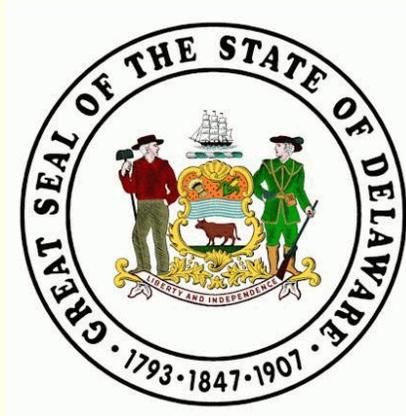


State of Delaware

State Public Integrity Commission



ANNUAL REPORT

March 1, 2002

John E. Burris, Chair
Arthur G. Connolly, Jr., Vice-Chair

Zenaida Otero Gephardt *Mary Jane Willis*
Paul E. Ellis *Arthur V. Episcopo*
Clifton H. Hubbard

STATE PUBLIC INTEGRITY COMMISSION

Annual Report - March 1, 2002

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STATE PUBLIC INTEGRITY COMMISSION

HISTORY AND BACKGROUND

I. Laws Administered by the Public Integrity Commission

The State Public Integrity Commission is an independent agency which administers and implements the “Laws Regulating the Conduct of Officers and Employees of the State.”¹ Those laws govern the ethical conduct of Executive Branch officials and employees; the disclosure of the personal financial interests of public officers in the Executive, Legislative and Judicial Branches; the Compensation policy for State employees holding dual government positions; and the registration and expenditure reporting of lobbyists.

Persons who are subject to the law can obtain advisory opinions from the Commission, based on the particular facts of their situation. *29 Del. C. § 5807(c)*. If the proposed conduct would violate the Code, the Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose or there is an undue hardship on the agency or the employee. *29 Del. C. § 5807(a)*. If they fully disclose the facts to the Commission, and in good faith rely on the Commission’s opinion, or its waiver, they are protected against disciplinary action. *29 Del. C. § 5807(a) and (c)*.

If a complaint is filed alleging a violation of the law, the Commission, after determining that it has jurisdiction, may conduct a hearing. *29 Del. C. § 5810(a)*. If, by clear and convincing evidence, a violation is found, the Commission may impose administrative disciplinary action. *29 Del. C. § 5810(d)*. Further, it may refer substantial evidence of any criminal law to the appropriate

¹ Delaware Code, Title 29, Chapter 58.

federal or State authorities. 29 Del. C. § 5810(h)(2).

Beyond providing specific guidance through advisory opinions, and acting on complaints, the Commission acts to aid those who are subject to the law in complying by providing training classes; publishing synopses of its opinions; and issuing Ethics Bulletins. It also has established and maintains a web site as another means of providing information not only to those subject to the law, but also to the public. Its web site is: **www.state.de.us/pic**.

A more detailed description of the laws, and the purposes of the legislation, are given below.

A. Code of Conduct

Since its beginning as the State Ethics Commission in 1991, the Commission has administered the Code of Conduct. The Code governs not only the ethical conduct of State employees, officers and honorary officials in the Executive Branch, but also the conduct of local government officials, unless the local government adopts a code of conduct at least as stringent as the State statute.² The legislative purpose of the code is to insure government employees, officers and officials conduct themselves in a manner that instills the public's respect and confidence. 29 Del. C. § 5802(1). The law provides rules to guide the conduct of employees, officers and honorary officials, and sets forth disciplinary mechanisms to insure uniform ethical standards. 29 Del. C. § 5802(2).

The rules of conduct restrict State employees and officials from: (1) participating in State matters if there is a personal or private interest which would impair judgment in performing official duties; (2) representing or assisting a private enterprise before the State; (3) contracting with the State; and (4) representing or assisting a private enterprise before the State on certain matters for 2 years after leaving State employment. 29 Del. C. § 5805. Violating those rules may result in not only administrative disciplinary action, but also criminal prosecution. 29 Del. C. § 5805(f) and § 5810.

²68 Del. Laws c. 433 § 1.

The Code also limits acceptance of gifts, other employment, compensation, or anything of monetary value. 29 Del. C. § 5806(b). It specifically prohibits the use of public office for private gain or unwarranted privileges, and the improper use or improper disclosure of confidential information. 29 Del. C. § 5806(e) thru § 5806(g). Violations of those provisions may result in administrative disciplinary action.

Administrative disciplinary action may consist of: (1) a letter of reprimand or censure to any person who violates the Code of Conduct; (2) removal, suspension, demotion, or other appropriate disciplinary action for persons who violate the provisions, other than elected officials; or (3) a recommendation of removal from office of an honorary State official. 29 Del. C. § 5810(h). Criminal violations of the Code carry a penalty of not more than one year in prison and/or a fine not to exceed \$10,000. 29 Del. C. § 5805(f).

B. Financial Disclosure

In 1994 legislation was passed which changed the Commission's name from the State Ethics Commission to the State Public Integrity Commission. The legislation also gave the Commission the added responsibility of administering and implementing the Financial Disclosure Law, starting in 1995.

Under the Financial Disclosure Law, public officers in the Executive, Legislative, and Judicial branches are required to file a financial disclosure statement within 14 days of becoming a public officer and on February 15 each year thereafter. Those who must file include: candidates for State office, State elected officials, cabinet secretaries, division directors, and members of the judiciary. 29 Del. C. § 5812.

They must disclose personal financial information regarding their own assets, debts, income, capital gains, reimbursement of expenses, honoraria and gifts. 29 Del. C. § 5813. Aside from their

own financial interests, they must disclose information on assets held with another person if they receive a direct benefit, as well as information on the financial affairs of their spouses and minor children. *Id.* Approximately 300 State officers file a disclosure form each year.

The legislative purpose of such disclosure is to guard against public officials acting in their official capacity on matters where there is a direct or indirect personal financial interest. 29 Del. C. § 5811.

Willful failure to file such reports is a Class B misdemeanor, or knowingly filing false information is a Class A misdemeanor. 29 Del. C. § 5815. The Commission may refer suspected violations to the Attorney General for investigation and/or prosecution. *Id.*

Officials in the Executive Branch who must comply with the Financial Disclosure Law, also are required by Executive Order No. 8 to notify the Governor's office of any gift received valued at more than \$250. Pursuant to the Executive Order, information about such gifts will be posted on the Governor's web site.

C. Compensation Policy

There are many elected State officials and other paid appointed officials who concurrently are employed by State agencies and other jurisdictions of government within the State. 29 Del. C. § 5821(a). The General Assembly believed taxpayers should not pay an individual more than once for coinciding hours of the workday. 29 Del. C. § 5821(b). To ensure that taxpayers are not paying such employees and officials from more than one tax-funded source during coinciding workday hours, they are required to comply with certain time keeping record standards which verify the number of hours worked at the full-time job on any day they miss work due to the elected or paid appointed position. 29 Del. C. § 5821(c) and § 5822(a).

The State Auditor is charged with auditing the time records to determine if a State employee

was paid from more than one tax-funded source for overlapping work hours. 29 Del. C. § 5823. Any discrepancy found by the Auditor shall be reported to the Commission for investigation under its complaint procedures, and/or to the Office of the Attorney General for possible prosecution under any appropriate criminal provision. 29 Del. C. § 5823.

D. Registration of Lobbyists

Beginning in 1996, the Commission began administering the Lobbying Law. Lobbyists must register with the Commission and file quarterly reports disclosing any direct expenditures on General Assembly members and employees and/or members of any State agency. Registration is required if an individual will be acting to promote, advocate, influence or oppose any matter pending before the General Assembly or a State agency by direct communication. 29 Del. C. § 5831. Approximately 200 lobbyists are registered with the Commission, filing both the registration form and employer's authorization (approximately 400 filings). Each lobbyist must file a quarterly expense report. 29 Del. C. § 5835. This results in approximately 800 filings each year.

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

Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. 29 Del. C. § 5837. Failure to file an authorization or a report serves as a voluntary cancellation of the lobbyist's registration. *Id.* Such persons are prohibited from re-registering or acting as a lobbyist until all delinquent authorizations and/or reports are filed with the

Commission. *Id.*

II. State Public Integrity Commission - Structure

The seven members of the State Public Integrity Commission are appointed by the Governor and confirmed by the Senate. 29 Del. C. § 5808. When their term expires, they may continue to serve until their successor has been appointed and qualified. *Id.* During 2001, the terms of John E. Burris and Zenaida Otero Gephardt expired after the General Assembly had adjourned. They are not eligible for re-appointment, but continued to serve pending appointment and confirmation of their successors after the General Assembly reconvened in 2002.

