



DELAWARE PUBLIC INTEGRITY COMMISSION

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TO: Elected State Officials/Cabinet Secretaries/School Districts

FROM: State Public Integrity Commission

DATE: March 8, 2002

SUBJ: **Ethics Bulletin 009 - Dual Positions in Government - "Double Dipping"**

1. Attached is *29 Del. C., Subchapter 3*. Under that law, any person employed by the State, or any political subdivision thereof, who also serves in an elected or paid appointed position in the State, or any political subdivision thereof, cannot be paid by more than one government agency for coinciding workday hours. *29 Del. C. § 5822*. Those individuals who are so employed in dual government positions must keep time records of their coinciding work hours. *Id.* Those time records must be verified by their immediate supervisors at least once each pay period. *Id.* When the workday hours coincide, their salary is subject to being prorated. *Id.* To insure persons holding these dual government positions are not paid from more than one tax-funded source for coinciding hours, the State Auditor must audit the time records. *29 Del. C. § 5823(a)*. The Auditor shall report any discrepancy to the Public Integrity Commission to be investigated as a complaint; and to the Attorney General for possible prosecution. *29 Del. C. § 5823(b)*.

2. Pursuant to law, the State Auditor's office audited time records of a limited number of State employees who hold dual government positions, and concluded there were discrepancies. The discrepancies included: failure of persons holding dual government positions to submit proper time records; failure of immediate supervisors to verify the records; and failure of agency payroll sections to prorate the employees' salary. Where these systemic failures resulted in overpayment to persons holding these dual positions, action is being taken to recoup the public funds from those persons.

3. This bulletin is to remind agencies and persons holding dual government positions that failure to comply with Title 29, Subchapter III may result not only in recoupment of overpayment of public funds to persons holding dual government positions, but may result in administrative disciplinary action and/or criminal prosecution. For example, in another jurisdiction where a government official submitted time cards indicating he was on his State job when he was not, the Court affirmed the State Ethics Commission decision that he violated the Code of Ethics provision which prohibited using public office for personal gain. *Merchant v. State Ethics Commission*, 733 A.2d 287 (Conn. App., 1999). Similarly, Delaware's Code of Conduct prohibits using public office for personal gain. *See, 29 Del. C. § 5806(e)*. Administrative disciplinary measures can range from letters of censure to removal, suspension, demotion or other appropriate disciplinary action. *29 Del. C. § 5810(d)*.

4. Moreover, in Delaware, where a State official improperly obtained State funds and did not repay

them in a timely manner, he was convicted under the criminal code of official misconduct, *11 Del. C. § 1211*, which prohibits officials from obtaining a personal benefit by knowingly refraining from performing a duty imposed by law or inherent in the nature of his office. *Howell v. State of Delaware*, 421 A.2d 892(Del. 1980). The defendant argued that, at most, his conduct was an ethical violation, not a criminal violation of the Misconduct in Office statute. The Delaware Supreme Court disagreed, stating that the official had an inherent duty not to profit personally from the services and property of the public agency, and a duty to reimburse the State in a timely fashion. *Id.* We note that where the payroll section fails to pro-rate the pay, even though the State employee submitted the time records, the State employee is the last step in the chain because they receive the payment. The Code of Conduct, by stating that “No State employee, State officer or Honorary State Official shall use his public office to secure unwarranted privileges, private advantage or gain,” imposes on the State employee the responsibility not to use public office for private gain. *Commission Op. Nos. 00-06 & 00-40*.

5. Thus, persons who hold dual government positions who do not have their State pay properly prorated because they did not comply with time-keeping requirements could be seen as using public office for personal gain as it results in a financial benefit, commonly referred to as “double dipping.” Moreover, based on *Howell*, failure to reimburse the State “in a timely fashion” when an official obtains personal benefits from public funds, may also raise issues under the Misconduct in Office statute.

6. The audit also brought to our attention that officials are obtaining interpretations of Title 29, Chapter 58 from various agencies. In one instance, an official relied on an interpretation of Subchapter III from his agency in trying to comply with the time-keeping provisions as it related to compensatory time. Subsequently, another opinion was issued by a different agency addressing the same issue for the same individual, but reaching a different conclusion. The inconsistencies in interpretations resulted in the statute being amended in an attempt to clarify the meaning of “workday” and the use of compensatory time. *H.B. 311, signed into law, 7/17/01*. Those inconsistent interpretations could have been avoided if the agencies or those subject to the law had followed Title 29, Chapter 58 which provides that:

Upon the written request of any State employee, officer, honorary official, or State agency, “**the Commission** may issue an advisory opinion as to the applicability of this chapter [Title 29, Chapter 58] to any particular fact situation. 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)(emphasis added)*. The Commission is also to strive for consistency in its opinions. *29 Del. C. § 5809(5)*.”

