Delaware's
"Anti-Double Dipping"
Law

State Public Integrity Commission

Dual Compensation

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January 20, 2009

Dual Compensation Synopses of Opinions

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Introduction

The State Public Integrity Commission was established in 1991 as the State Ethics Commission. It was responsible for administering and implementing the Code of Conduct, Title 29, Chapter 58, governing the ethical conduct of State employees, officers and honorary officials.

In 1994, Title 29, Chapter 58 was amended. The amendments changed the Commission's name, authorized full-time legal counsel and added the additional responsibilities for the Commission to administer and implement all subchapters of Title 29, Chapter 58, over a phased in time period. Thus, in addition to the ethics law, the Commission began administering the Financial Disclosure statute, the Dual Compensation statute and the Registration of Lobbyists statute.

As part of the Commission's statutory duties, it is to prepare and publish manuals and guides explaining the duties of individuals covered by Title 29, Chapter 58, issue written advisory opinions; and summaries of its opinions for public distribution; and prescribe forms for reports and other documents required by law. *See, 29 Del. C. § 5809(2), (8) and (9) and 29 Del. C. § 5807(d)(4).* The Commission's opinions on the dual compensation law were previously included with the Ethics Synopses of Opinions. This publication contains not only the Commission's opinions on dual compensation, but also Attorney General Opinions issued before the Commission was given authority to administer the law. For the reader's convenience, a copy of the statute and sample letters and forms to aid in compliance are attached.

The Commission's opinions on ethics, financial disclosure, and lobbying are published separately.

The Commission may be contacted at 302-739-2399. Our address is on the inside cover of this document.

ATTORNEY GENERAL OPINION SYNOPSES

Title 29, Chapter 58, SUBCHAPTER III - Compensation Policy

Jury Duty and "Double Dipping" - *Att'y Gen. Op. No. 88-I008*

The State Auditor asked if service as a juror is covered by the "Double Dipping" Act, *29 Del. C., ch. 58, subch. III.* The statute provides that persons employed by the State or any political subdivision of the State, who serve in an elected or paid appointed position in state government or the government of any political subdivision shall have the State 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 work-week 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. *29 Del. C. § 5822(a).* The AG's office concluded that the act does not apply to jury service because it was not thought that jury service was the type of "appointed service" which the act covers. *Att'y Gen. Op. No. 88-I008 (March 31, 1988).* It rests with the employer to decide if the employment policy should be to let the employee keep or return to the employer the jury fee. *Id.* The Merit Rule, in effect at the time, permitted Merit Employees to be excused with pay. *Merit Rule 6.0450.* The AG's office said that given the public policy favoring jury service and the citizens' obligations to serve on juries, it would not say that the Merit Rule was contrary to law.

Note: As of August 2003, the applicable Merit Rule was still: *6.0450: Jury Duty and Appearance as Witness*. However, the Merit Rules were under revision. The rules are available at www.state.de.us/hrm. Since this decision, legislation was passed to prohibit employers from considering the daily jury allowances as pay and docking that amount from the employees' pay. *See, 10 Del. C. § 4515.*

Delegating Authority under "Double Dipping" Law - *Att'y Gen. Op. No. 87-I016*

Immediate supervisors, or if there is no immediate supervisor for school administrators then school boards, have a statutory duty to verify the dual government employee's time records on a regular basis. *29 Del. C. § 5822(b).* The State Auditor asked if that duty could be delegated. *Att'y Gen. Op. No. 87-I016 (June 3, 1987).* Generally, a public official may not delegate his authority, but may employ assistants when necessary to carry out his duties. *Id.(citing Brennan v. Black, Del. Supr., 104 A.2d 777, 795 (1954).* Therefore, the officers named in the act remain responsible for exercising the final authority to verify the records even though they may find it necessary to direct someone to perform the clerical function of keeping the records. *Id.*

Reservists, National Guard, & Federal Employees - *Att'y Gen. Op. No. 87-I016*

Merit employees who are members of the Reserve or the National Guard and are ordered to training camp or to perform special duty not in excess of 15 days in any calendar year are on the

payroll of the United States. *Att'y Gen. Op. No. 87-I016 (June 3, 1987).* Thus, they are not serving in "an elected or paid appointive position in state government or in the government of any subdivision of the State," and, therefore, not covered by the "Double Dipping" act in title 29, subchapter 3. *(See also, Commission Op. No. 95-19--National Guard members subject to State Code of Conduct when paid by State appropriations).* Similarly, the double dipping act does not apply to federal employees who receive additional compensation from tax funds generated in Delaware, as the act applies only to persons "employed by the State, or by any political subdivision of the State..." The federal government is neither a State nor a political subdivision. *Att'y Gen. Op. No. 87-I016 (June 3, 1987).*