Members may not hold any elected or appointed office, or be a candidate for federal or State office. *Id.* They also cannot hold any political party office or be an officer in any political campaign. *Id.* No more than four members of the Commission may be registered with the same political party. *Id.* The Commission members elect the Chairperson. *Id.*

While the statute does not require that each county be represented on the Commission, the appointments that have been made to the Commission have resulted in appointees from each of the three counties.

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

During 2001, the Commission met twelve (12) times to consider requests for advisory opinions, waivers, and complaints. The meetings were conducted at the Margaret O'Neill Building, Dover, Delaware, which is where the Commission's office is located. Notice of meetings was posted as required by the Freedom of Information Act.

During 2001, the following seven (7) citizens served on the Commission:

John E. Burris, Chair

Since the Commission's inception in 1991, John E. Burris has been continuously selected by the other Commission members to serve as Chair. He was initially appointed to the Commission on April 2, 1991, for a three-year term, which expired on April 2, 1994. In 1994, when the law was re-written, as a serving member he was eligible to be re-appointed for a seven-year term. That term expired on July 5, 2001. He is not eligible for re-appointment. Although his term expired, the statute permits him to continue to serve until his successor is appointed and confirmed.

In private life, Mr. Burris is the Chairman of Burris Logistics, Inc. The corporation, located in Milford, Delaware, warehouses and distributes frozen foods and ice cream for supermarkets and warehouses. He also has been active as a trustee of the University of Delaware.

He recently was awarded the Edward P. Miller Community Fellowship Award by Dover's Colonial Rotary Club, which recognizes non-Rotarians for outstanding service to their community.

Arthur G. Connolly, Jr., Vice-Chair

Commissioner Arthur G. Connolly, Jr., was elected as the Commission's Vice Chair in 1998. His initial appointment to the Commission was made on April 2, 1991, and his five-year term expired on April 2, 1996. The 1994 legislation permitted him to be re-appointed for a seven-year term. He was re-appointed on June 11, 1996. His seven-year term expires on June 11, 2003.

Mr. Connolly is a partner in the law firm of Connolly, Bove, Lodge and Hutz, in Wilmington, Delaware. He has actively participated in the legal community, serving in such positions as President of the Delaware State Bar Association, Chairman of the Board of Bar Examiners, and as an Adjunct Professor of Trial Practice at Delaware Law School, now known as Widener University School of Law. He also has served as a member of the Delaware Code of Judicial Conduct Committee of the Delaware Supreme Court and was a member of the Board of Professional Responsibility of the

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

Zenaida Otero Gephardt

Commissioner Zenaida Otero Gephardt was appointed to the Commission on September 19, 1994. Her seven-year term expired on September 19, 2001. She is not eligible for re-appointment.

Dr. Gephardt, who is a Wilmington resident and a registered engineer in Delaware, earned her Ph.D and Master of Science Degrees in Chemical Engineering from the University of Delaware and is an active member in many technical societies. She is a Professor of Engineering at Rowan University of New Jersey. She was selected to the 1993 Hispanic Women Leadership Institute at Rutgers University and received the 1992 Excellence in Scholarship Award from the Hispanic Association for Higher Education in New Jersey. She is active in community service, serving on the Advisory Board of the Partners with Students Program and Camden County Community College, and is on the Board of Directors of the YWCA of New Castle County. She also has served on the Board of Girls, Inc. of Delaware (formerly Girls Club). She received the 1989 Girls, Inc. of Delaware award honoring Delaware women of achievement and has worked with the Forum for the Advancement of Minorities in Engineering.

Mary Jane Willis

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

At present, Ms. Willis holds a number of other public service positions, including: Delaware State Chair, United States Olympic Committee; Trustee, University of Delaware, Children's Beach House; and the Delaware Children's Fire Safety Foundation; Director, Schwartz Center for the Arts and KidsPeace National Council for Kids; Board Member, Washington College Parents' Council; and member of Delaware Court on the Judiciary's Preliminary Investigatory Committee, West Virginia Wesleyan College National President's Advisory Council, and Smyrna High School Wellness Advisory Board.

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

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

Paul E. Ellis

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

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

Arthur V. Episcopo

Commissioner Arthur V. Episcopo was appointed, in 1998, to a seven-year term which expires on July 8, 2005. He previously served as an appointee to the Industrial Accident Board.

Mr. Episcopo has had dual careers in the private sector and the military. For 32 years, he worked for E.I. Du Pont De Nemours and Company, Inc., with varied assignments, principally in line management and subsequently in staff positions. His responsibilities included supervisory positions in Personnel, Employee Relations, Site Safety Occupational Health and Fire Protection, Site Engineering Maintenance, Laboratory Maintenance, Site Electrical, and Planning and Scheduling. While pursuing a career at Du Pont, he also pursued a career in the Army National Guard. He served in the Army National Guard for more than 42 years, rising through the enlisted ranks to become the Adjutant General of the State of Delaware. He served in that Cabinet position from February 1989 to April 1993.

Clifton H. Hubbard

Commissioner Hubbard was appointed to complete the term of Christopher E. Bullock, who

resigned from the Commission after accepting the pastorate of a church in Chicago, Illinois. Commissioner Hubbard's appointment to complete Reverend Bullock's term expires on August 29, 2002. He is then eligible to serve his own seven-year term.

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

After receiving his Bachelor of Science in both Chemistry and Biology, he was a Chemistry Instructor at his Alma Mater, Claflin College, Orangeburg, South Carolina, before accepting a position as a chemical analyst at Rohm-Haas Chemical Company. Subsequently, he accepted employment with International Playtex, Inc., as a chemical analyst. That position resulted in his move to Delaware, where he also attended the University of Delaware for advanced chemistry studies. In 1971, he had a patent approved on the "Method of Making Foraminous Forming Conveyors." He was Manager of the Elastomers Department when he retired from Playtex.

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

Commission Staff

Commission Counsel

As an independent agency, the Commission appoints its own legal counsel. 29 *Del. C.* §

5809(12). Janet A. Wright was appointed in 1995. A graduate of Widener University School of Law (cum laude) in 1989, she was admitted to practice in Delaware that same year. After graduation, Ms. Wright was a judicial clerk for the Honorable Richard S. Gebelein, Delaware Superior Court. After her clerkship, she was an Assistant City Solicitor for the City of Wilmington. Initially, she prosecuted violators of the Building and Housing Code, Fire Code, and animal protection laws, and periodically prosecuted criminal matters in Municipal Court. She subsequently was a civil litigator, defending the City and its employees in civil rights and personal injury actions. Ms. Wright is admitted to practice in the Delaware Courts, the U.S. District Court in Delaware, and the U.S. Third Circuit Court of Appeals. She received the American Jurisprudence Award for her studies in Professional Responsibility, and completed the National Institute for Trial Advocacy's course on Trial Advocacy Skills. She has served as the Chair, Northeastern Regional Conference on Lobbying (NORCOL), which is comprised of state and local government agencies from Washington, D.C. to New England that regulate lobbying. She also served on the Site Selection Committee for the Council on Government Ethics Laws (COGEL), which consists of representatives from all fifty (50) states, the federal government and the Canadian government who work in government ethics, lobbying, financial disclosure, and campaign finance. Her book review of Alan Rosenthal's Drawing the Line: Legislative Ethics in the States, was published in the "COGEL Guardian."

Administrative Assistant

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

Following her employment with Rockwell, she was a paralegal for Locke Liddell & Sapp, LLP and Martin, Farr, Miller & Grau, LLP, in the areas of civil and commercial litigation. She received her paralegal certificate from the Professional Development Institute at North Texas University, Denton, Texas.

III. Commission Accomplishments in 2001

The Commission's goals for 2001 were to continue to emphasize its training program, and to increase access to its synopses of opinions and other public information through the use of its web site, which became operational in March 2000. Beyond those goals, the Commission continued to perform its statutory functions of issuing advisory opinions and acting on alleged violations of the laws it administers.

In meeting its training goals, it had an increase in both the number of classes offered and the number of attendees. Regarding the use of its web site as a means of access for those subject to the law, and to members of the public, the Commission had more than 60,000 hits on its web site during the year, which it believes indicates that the web site is serving as a significant means of distribution of its opinions and other publications.