7. Courts, in interpreting similar statutory language, have said: the legislature, in enacting the law intended that the procedure provided by the statutory provision for advisory opinions from the Ethics Commission, which is the only agency charged by the legislature with the interpretation and

enforcement of the law, shall be the only procedure upon which a state public official has a right to rely on in such a case, and also intended that this Commission be the only state agency entitled to give advisory opinions relating to the interpretation and application of the laws upon which state public officials have a right to rely. *Davidson v. Oregon Government Ethics Commission*, 712 P.2d 87 (Ore. 1985). Where a government official relies on the advice of public officials, **and** those officials are given charge of advising such personnel on conflict of interest problems, the person to whom the advice is given can raise an estoppel defense. *United States v. Hedges*, 912 F.2d 1397 (11th Cir., 1990)(*emphasis added*). *See also, United States v. Tallmadge*, 829 F.2d 767 (9th Cir., 1987)(*elements of an estoppel defense are: (1) the official interpreting the law was authorized to enforce or interpret the statute; the official's interpretation affirmatively misled the defendant; and (3) the defendant reasonably relied on the official's interpretation*) (*emphasis added*). *See also, Cox v. Louisiana*, 379 U.S. 559 (1965).

8. As the Public Integrity Commission is the only agency authorized by law to issue advisory opinions interpreting Title 29, Chapter 58, and to insure consistencies in the interpretation of that law, we emphasize to persons subject to the dual government employment law, their immediate supervisors who must verify their time cards, and/or the agencies who must insure that the pay is properly prorated, that any questions concerning interpretations of Subchapter III, or any other provisions of Title 29, Chapter 58 should be submitted to the Public Integrity Commission if they want the protection against disciplinary action offered by the statute.

NOTE: On April 1, 2003, House Bill 88 was signed into law. Among other things, it amends Title 14, Section 1206(h) to exempt members of the Professional Standards Board (PSB) from Title 29, Chapter 58, Subchapter III. It provides other rules on how those member's compensation will be prorated to avoid being compensated twice for coinciding hours. PSB members should refer to H.B. 88 or Title 14, Section 1206(h) and contact their agency's Deputy Attorney General for guidance. An extract of **only that portion** of H.B. 88 dealing with exemption from Title 29, Chapter 58, Subchapter III is at the end of this document.

DELAWARE CODE ANNOTATED

TITLE 29. STATE GOVERNMENT
PART V. PUBLIC OFFICERS AND EMPLOYEES
CHAPTER 58. LAWS REGULATING THE CONDUCT OF OFFICERS AND EMPLOYEES
OF THE STATE
SUBCHAPTER III. COMPENSATION POLICY

29 *Del. C.* § 5822 (2001)

§ 5822. Policy

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

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

(c) All time records, so verified, shall be kept by the immediate supervisor until such time as they are required by the State Auditor.

(d) No employee shall be permitted to make up time during hours other than the normal workday for purposes of compensation. A normal workday is defined by Merit Rule 5.0200. A standard work schedule is defined by Merit Rule 5.0210.

(e) Any hours or days during which an employee uses vacation, personal, or compensatory days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter.

(f) School administrators whose duties require that they work regularly during summer months shall not be exempted from this chapter. If a school administrator shall have no immediate supervisor, the school administrator's time record shall be verified by the appropriate school board at its next regular or special meeting following any pay period in which said administrator missed work due to his or her elected or paid appointed position.

§ 5823. Audits; penalty

(a) The State Auditor shall conduct an annual audit of the time records which have been kept by the supervisors or school board in accordance with § 5822(b) and (c) of this title to determine whether or not an employee was paid from more than 1 tax-funded source for working coincident hours of the day.

(b) Any discrepancy found by the State Auditor shall be reported to the Public Integrity Commission for investigation pursuant to § 5810 of this title and/or to the Office of the Attorney General for possible prosecution under § 876 of Title 11 (tampering with public records in the first degree) and any other appropriate section.

Extract of A Portion of House Bill No. 88, Signed 4/01/03
Delaware Laws Vol 74, Chapter 13

Further Amend § 1206(h) by adding a new paragraph at the end of the Section as follows:

“The provisions of Subchapter III of Chapter 58, Title 29 of the Delaware Code shall not apply to members of the Standards Board. Any Standards Board member employed by a public school district will be released from his or her normal duty for the purpose of attending any regular monthly meeting of the Board which is scheduled during normal school hours as provided in this Section, and such member shall receive his or her normal salary from the member’s employer pursuant to the provisions of Chapter 13 of this Title and any applicable collective bargaining agreement. Subject to the availability of appropriated funds, the Standards Board shall reimburse the member’s employing school district for such costs as the school district may incur in order to obtain the services of a substitute teacher to take the place of any teacher member of the Standards Board who is granted release time pursuant to this Section. A member of the Standards Board who is granted release time pursuant to this Section shall have his or her compensation, as provided in the first paragraph in this Section, proportionally reduced so that such member is not compensated twice for the time spent in meeting.”

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