Purpose of Double Dipping Statute - *Att'y Gen. Op. No. 87-I016*

In 1986, the General Assembly decided that many public officers were taking home two government paychecks. In some instances it was believed the officials were paid from one source of public funds for the discharge of appointed or elected duties, and at the same time, paid from other public funds for regular employment with State agencies or institutions. *Att'y Gen. Op. No. 87-I016.* This practice is commonly called "Double Dipping." The policy behind the act is to stop double dipping, and conserve public funds. *Att'y Gen. Op. No. 87-I016*.

[NOTE: *Criminal penalties may attach if discrepancies are found in the record keeping, 29 Del. C. § 5823]*. The act requires additional records be kept; that they be audited; and false records or discrepancies referred to the Public Integrity Commission or the AG.

"Double Dipping" and Collective Bargaining - *Att'y Gen. Op. No. 87-I016*

The "Double Dipping" act prohibits State employees from making up compensation lost from their State job because of their other government position as an elected or appointed official during other than normal work day hours. *Att'y Gen. Op. No. 87-I016 (June 3, 1987).* The State Auditor asked if that prohibition violated collective bargaining agreements. *Id.* No specific decision could be made absent examination of a specific contract. However, generally, a State may not impair the validity of an existing contract. *Id. (citing In re State Employees' Pension Plan, Del. Supr., 364 A.2d 1228 (1976)).* Conversely, the State may be able to impose certain requirements on individuals who wish to discharge elected or appointed responsibilities at public expense. *Id.* Such a condition for holding public office may necessitate the office holder waiving contractual rights, including benefits bestowed through collective bargaining agreements. In any event, no contract entered into after the Act's effective date could ignore its provisions. *Id. (citing cf., Shaw v. Aetna Life Ins. Co., Del., Super., 395 A.2d 834 (1978)).*

PUBLIC INTEGRITY COMMISSION SYNOPSES

[**NOTE:** By 1996, the Public Integrity Commission became responsible for interpreting all subchapters of Title 29, Chapter 58. *See, e.g.,* ***29 Del. C. § 5809(b)*****].**

Running for Elective Office *- Commission Op. No. 92-2*

A State employee asked if it would be a conflict of interest if he ran for an elected State office while employed by the State. The Commission found no specific Code of Ethics provision which banned such activity. However, it noted that if the employee were elected, the Code would apply in toto to both his full-time and his elected position. ***(Merit Employees, See,*** *29 Del. C. § 5954 and Att'y Gen. Op. No. 78-016 (Oct. 5, 1978)****).***

NOTE: The Commission's opinions must be based on a particular fact situation. *29 Del. C. § 5807(c)*. Certain persons covered by the Code of Conduct could be prohibited from maintaining a State position and elective office by other laws, e.g., State Election Commissioner cannot hold or be a candidate for office, *15 Del. C. § 301*; Public Integrity Commission members, formerly State Ethics Commission, cannot hold elected or appointed U.S. or State office, or be a candidate for such office, *29 Del. C. § 5808(b)*. Readers should be alert to other rules, statutes or decisions restricting such actions, *e.g.*, *29 Del. C. § 5954 (regarding political activities by State employees*); *In Re: Request of the Governor for an Advisory Opinion, Del. Supr., 722 A. 2d 307 (1998)(State trooper cannot hold dual positions as trooper and State Representative as it would violate separation of powers clause); Merit Rules 5.04 & 5.05.*

Full-Time State Position/Part-Time Appointee *- Commission Op. No. 93-5*

An individual served as an honorary State official on a State Board. "Honorary State officials" are appointed members, trustees, directors or the like of any State agency and receive not more than $5,000 per calendar year in compensation. *29 Del. C. § 5804(13)*. The official was subsequently hired as the director of a State agency. He asked if holding the concurrent positions created a conflict. His decisions as an Honorary State official would not effect the State agency for which he worked. His job with the State agency had no effect on the commission to which he was appointed. He said he would decline payment of expenses or the $75 stipend he would normally receive from the position to which he was appointed. The Commission found no violation of the Code of Conduct.