The details of its accomplishments in training, publishing information, and actions on requests for advisory opinions and allegations of violations are given below.

A. Training Sessions

Seminars and workshops to educate individuals covered by the laws regulating the conduct of State employees, officers and officials are part of the Commission's mandate. 29 *Del. C.* § 5808A(a)(1).

During 2001, the Commission held twenty-two (22) training sessions. This is the most training sessions it has given in a single year since its education program began in 1995. It gave 13

sessions in 1995; 12 in 1996; 17 in 1998; 14 in 1999; and 15 in 2000.

Sixteen (16) of the 2001 classes were training on the State Code of Conduct and six (6) were on Financial Disclosure Reporting. A total of 368 people attended the classes in 2001. This was an increase of 162 people over 206 attendees in 2000, and an increase of 197 over 171 attendees in 1999.

The Commission, as in the past, offered both the Code of Conduct training and Financial Disclosure Training through the State Personnel Office's Training Unit. The Code of Conduct training was part of its Career Enrichment Program (CEP), for rank and file State employees. Both the Code of Conduct and Financial Disclosure were offered through its Management Development Institute (MDI), for senior-level Executive Branch officials.

The Commission continued to work with the Department of Health and Social Services (DHSS) to provide Code of Conduct training on a quarterly basis. DHSS and the Commission coordinate the training sessions at various DHSS locations for the convenience of as many DHSS employees as possible. DHSS and the Commission began these training programs in 1995, and their efforts were re-emphasized as a result of a recommendation to provide ethics training by the State Legislative and Citizens Investigative Panel of Nursing Homes in the 1998 "Marshall Report." In 2001, eight (8) classes were given to DHSS employees in Dover, Georgetown, and Wilmington, with three of those sessions running through the night at Emily Bissell Hospital, for the convenience of the night shift.

After legislation was introduced to make local School Board members subject to the State Code of Conduct, a number of education entities asked for a Code of Conduct class. Training was given to the Brandywine School Board; the Capital School Board; and the Delaware School Boards Association. Evening sessions were provided to accommodate these entities. As a result of School

Board members becoming subject to the Code of Conduct, some schools also requested that training be given to their teachers and administrators. Sessions were given for employees of the Brandywine School District and Hanby Middle School

Code of Conduct training was also given to Department of Transportation (DelDOT) employees, and introductory information on the Code of Conduct was provided to Title 23 and Title 24 Board members at an orientation for appointees to those Boards hosted by the Division of Professional Regulation.

Financial Disclosure sessions were given as part of the “Orientation Program for New Legislators,” for newly elected members of the General Assembly. Also, the Senate Minority requested that the training be provided to its members.

At all the classes, attendees were given copies of the pertinent statute, synopses of opinions concerning the particular class subject matter, and copies of forms for financial disclosure reporting.

B. Requests for Advisory Opinions, Actions on Complaints, and Referrals

The Commission is charged with issuing advisory opinions and waivers, and with investigating and ruling on complaints alleging violations of the Code. 29 *Del. C.* §§ 5807 and 5810. Almost all of the Commission’s rulings are rendered after a hearing, even though hearings are not mandated for advisory opinions and waivers.

In 2001, fifty-two (52) requests for advisory opinions, waivers and complaints requiring interpretation of the Code of Conduct and Financial Disclosure Laws were submitted to the Commission. Additionally, it had six (6) matters that were carried over from 2000.

Of the matters carried over from 2000, one was a request for an advisory opinion, where additional information was needed. After that was obtained, the request was promptly addressed at the Commission’s first meeting in 2001. Another request was received after the Commission’s final

meeting in 2000. It, too, was addressed in 2001. The other four (4) matters carried over from 2000 were where four candidates for State office failed to file financial disclosure reports. After notices were sent by both regular and certified mail advising the candidates that willful failure to file could constitute a misdemeanor, the Commission referred the matters to the Attorney General for investigation and/or prosecution at her discretion, as required by the Code. In early 2001, the Attorney General's office then notified the candidates again of the requirement to file, and that they could be prosecuted. That action resulted in resolution of the matters.

Added to those six matters carried over from 2000 were 52 individual requests for advisory opinions, waivers, or complaints. The 52 matters break down as follows: (a) 44 requests for advisory opinions; (b) three requests for waivers; (c) two referrals to the Attorney General; and (d) four referrals from the Office of the State Auditor.

(1) Advisory Opinions

Upon the written request of any State employee, State officer, Honorary State official, or State agency, the Commission may issue an advisory opinion as to the applicability of the law to any particular fact situation. 29 *Del. C.* § 5807(c).

The majority of requests for advisory opinions asked for an interpretation of the restriction on State employees after they leave the State. Sixteen (16) people sought an interpretation of the post-employment provision. Eleven (11) people asked for an interpretation regarding the restrictions on holding a second job, while employed by the State. Some of those requests covered questions dealing with a second job in the private sector, while others sought guidance on holding a second job in the public sector. An equal number of people asked for opinions on whether their personal or private interests created a conflict that would require that they recuse themselves from participating in State decisions. The "personal or private interests" included familial relationships, financial

investments, and serving as Board members of private organizations.

Only three persons asked for an interpretation of the State's gift law. This is a significant reduction from last year when there were fourteen (14) requests for interpretations of the gift law.

The reason there were fewer requests for opinions about the gift law was because, in prior years, Senior Level Executive Officers were required, by Executive Orders, to obtain an advisory opinion anytime they received a gift valued at more than \$250. In January 2001, those Executive Orders were rescinded and, thus, there is no longer a mandate for such officials to obtain an advisory opinion on whether acceptance of a gift raises any ethical issues.

The law does mandate that anytime an employee or official has a financial interest in a private enterprise that does business with, or is regulated by, the State, they must file a full disclosure with the Commission. Such filings are a condition of commencing and continuing employment with the State. Upon receipt of the filings, the Commission determines if any ethical issues are raised by such activities. In 2001, there were six (6) such filings with the Commission. In two instances, conflicts were created, but the Commission granted waivers. Those waivers are discussed below.

(2) Waivers

The Commission may grant a waiver if the literal application of the law is not necessary to serve the public purpose, or there is an undue hardship on the State employee or State agency. 29 *Del. C. § 5807(a)*. Three (3) requests for waivers were heard by the Commission in 2001. In two instances, waivers were granted so that State agencies could contract with persons within their agencies. *Commission Op. Nos. 01-22 and 01-36*. In both cases, the waivers were granted because of an "undue hardship" for the State agency. Additionally, the Commission considered factors that served to diminish the possibility that the contracts were granted out of favoritism, undue influence, and the like.

The agencies had attempted, in both instances, to find other persons who would contract with the State to provide certain services. Although the contracting opportunity was publicly noticed and bid in both instances, no bids were submitted except from a State employee who worked in the agency which was seeking to contract. As the law prohibits State employees and officials from contracting with their own agency, such contracts would violate the Code. However, if the agency could not contract with these persons, they would be without a vendor to provide the services. The “undue hardship” was that even though the agencies made efforts to find other vendors, they could not do so. Moreover, both agencies worked to insure that the amount to be paid to the only vendors available—the State employees—was a fair market price. Whenever a waiver is granted, the proceedings become a matter of public record so that the public knows that its concerns about the possibility of undue influence, conflict and the like are addressed. Thus, the opinions rendered in those two instances are not confidential, and are attached as [Appendix A](#).

The third situation was a request for a waiver of the post-employment law. That law restricts former State employees from representing or otherwise assisting a private enterprise on matters involving the State if they are matters where the former employee gave an opinion; conducted an investigation; or was otherwise directly and materially responsible for the matter while employed by the State. The restriction applies for two years. A State employee planned to leave State employment and immediately go to work for a private company which contracted with her State agency. She would perform the exact same job for the private company that she had with the State. In fact, she would even work in the same office she worked in for the State.

No facts indicated a hardship on either the State agency or the State employee. Moreover, she was not prohibited from accepting employment with that particular private enterprise or any other private enterprise as long as she did not work on matters for which she had been directly and

materially responsible. Accordingly, the Commission found it could not grant a waiver based on an “undue hardship.” The Commission also considered the purpose of the Code, which is to prohibit State employees from financially capitalizing on their former State employment and from assisting the private enterprise in obtaining an unfair advantage. Here, she would perform the same work, at the same desk, but receive a higher salary, stock options, etc. Thus, she would financially capitalize on her former employment. Moreover, if the private enterprise was able to hire her away from the State, it would receive a mark-up in its contract for adding her as an employee. Based on those facts, the Commission found that the literal application of the law was necessary to serve the public purpose, and, therefore, did not grant a waiver on that basis.

