond. She requested, and received, an extension. Because she changed attorneys, another extension was requested. It was granted. It has now been nearly three months since the Commission's decision, and Respondent now basically seeks another extension until the U.S. Supreme Court decides, which could result in approximately a 7 month delay. At the Commission meeting, it was stated that if a delay would have some negative impact, it probably would be on Respondent, because she "is anxious to have her day and to argue her case." At the same time, it has been widely published that the Town is trying to reach an agreement with the developer in the federal suit. The Code of Conduct is meant to instill the public's confidence in the conduct of its officials. *29 Del. C. § 5802(1)*. Having a resolution, rather than a delay, would not only give Respondent "her day," but also would benefit the public interest with a speedier resolution.

The Respondent identifies no irreparable harm to her if the stay is denied. In fact, she conceded that if a delay would have a negative impact, it would probably be on her. Moreover, there is another interested party, the complainant, who likely would want the matter resolved. Beyond that, as the Code of Conduct is to instill public confidence, there is a public interest in seeing it resolved.

III. Conclusion

Based on the above law and facts, the stay is denied.

It is so ordered on this 28th of February 2011.

FOR THE PUBLIC INTEGRITY COMMISSION



Barbara Green, Chair
State Public Integrity Commission

⁵ Tab 1. Oral argument is scheduled for April 27, 2011.