(3) Referrals to the Attorney General

Under the Financial Disclosure Law, any public officer who willfully fails to file shall be guilty of a class B misdemeanor. 29 Del. C. § 5815(a). “Public officer” is defined to include any candidate who has filed for any state office. 29 Del. C. § 5812(a)(3). In 2001, a candidate for State office did not file a Financial Disclosure report, even after being sent notice of the requirement by both regular and certified mail. The Commission referred the suspected violation to the Attorney General, pursuant to 29 Del. C. § 5815(c). After the Attorney General’s office again notified him, he submitted his report.

An anonymous complaint was sent to the Commission which basically alleged that a State employee was using government funds to pay for personal items, and that she was violating certain State regulations. As to the allegations that she was using government funds to pay for her personal items, the Commission has held that it has no authority to review expenditures of State funds. See, e.g., Commission Op. No. 97-23. Regarding the allegation of violating State regulations, the Commission can only interpret Title 29, Chapter 58, and has no authority to interpret other State

laws, rules, or regulations. *See, e.g., Commission Op. No. 97-28.* However, the Commission has authority to refer to the appropriate State authority. *29 Del. C. § 5809(4).* It referred the matter to the Attorney General's office to act at its discretion.

(4) Referrals from the State Auditor's Office

The State Auditor, in conducting agency audits, found several situations where he believed the Commission needed to determine if the State Code of Conduct had been violated.

Title 29, Chapter 58, Subchapter 3 requires the Auditor to audit the time records of State employees who also hold an elected and/or a paid appointed position. *29 Del. C. § 5822 & § 5823.* Any discrepancy shall be reported to the Public Integrity Commission for investigation to determine if there is any violation of the Code. *29 Del. C. § 5823(b).* The Auditor, having found some administrative discrepancies, reported the matter to the Commission. It decided to issue an Ethics Bulletin to alert State employees who hold such dual government positions of the time-keeping law. At the time of this report, the final version of the Ethics Bulletin had not be completed.

The State Auditor also noted, during routine agency audits, some situations where State employees may have a financial interest in a private enterprise that may be doing business with the State. If a State employee has such interest, they must file a full disclosure with the Commission as a condition of commencing and continuing State employment. *29 Del. C. § 5805(d).* The records on the transactions, have been submitted to the Commission's office. The Commission's Counsel is to review information relating to potential violations and make a recommendation to the Commission on whether the information, if true, would violate the Code. *29 Del. C. § 5805A(a)(3) and (4).* The information is presently under review.

C. Publications

The Commission is to publish synopses of its advisory opinions without disclosing the identity

of the applicant, and is to prescribe forms, and publish manuals and guides explaining the duties of individuals covered by the laws the Commission administers. *See, 29 Del. C. § 5807(d)(4); § 5809(8) and (9).*

As previously noted, the Commission indicated in its prior annual reports that one of its goals was to make its publications available on a web site. In March 2000, the Commission's Web site became operational. The documents published to the Internet are: the Commission's synopses of opinions since its inception in 1991; forms for financial disclosure and lobbying registration; a list of all lobbyists registered with the Commission; the Commission's annual reports; and the Commission's Rules of Procedures. During 2001, the Commission's web site averaged close to 5,000 hits per month, with a total of 64,146 visits to the site recorded during the year. The number of recorded visits is a less than actual visits because for nine (9) days in April 2001, the tracking system was not operational.

The most frequently downloaded publication was the list of lobbyists who are registered in Delaware. The list was downloaded more than 1,930 times during the year, for an average of more than 160 downloads per month. As the publication is approximately 38 pages, the number of downloads are an effective means of saving the time and costs associated with producing and mailing more than 150 copies per month. As one purpose of the lobbyists' registration statute is to allow the public to be informed as to the identity of persons acting to influence State government, the web site has provided a significant means of providing the public with that information.

As all candidates for State elected office must file a financial disclosure report with the Commission after filing as a candidate, the Commission worked with the Department of Elections to create a link between the Elections web site and the Commission's web site. This allows "one-stop shopping" in obtaining forms that candidates must file as part of their campaign activities.

The Commission also distributed hard copies of its synopses of opinions and Ethics Bulletins at the 22 classes that were conducted. More than 350 people received the publication through those

classes. The evaluations by attendees continue to indicate, as they have in past years, that the publications are one of the greatest values of the training program. Additionally, as State employees contacted the Commission's office seeking information on the Code, copies of the Commission's opinions were provided to those individuals.

The Commission's synopses of its Code of Conduct opinions issue in 2001 are being drafted and will be sent to Graphics and Printing in early 2002.

D. Review of Local Government Codes of Conduct

Local governments are subject to the State Code of Conduct unless they adopt their own Code which must be approved by the Commission as being as stringent as the State Code. *68 Del. Laws, c. 433 § 1.*

The Commission has approved Codes of Conduct for six local governments—Dover, Lewes, Millsboro, New Castle County, Newark, and Wilmington. The Commission must also approve any amendments to local Codes. During 2001, no additional local governments adopted their own Code, and no amendments were made to the existing local Codes.

E. Legislative Matters

A number of pieces of legislation of interest to the Commission were introduced during the first session of the 141th General Assembly, which ended on June 30, 2001. A chart showing the status of the legislation introduced and followed by the Commission in 2001, can be found at [Appendix B](#).

Legislation introduced in 2001, which was carried over into the 2nd session of the 141th General Assembly, is included on the chart. Key legislation affecting the Commission is discussed in more detail below.

(1) Legislation Effecting the State Code of Conduct

Pursuant to its authority to recommend to the General Assembly rules of conduct for public employees and officials under 29 *Del. C. § 5809*, the Commission worked with the General Assembly on legislation to amend the Code of Conduct, to add local School Board members to those who are subject to the State Code of Conduct. *H.B. 54*. Its passage placed those local government officials, for the 19 School Districts, in the same status as other local government officials who were already subject to the State Code of Conduct. As school boards are comprised of between 5 and 7 members, that legislation adds between 95 and 133 new people to those who are subject to the Code of Conduct.

The other legislation affecting the State Code of Conduct eliminated application of the post-employment law for employees of the Office of Information Services (OIS), which became the Department of Technology and Information (DTI). *S.B. 215*. The reason for eliminating the post-employment law for those State employees was because the restructure of OIS could result in those employees taking jobs in the private sector if the State cannot place them in State jobs with either DTI or another State agency. The legislation was apparently intended to cover those employees during the transition period from OIS to DTI. However, as written, it eliminates application of the post-employment law for all time for all OIS and DIT employees. The Commission is working with the drafters of the legislation to see if a time limit that would cover the transition period would be feasible. After that point, the post-employment law would then apply to DTI employees, just as it applies to all other State employees.

(2) Legislation Effecting Financial Disclosure

Several pieces of legislation were introduced which created or renamed various Divisions and Departments. *S.B. 144; S.B. 215; S.B. 230, and H.B. 152*. The only impact of those bills was the resulting administrative changes required to be made to the list of titles of Division Directors and other officials who must file financial disclosure reports.

(3) Legislation Effecting the Compensation Policy

For persons who are a State employee and also hold an elected or paid appointed position with the State or local government, they must comply with certain time keeping procedures to insure that their pay is prorated for any hours or days missed during the course of their normal workday or normal workweek while serving in the elected or paid appointed position. *H.B. 311*. In an effort to recognize that the normal “workday,” can vary for individuals because some may work shifts or be on “flex” time, the definition of “workday” was amended. The statute also was amended to add authorization for those holding such dual positions to, when appropriate, use compensatory hours.

(4) Other Legislation Monitored by the Commission

Reapportionment legislation has been introduced in both the House and Senate to establish a commission to accomplish the task of reapportionment following the 2000 and future censuses. *S.B. 36; S.B. 301 w/ S.A. 1; and H.B. 105*. Among other things, the proposed legislation provides that appointees to the reapportionment committee cannot have been a lobbyist within two years prior to appointment and cannot register as a lobbyist for two years after the plan is adopted. There also are restrictions on appointees running for public office. The House also apparently wants to increase the number of legislative districts. The legislation is being monitored because if additional districts are added, the Commission will need to notify candidates for the new districts of the requirement to file a financial disclosure report. It also will have to monitor lobbyists’ registrations regarding such things as the two-year provision, and monitor financial disclosure reports by candidates for office to insure appointees to the Reapportionment Commission are not filing as candidates if it is not permitted.

F. Administrative Issues

(1) Financial Disclosure Reports

Public officers are to file annual Financial Disclosure reports by February 15 of each year. Annually, the Commission sends its Financial Disclosure synopses, the disclosure form and instructions to more than 300 public officers notifying them of the requirement to file. In 2001, after the initial notice was sent, eight (8) public officers did not respond. A second notice was sent by certified mail. Seven of the eight officers then responded. The one officer who did not respond had been ill for an extended period of time and was unable to work. Due to the illness, it did not appear that the individual would return to work, and the Commission advised the official that he would not be required to file.

As part of the disclosure requirements, public officers must report gifts valued at more than \$250. As lobbyists must report by name and amount any expenditure on a public officer which exceeds \$50 per day, the Commission's staff compared the lobbying expenditure reports to the financial disclosure reports to insure that any gift of more than \$250 to a public officer from a lobbyist was reported. If there was an inconsistency in the reports, the public officer and the lobbyist were notified of the discrepancies. Where necessary, the public officers amended their financial disclosure reports for accuracy.

(2) Lobbyists' Expenditure Reports

Registered lobbyists are required to file expenditure reports on a quarterly basis, identifying the total amount of expenditures made on members of the General Assembly or State employees for such items as food, entertainment, travel, gifts, etc. There are approximately 200 lobbyists registered with the Commission.

The filing for the last quarter of 2000 was due on January 20, 2001. Fifty-four (54) lobbyists did not file by the due date. They were notified that, by statute, failure to file serves as a voluntary cancellation of their registration, and they cannot re-register or act as a lobbyist until the reports are

filed. After a first and second notice were sent, five (5) lobbyists did not file the reports and their registrations were canceled. Several months later, one of those lobbyists did submit all of the required reports and his registration was reinstated.

The filing for the first quarter of 2001 was due on April 20, 2001. Notification was made to fifty-one (51) lobbyists that their reports were not received by the due date. The standard notice stating that failure to file served as a voluntary cancellation was sent. All but twelve (12) responded. Additional notices were sent by certified mail to the lobbyists and the organizations they represent. Following those notices, all of the lobbyists filed reports, and no registrations were canceled.

The filing for the second quarter of 2001 was due on July 20, 2001. Fifty-three (53) lobbyists failed to file their quarterly expense report by that date. After notices of failure to file were sent, all but five (5) filed reports. After a second notice by certified mail, the remaining lobbyists complied with the requirement to file.

The filing for the third quarter of 2001 was due on October 20, 2001. A first notice of failure to file was sent to sixty-five (65) lobbyists. Nineteen (19) lobbyists received a second, certified mail, notice. Subsequently, all nineteen submitted their reports.

The filing for the last quarter of 2001 was due on January 20, 2001. As the annual report went to press shortly after the filing date, the data for that quarter will be included in next year's annual report.

(3) Personnel Change

The Commission's administrative assistant, Lisa Anderson, left State employment to return to school full-time. The Commission hired Aimee Baysinger as its new administrative assistant in October 2001, after interviews with ten (10) qualified applicants who were on the State certification list.

IV. Funding

For Fiscal Year 2002, the General Assembly appropriated a total of \$164,400 for the Commission's budget. This was an increase of \$1,900 over the FY 2001 appropriation of \$162,500. The increased appropriation was to cover the salary line, adjusting for pay raises and other employee costs (EOCs) for State employees. There was no increase in appropriations for operating costs. Those costs are \$40,100 of the total appropriation. Like all State agencies, the Commission was asked to cut 2.0% from its operating budget for FY 2002. A 2.0% cut of the Commission's operating costs was calculated at approximately \$802, leaving the Commission with approximately \$39,278 for operating costs. For FY 2003, the Commission requested the same appropriations as in FY 2002. All agencies have been advised that they may expect that their budgets could be cut by 2%. However, as of early January when the Governor's Proposed Budget was introduced as legislation, it proposed \$164,400 for the Commission. *S.B. 290.*

V. Future Goals

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

To provide additional services to the public officers and lobbyists who must file reports with the Commission, it will work toward creating forms that can be filled out from its web site and investigate the costs associated with making electronic filing available.

APPENDIX A

July 24, 2001

Mr. Alexander J. Rose
Delaware Developmental Disabilities Council
Margaret M. O'Neill Building
410 Federal Street, Suite 2
Dover, DE 19901

WAIVER GRANTED

Advisory Op. No. 01-22 - Concurrent Employment/Contracting with the State

Hearing and Decision by: John E. Burris, Chair;

Commissioners Mary Jane Willis, Paul E. Ellis, Arthur V. Episcopo, and Clifton H. Hubbard

Dear Mr. Rose:

The State Public Integrity Commission has granted a waiver so that three Council members of the Developmental Disabilities Council can work, in their private capacity, on a mini-grant for the University of Delaware's Center for Disabilities Studies. However, they should recuse themselves as Council members when issues on the mini-grant arise before the Council.

(A) Applicable Law

Honorary State officials are prohibited from reviewing or disposing of matters before the State where they have a personal or private interest. 29 *Del. C.* § 5805(a)(1). A personal or private interest is one which tends to impair judgment in performing official duties. *Id.*

Honorary State officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. 29 *Del. C.* § 5805(b)(1).

(B) Application of Law to Facts

The Developmental Disabilities Council ("the Council") is a State agency created to insure self-determination, independence, productivity, integration, and inclusion in community life of persons with disabilities. It achieves its purpose, in part, by issuing mini-grants to persons or entities that can help accomplish its mission. During its most recent mini-grant cycle, it publicly noticed the opportunity to submit funding proposals. The Council received only one proposal. Theda M. Ellis submitted a proposal on behalf of her employer, the University of Delaware's Center for Disabilities Studies ("the Center"). By law, the Center must have a representative on the Council. 42 *U.S.C.* § 15025(b)(1)(C)(4)(II). Ms. Ellis serves as its representative.

The Center seeks a Council grant to contract with Phyllis Guinivan and Gary Mears to teach a course to University of Delaware undergraduates, consumers and family members on "Family Support, Self-determination and Disability." Phyllis Guinivan and Gary Mears are also Council

members. This means the Council would award the grant to its own member's employer, who will then turn around and contract with two other council members.

However, federal law requires the Council to collaborate with entities represented on the Council, including the Center. *42 U.S.C. § 15025(c)(5)(G)(ii)*. While envisioning contracting with those entities, it tries to reduce conflicts by requiring the Council to have a plan so that Council members will not vote on matters if they would financially benefit; do not discuss grants or contracts if the entity they represent on the Council is the beneficiary, or otherwise engage in conduct that would give the appearance of a conflict. *42 U.S.C. § 15024 (c)(5)(D) and § 15025 (b)(1)(4)(B)(ii)*.

To comply with the federal requirement to have a conflict of interest plan, the Council's plan consists of obtaining a decision on whether the conduct would violate the State Code of Conduct. If so, it seeks a waiver pursuant to *29 Del. C. § 5807(a)*.³

(C) Background to the Proposal

The Center is part of the National Network of Centers for Excellence in Developmental Disabilities Education, Research and Services created by federal law. *42 U.S.C. §15063*. Among other things, it trains individuals with developmental disabilities, their families, professionals, para-professionals, policy makers, students, and other community members. *Id.* Earlier this year, it offered a free six-day course to consumers and parents of children with developmental disabilities on "Family Support, Self-Determination and Disability." The course was advertised Statewide. Though not mentioned in the ad, the Center planned to have students who completed the course serve as instructors for the same course which it now seeks to pay for with the Council's mini-grant. All 25 students who took the course were offered the chance to teach. Ms. Guinivan and Mr. Mears took the course as they have children with developmental disabilities. They were the only ones interested in contracting.

(D) Terms of the Proposal

The contract will be for one semester at the University of Delaware as part of the undergraduate course, adult education classes, etc. Ms. Guinivan and Mr. Mears will divide the amount paid for the course of \$3,645. The mini-grant will also pay their FICA; costs of copying materials; the "university indirect," etc. The total will be \$4,881. Thus, the salary/benefits received by each will be \$2,440.50. The salary/benefits are based on what a University of Delaware professor would be paid. The proposal indicates that after these classes are taught, the Center plans to use students from those classes for future presentations.

³The Commission's jurisdiction is limited to interpreting the State Code of Conduct, and it has no authority to interpret federal law. Thus, to the extent the federal law may impose additional restrictions, this opinion is not meant to circumvent federal law.

(E) “Personal or Private Interests” of Ms. Ellis, Ms. Guinivan and Mr. Mears

Honorary State officials (appointees to Boards and Commissions) may not review or dispose of matters if they have a personal or private interest which tends to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). The personal or private interest of Ms. Ellis is that she wrote her employer’s proposal. As an employee, she has a duty and vested interest in the proposal she wrote for the Center. *See, e.g., Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff’d, Del. Supr., No. 304, Veasey, J. (January 29, 1996)(improper for appointee to participate in decision when his employer was entering a business alliance with applicant appearing before the Board).* Ms. Ellis’ interest is more direct than the appointee in Beebe as her employer (through her) is directly applying for the grant.

Similarly, Council members Guinivan and Mears have a “personal or private interest” in the grant as they will benefit financially. *See, Commission Op. No. 00-32 (appointee to Delaware Heritage Commission should not participate in its decision to award him a contract).*

Thus, the three Council members should not review or dispose of the decision to award the contract or subsequent decisions on the grant, e.g., reviewing how the grant monies were used, whether the contract was properly performed, etc. The Council’s letter says the three council members will not participate in the decision to award the grant. If they recuse themselves on all issues dealing with the grant, there will be no violation of 29 Del. C. § 5805(a)(1).

(F) “Representing or Otherwise Assisting” a Private Enterprise before One’s Own Agency

Honorary officials also may not represent or otherwise assist a “private enterprise” on matters involving the State before their own agency. 29 Del. C. § 5805(b)(1).

The first issue is whether the University of Delaware’s Center for Disabilities Studies (the Center) is a “private enterprise” or a State agency. The federal law says that the Centers may be a public or private entity. (*Citation omitted*). If it is a “State agency,” then this particular provision would not apply. The Code of Conduct definition of “State agency” refers only to “school districts.” 29 Del. C. § 5804(10). There is no reference to institutions of higher learning. Thus, it is not specifically defined as a “State agency” in the Code.

Delaware Courts, in trying to decide if the University of Delaware is a “State agency” or a “private entity,” have recognized that the answer is not easy. In Rumsey Elec. Co. v. University of Delaware, Del. Supr., 358 A.2d 712 (1976), the Delaware Supreme Court said:

The question of whether the University of Delaware is an agency of the State is a vexing one because of its mixed proprietary activities and public funding. Parker v. University of Delaware, 31 Del. Ch. 381, 75 A.2d 225 (1950); City of Newark v. University of Delaware,

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Del. Ch., 304 A.2d 347 (1973). [However,] “In the contractual area its status appears to have been legislatively defined. In 1964, by specific enactment, the General Assembly conferred upon the University's Board of Trustees ‘the entire control and management’ of its affairs including ‘the manner of awarding contracts.’ 14 *Del.C.* § 5106.”

Based on that law, the Court held that the University of Delaware was **not** a “State agency,” but a private entity when it engaged in awarding contracts. *Id.* Thus, it is arguable that in this situation, as the Center is contracting, it could be considered a “private enterprise.”⁴

Assuming it is a private enterprise, the next issue is whether Ms. Ellis “represented or otherwise assisted” the Center before her own agency. Here, Ms. Ellis wrote the proposal she submitted to her Council. Beyond that, if the Council has questions when it considers the proposal, it wants Ms. Ellis to answer the questions. As she has “represented or otherwise assisted” the Center before her own agency, and might continue to do so if the Council has questions about her proposal, it would violate the Code unless a waiver is granted.

It also is possible that Ms. Guinivan and Mr. Mears could end up representing or otherwise assisting the Center before their own agency. By law, the Council must conduct a comprehensive review and analysis of the services offered, including descriptions of how entities funded through it collaborated and contributed to the purpose of the law. 42 *U.S.C.* 15024(c)(3)(A) and (D). For example, if the Council has to inquire how the grant monies were used by Ms. Guinivan and Mr. Mears; look at whether they properly performed the contract; etc., or if Ms. Guinivan and Mr. Mears have to report on the success of the course to the Council, for the Council to complete its comprehensive review and analysis, then the Council would evaluate its own members’ performance, and the Council members would be addressing their private work before their own Council.

(G) Request for a Waiver

Because of the Code issues raised by this arrangement, the Council seeks a waiver. A waiver may be granted if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an “undue hardship” on the agency. 29 *Del. C.* § 5807(a).

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

The purpose of the Code of Conduct is to instill public confidence in the integrity of its government. 29 *Del. C.* § 5802(1). This is accomplished by setting specific standards to guide the

⁴In other situations, e.g., zoning, constitutional issues, etc., the University has been held to be a “State agency.” *See, e.g., Parker, supra.* If the Commission assumed the University was a “State agency,” it could still raise issues under the Code of Conduct, e.g., 29 *Del. C.* § 5805(a)(1)(having an interest which tends to impair judgment); 29 *Del. C.* § 5806(b)(accepting other employment); 29 *Del. C.* § 5806(e)(using public office for unwarranted privileges, private advantage or gain); and 29 *Del. C.* § 5806(a) (appearance of impropriety).

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conduct of State employees and officials. 29 Del. C. § 5802(2). The specific standards at issue are: (1) reviewing or disposing of matters if there is a personal or private interest; and (2) representing or otherwise assisting a private enterprise before one's own agency.

Regarding the first standard, it appears that the Council members can recuse themselves from acting in their official capacity on the grant matter. Thus, a waiver is not needed for that provision.

The second provision requires a waiver as it is clear that Ms. Ellis is representing the Center before her own agency. Also, as noted, the other two Council members may be put in a situation where they may have to explain to the Council how the monies were used, etc.

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

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

Here, public concerns about awarding the contract out of favoritism, preferential treatment, etc., are diminished by the following facts: (1) the Council publicly noticed the opportunity of the grant monies to any person or entity which sought to apply; no one else did apply; (2) the Center course was also publicly noticed; (3) the course was free so no member of the public was financially hindered in taking the course; (4) all attendees were notified of the teaching opportunity if they completed the course; (5) the three Council members will not participate in deciding if the Center will be awarded the grant; (6) the credentials of the two Council members to teach the course are outlined in the proposal, giving an objective factual basis for their selection other than mere attendance at the free course; (7) federal law requires the Center and the Council to collaborate on services and programs for persons with developmental disabilities; and (8) by law, if a waiver is granted the proceedings become a matter of public record so that the public will know its concerns about favoritism, undue influence and the like were addressed. *See, 29 Del. C. § 5807(b)(4).*

We also note that if the two Council members are permitted to teach the course that 20-45 persons are expected to attend. According to the proposal, attendees could subsequently teach the course. That would mean the Council would not have to continue dealing with its own council members to fulfill subsequent contracts.

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Those facts serve the public purpose--insuring that the contract is not granted out of favoritism, undue influence, and the like.

(2) Is there an “undue hardship” on the State agency--the Council.

If a waiver is not granted, the hardship for the Council is that it appears that the Council could not issue the grant because there were no other applicants. The effect of that would be that the training program could not be offered as there are no alternative entities to which to award the grant nor are there alternative persons to teach the course.

(H) Conclusion

Based on the above facts and law, we conclude that the three Council members should not participate in their official capacity on matters related to the mini-grant to avoid a violation of *29 Del. C. § 5805(a)(1)*. However, the facts show that the public purpose has been served (grant not awarded out of favoritism, undue influence and the like), and there is an undue hardship on the agency, so we grant a waiver of *29 Del. C. § 5805(b)(1)* so that the three Council members can, if required, represent or otherwise assist the Center before their own Council.

Sincerely,

John E. Burris, Chair

JEB:lha

September 26, 2001

Orlando J. George, Jr.
President, Delaware Technical and Community College
Office of the President
P.O. Box 897
Dover, DE 19903

WAIVER GRANTED

Advisory Op. No. 01-36 - Contracting with State

*Hearing and Decision by: John E. Burris, Chair; Arthur G. Connolly, Jr., Vice-Chair;
Commissioners Mary Jane Willis; Paul E. Ellis; Arthur V. Episcopo; and Clifton H. Hubbard*

Dear President George:

The State Public Integrity Commission reviewed the correspondence concerning Delaware Technical & Community College (Del Tech) contracting with a Board of Trustees member, John Mariorano, to provide services as a travel agency for a study tour in Turkey and Greece. While such contract would violate the Code of Conduct, a waiver is granted based on the following law and facts.

Where a State official seeks to contract with his own agency, the official then has a “personal or private interest” in the matter. *Commission Op. No. 98-11*. When an official has a “personal or private interest,” the Code requires that he not, in his official capacity, review or dispose of matters related to the contract. *29 Del. C. § 5805(a)(1)*. Also, officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. *29 Del. C. § 5805(b)(1)*. Accordingly, Mr. Mariorano should not participate in his official capacity on matters concerning the contract. However, as he wrote his company’s response to the College’s request for proposals, his actions would constitute representing or otherwise assisting his private enterprise before his own agency.

As the contract, at a minimum, appears to violate the provision on contracting with one’s own agency, and may raise issues under the provision dealing with outside employment which restricts such employment if it may result in impaired judgment, preferential treatment, etc., the focus turns to the basis for a waiver.

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

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

The public purpose served by prohibiting State officials from contracting with their own agency was noted in a 1971 Court opinion. *W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748 (1971)*. In *Heller*, the Court said that when State officials contract with their own agency the

concern is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” The Court noted that, at that time, the State had no conflicts of interest law. Subsequently, the Code of Conduct was passed, and restricted officials from dealing with their own agency. 29 *Del. C. § 5805(b)(1)*. This insures that officials do not use their influence with their agency to affect decisions by their colleagues or employees or use access to information or other influence to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. *Commission Op. No. 00-32*.

Here, the agency, to insure that the contract award was not based on favoritism, but rather on the ability of the bidders to provide certain services, publicly noticed the opportunity for any person or company to compete if the bidder met the criteria outlined in the request for proposals. Public notice and bidding helps diminish the possibility of showing favoritism as it provides the competitive opportunity to all persons or organizations similarly situated to Mr. Mariorano’s company. It also aids in diminishing the opportunity for Mr. Mariorano to use his State position to obtain the contract because neither the agency nor he would know, until after the fact, what competition he might have, what bid any competitor would make, etc. As it turned out, there was no competition, but that fact was unknown when he submitted his bid.

Public notice and bidding also helps insure a fair market price. Delaware Courts have held that an “economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions.” *Commission Op. No. 97-17 (citing e.g., Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991))*. Your letter indicates that travel agencies are generally compensated through commissions from the service providers to the tour (e.g., airlines, hotels, etc.). When the compensation to a travel agency is paid by the airlines and hotel operators, it is fixed by the industry. Thus, the price would be the fixed market price. That aids in insuring that Mr. Mariorano’s compensation is not based on favoritism, undue influence, and the like. In some instances, the commission to the travel agency is established by a direct fee from the participants. However, as his price was established in responding to the public bidding opportunity, that increases the likelihood that his bid would have been the market rate, even though it turned out that he had no competition.

Aside from the above facts, which aid in insuring that the public purpose is served, if a waiver is granted the proceedings before the Commission become a public record, thereby permitting the public to know that its concerns about favoritism, etc., were addressed. *Commission Op. No. 01-22*.

(2) Is there an “undue hardship” on the State official or the Agency?

No facts indicate any hardship on Mr. Mariorano. However, as there were no other bidders, it appears that Del Tech could not go forward with its study tour if Mr. Mariorano’s company is not granted the contract.

Accordingly, since the possibility of the contract being awarded out of favoritism, undue influence and the like has been diminished by the College’s actions in publicly noticing and bidding the contract, and as there is a hardship on the agency, a waiver is granted.

Sincerely,

John E. Burris, Chair
State Public Integrity Commission

cc: Kathi A. Karsnitz, Esq.

APPENDIX B

<i>SENATE LEGISLATION</i>			
BILL #	SYNOPSIS	REASON FOR MONITORING	STATUS
25	When agencies adopt a regulation, the regulation and the order adopting it, must be filed with the Registrar of Regulations and becomes the official regulation.	Applies to PIC's regulations.	Signed into law - 6/18/01.
36	Creates a Reapportionment Commission to draw legislative districts. Commissioners cannot be or cannot have been a lobbyist for 2 years preceding the Act; and cannot register as a lobbyist while on the Commission or within 2 years of the effective date of the reapportionment plan. <i>-- Similar Senate Bills No. 301 w/ S.A. 1 & Similar House Bill No. 105 --</i>	If requested, PIC would give the appointing authority info on whether appointees are or have been lobbyists, and would monitor future registrations for compliance.	Referred to Senate Exec. Committee - 1/25/01.
141 - Senate Substitute No. 1	Delaware Uniform Athlete Agents Act. Creates the Board of Athlete Agency Examiners. Provides that Board members and its agents, appointed or otherwise, are subject to the State Code of Conduct, as it applies to State "employees." Provides that Board members cannot be a "close relative" as defined by the State Code of Conduct, of an athlete agent, or have been employed as an athlete agent. <i>- See Similar Senate Bill No. 241 -</i>	Creates another Board whose members are subject to the State Code of Conduct. Code presently applies to more than 200 Boards and Commissions.	Referred to Senate Exec. Committee. Subsequently stricken. S.B. 241 was passed instead.
144 - as amended by S.A. No. 2	Renames the Division of Mental Retardation as the Division of Developmental Disabilities Services.	PIC will make administrative changes to its list of titles of public officers who must file financial disclosure reports.	Signed into law - 7/3/01.
150	Amends Title 24, Chapter 51 for the Board of Cosmetology and Barbering based on Sunset Committee recommendations. One change is that the prior language provided that the Board members were to be treated as "employees" under the State Code of Conduct. The amendment eliminates the term "employee" because under the State Code of Conduct members of Boards such as this are not defined as "State employees," but as "Honorary State Officials." Under the State Code of Conduct, two provisions apply differently to those defined as "State employees" and those defined as "Honorary State Officials." <u>See, 29 Del. C. § 5805(c) and 29 Del. C. § 5806(d).</u>	PIC previously notified the Sunset Committee of the distinction between "Honorary State Officials," and "State employees." This amendment to the Board's statute makes it consistent with how these board members, and other similarly situated board members, are treated under the Code of Conduct.	Signed into law 7/10/01.
204	Creates a reapportionment committee for the City of Wilmington. Prohibits appointees from being lobbyists while a member and for two years after the effective date of the plan.	PIC would give appointing authority info on registered lobbyists, and monitor future registrations for the 2 year period.	Reported out of the Senate Judiciary Committee - 6/14/01

215	<p>Establishes new Department of Technology and Information to replace the Office of Information Services (OIS) and defines the Chief Information Officer's position as a Cabinet level position.</p> <p>Senate Substitute 1 to S.B. 215 exempts OIS and DTI State employees from the State Code of Conduct's post-employment law.</p>	<p>Change list of who must file financial disclosure report.</p> <p>PIC understood that the amendment was to assist OIS employees during transition from OIS to DTI if they could not retain a job in DTI or a similar job in another agency. However, the amendment forever exempts all OIS & DTI employees from the post-employment law. PIC is working with the drafters to see if a transition time is feasible, after which DTI employees would be subject to the post employment law as are all other State and local government employees.</p>	Signed into law - 7/1/01
230	Creates new Division of Support Operations in Department of Administrative Services by combining the Divisions of Purchasing and Support Operations.	Will change list of who must file financial disclosure report.	Signed into law - 7/9/01.
241	Delaware Uniform Athlete Agents Act. See information under S.B. 141.	See information under 141.	Signed into law - 7/9/01.
290	Governor's Proposed Budget for FY 03 - Proposes \$164.4 for PIC	PIC budget same as FY 02.	Senate Finance Comm. - 1/24/02
301	Reapportionment. Amendment has language similar to S.B. 36 on lobbyists.	See Comments on S.B. 36	Passed Senate - 1/17/02. Referred to House Admin. Comm. - 1/23/02

	<i>HOUSE LEGISLATION</i>		
BILL #	SYNOPSIS	REASON FOR MONITORING	STATUS
7	Allows School Districts to re-hire retired teachers one year after retirement to teach in areas where there are teacher shortages without an impact on their pensions.	If a former State employee privately contracts with the State within 2 years after terminating, to perform the same job they had as a State employee, it could violate the post-employment law. However, if the former employee is re-hired as a State employee, the post-employment law would not apply as such persons are not former employees, but current employees. <i>Ethics Bulletin 007.</i> When a retired former employee is re-hired, they have a pension off-set. <i>See, 29 Del. C. § 5502.</i> This bill permits retired teachers to be re-hired without violating the post-employment law or having the off-set.	House Passed 1/25/01 Referred to Senate Education Committee - 3/13/01.
10	2 nd leg of Constitutional amendment. Creates position of Senior Judge in State's Court system. Will be filled by any retired judge of a court established by the Constitution or the General Assembly. Qualifications, manner of appointment, term of office, compensation, duties, and all other matters relating to the office of the Senior Judge shall be specified by statute.	This position may result in the requirement for the Senior Judge to file a financial disclosure report, as do all other Judges. PIC will monitor for the statute creating the responsibilities of that office.	Passed - 7/1/00 and 5/8/01. Governor's signature not required on Constitutional amendments.
17	Permits retired teachers to be re-hired as substitute teachers without affecting their pension benefits.	See Comments to H.B. 7.	Signed into law - 4/10/01.
23	1 st leg of Constitutional amendment. Provides that persons currently holding an elected State office shall be deemed to have resigned from that office when they become a candidate for a different elected State office, if they become a candidate more than 30 days prior to the natural expiration of their present term of office. Resulting vacancies shall be filled by the same general election where the office is filled for which said vacancy was created, as long as the vacancy occurs after June 30 of the general election year.	May require administrative monitoring of status of officials as financial disclosure report filing dates for those holding elected State office and those who are candidates for State office are based on their status.	Referred to House Admin. Committee - 1/10/01

48	Eliminates \$3 fee to commission a public officer who has been appointed to serve on the State's various boards and commissions.	Applies to PIC appointees.	Passed House - 1/22/02. Referred to Senate Finance Comm. - 1/23/02.
50	Governor's Recommended Budget for FY02.	Recommended \$164.4 for PIC.	See H.B. 350, final FY02 budget bill.
54	Adds elected School Board members to those who are subject to the State Code of Conduct.	Last year's proposed bill had unique exceptions to the Code of Conduct for School Board members. PIC notified the legislature of concerns. This bill treats School Board members the same as other local officials who are subject to the Code.	Signed into law - 4/10/01.
64	Provides that officers and employees of Kent County government shall not hold more than one position of county office or employment from which he or she derives compensation.	As Kent County has not adopted its own Code of Conduct, it is subject to the State Code of Conduct, which restricts holding "other employment," including dual government employment. This legislation is more stringent, creating a total ban on dual employment by County personnel. Thus, the less stringent Code of Conduct restriction on dual employment would not apply to Kent County employees/officers.	Signed into law - 5/8/01.
75	Requires any employer, including the State, who monitors any telephone calls, e-mails, or Internet access of or by employees, to give notice of such monitoring activities to the employees prior to doing so or at the time of hiring.	As PIC's two computers are connected, it is possible for one user to see the use of the other user, revealing such things as Internet use. While this is not deliberate monitoring, PIC employees will be alerted that their usage can be observed.	Signed into law - 7/10/01

96	<p>Would establish a new County in Delaware–Appoquinimink.</p>	<p>The Code of Conduct applies to local governments, unless they adopt their own Code of Conduct, approved by PIC to be as stringent as the State Code. If the bill passes, PIC will notify the employees and officers of the new County of that law.</p>	<p>Referred out of the House Land Use/ Infrastructure Committee - 6/21/01.</p>
105	<p>Creates independent, bipartisan reapportionment commission. Appointees to the Commission cannot have been a lobbyist within two years prior to the appointment; appointees and employees of the Commission cannot hold or campaign for public office while serving; cannot run for the House or Senate for two years after the effective date of the plan; and cannot register as a lobbyist while a Commission member or within two years of the date of the effective plan.</p> <p style="text-align: center;"><i>-- See Similar Senate Bill No. 36 --</i></p>	<p>Regarding the restrictions on lobbying, see Comments to S.B. 36. Because this bill also restricts campaigning for or holding public office, if passed, PIC will monitor financial disclosure filings of candidates and public officers to aid in insuring compliance.</p>	<p>Referred to House Admin. Committee - 3/14/01</p>
110	<p>Permits “close relatives” of the Commissioners for Thoroughbred Racing to have a legal or beneficial interest in a firm, association, or corporation licensed or regulated by the Commission or which participates in pari-mutual meetings. “Close relative” in this statute would have the same meaning as that term in the State Code of Conduct.</p> <p style="text-align: center;"><i>-- See Similar House Bills No. 361 & 405--</i></p>	<p>Code of Conduct restricts appointees to Commissions and Boards from participating in decisions re: close relatives. PIC had noted this with General Assembly members. This bill specifically notes that Racing Commissioners remain subject to the Code of Conduct.</p>	<p>Referred to House Game/Parmtl Committee - 3/20/01; Stricken - 3/12/02</p>
152	<p>Renames Division of Alcoholism, Drug Abuse & Mental Health as the Division of Substance Abuse & Mental Health.</p>	<p>Requires administrative change to list of titles for Division Directors who must file financial disclosure report.</p>	<p>Signed into law - 6/11/01.</p>

311	Dual Government Employment. Amends Title 29, Chapter 58, administered by PIC. Presently, State employees holding a second position as an elected official, or as a paid appointee, with the State or with a local government, who leave their State job to go to the second job, have their full-time pay prorated for coinciding workday hours--unless they take annual leave or leave without pay. This bill would permit them to also use compensatory time. It also defines "workday" to recognize that some employees are on flex-time. The law will still require that if the normal workday hours at the full-time job coincide with the hours at the second job, supervisors must keep time records of the full-time employee's status while attending the second job. Such time records are subject to an annual audit to insure that the individual is not "double-dipping."	In issuing advisory opinions to persons holding such dual positions, the Commission will now consider that compensatory time may be used to go to the second position.	Signed into law - 7/17/01.
344	Reapportionment of General Assembly. Among other things, increases number of seats in the House from 41 to 45. <i>-- See Similar House Bill No. 345 --</i>	If number of seats increases, Commission will insure that candidates for the new districts file a financial disclosure report within 14 days of filing as a candidate, and that the person elected for the new districts files each year thereafter.	Referred to House Admin. Committee - 11/01/01
345	Reapportionment of General Assembly. Among other things, Increases number of seats in the House from 41 to 45. <i>-- See Similar House Bill No. 344 --</i>	See comments on H.B. 344 above.	House passed - 11/1/01 - Referred to Senate Judiciary Committee
350	Budget Bill for Fiscal Year 2002. Appropriates \$164,400 for PIC. Provides 2% or \$650 pay increase, whichever is higher, to all State employees.	PIC's appropriation is the same as last year's. The new pay raise will be 2% for both PIC employees. The pay raise will require recalculation of PIC's salary line for the upcoming FY.	Signed into law - 6/28/01.

<p>361</p>	<p>Permits “close relatives” of the Commissioners for Thoroughbred Racing to have a legal or beneficial interest in a firm, association, or corporation licensed or regulated by the Commission or which participates in pari-mutual meetings. “Close relative” in this statute would have the same meaning as that term in the State Code of Conduct.</p> <p style="text-align: center;"><i>-- See Similar House Bills No. 110 & 405 --</i></p> <p>This bill adds several sections that are not in H.B. No. 110. Those provisions address the limits on the financial interest a Racing Commissioner may have; requires Commissioners to have racing experience; and limits the terms of Commissioners.</p>	<p>Code of Conduct restricts appointees to Commissions and Boards from participating in decisions re: close relatives. PIC had noted this with General Assembly members. This bill specifically notes that Racing Commissioners remain subject to the Code of Conduct.</p>	<p>Referred to House Game/Parmtl Committee - 1/09/02</p>
<p>389</p>	<p>Amends the Misconduct in Office statute to include Public Servants who may be suspended from their positions, which recognizes that they may still do harm by virtue of their position or access to government resources. Prohibits unauthorized acts done specifically as an official function, but also those abuses facilitated by the Public Servant’s position. Unauthorized acts includes any unauthorized use of public money.</p>	<p>The Code of Conduct also prohibits misuse of public office, and the Commission may refer suspected violations of a criminal law, e.g., Misconduct in Office law, to the Attorney General.</p>	<p>Referred to House Judiciary Committee. Reported out of Committee - 3/13/02.</p>
<p>405</p>	<p>Amends Delaware Code of Thoroughbred Racing. Similar to House Bills No. 110 & 361. See Comments on those bills</p>	<p>See Comments on House Bills 110 & 361.</p>	<p>Referred to House Game/Parmtl Comm. - 2/20/02</p>