NOTE: The Code prohibits persons employed by the State who also serve in an elected or paid appointed position from accepting payment from more than one tax-funded source for duties performed during coincident hours of the workday. *29 Del. C. § 5822.*

Running for Elective Office *- Commission Op. No. 97-06*

A State agency asked if a Merit employee, in a federally funded position, may serve in an elected office without a conflict with the federal grant or any State law. The State employee was contemplating running for a local government position.

As noted in prior opinions, no specific provision in the Code of Conduct totally bans running for elective office. *See, Commission Op. Nos. 92-2, 96-02, and 96-22.* However, while running for elective office, individuals must be alert to the provisions which restrict State employees, officers and officials from engaging in conduct that would appear improper and from engaging in activities in substantial conflict with official duties. *Id.; See, 29 Del. C. § 5806(a) and (b)*. The Commission has interpreted those provisions as precluding the individual from engaging in political activities or soliciting political contributions, assessments or subscriptions during State work hours or while engaged in State business. *See, Commission Op. Nos. 96-02 and 96-22.*

Regarding other State statutes that may apply, the Commission has no authority to interpret such provisions. However, the Commission referred the agency and the Merit employee to *29 Del. C. § 5954. See also, Att'y Gen. Op. No. 78-016(discussing application of Merit Rules if running for elected office).* Also, the Delaware Code may have other provisions that may apply to the individual which the Commission has no jurisdiction to interpret. For example, in other cases the Commission referred individuals to the Police Officer's Bill of Rights, etc., and advised the individual to check the Delaware Code to see if other provisions may affect their decision to run for office. ***(Note: See, 29 Del. C. § 5822 (provides that those employed by the government and who also serve in an elected position shall have their pay reduced on a prorated basis for hours or days missed during the normal workday while serving in an elected position which requires the employee to miss time which is normally required of other employees in the same or similar positions).***

Regarding the fact that the individual may move to a federally funded State position, the Commission is aware of a Federal provision referred to as "The Hatch Act," governing political activities for federal employees. *See, "Hatch Act," c. 410, 53 Stat. 1147 (1939)(codified in scattered sections of 5 and 18 U.S.C.);* Whether that provision applies to State employees who are paid by federal funds would not be a matter within this Commission's jurisdiction. *See, Att'y Gen. Op. No. 78-016(discussing application of Hatch Act to certain State employees).* Here, the agency had discussed the Federal statute with the Federal agency which would fund the position.

As noted in other Commission decisions, specific facts must be presented before the Commission can decide if holding elected office while a State employee creates a conflict. *29 Del. C. § 5807(c).* Here, the individual had not yet been elected. As there were no specific facts on which to rule, the Commission advised the agency and the individual to be alert to the Code of Conduct provisions referred to above and to provisions restricting outside employment. *See, 29 Del. C. § 5806(b).*

As the individual was running for an elected office in a local government which had not adopted its own Code of Conduct, he also was alerted to the fact that the State Code of Conduct applies to him not only in his State position, but also would apply to him if elected as a local government official. *See, 68 Del. Laws c. 433 § 1 (State Code of Conduct applies to local government employees and*

officials unless it adopts a code at least as stringent as the State Code).

If he were not elected, he would have no further concerns about an actual conflict between the elected position and the State position.

"Other Employment" includes Dual Employment by the State *- Commission Op. No. 99-35*

The Code of Conduct restricts the conduct of State employees when they hold "other employment." *29 Del. C. § 5806(b).* The issue was whether a State elective office constitutes "other employment" when an individual holds a full-time State position. We have held that State employees, who also hold elective office in a local government, are subject to the "other employment" restriction. *Commission Op. Nos. 92-2; 96-02; 96-22; 97-06.* The jurisdictional basis was not specifically addressed in those cases.

At common law, it was incompatible for an individual to hold dual government positions if in one position the individual could act upon the appointment, salary and budget of his superior in the second position. *See, e.g., People Ex. Rel. Teros v. Verbeck, Ill. App. 3 Dist., 506 N.E. 2d 464 (1987)*. The common law ban on holding two government positions under such situations was because of the potential for influencing their superior's salary and budget, and ultimately their own salary. *Teros; People Ex. Rel. Fitzsimmons v. Swailes, Ill. Supr., 463 N.E. 2d 431 (1984); People Ex. Rel. v. Claar, Ill. App. 3d, 687 N.E. 2d 557 (1997); Mead v. Board of Review, Ill. App. 2d, 494 N.E. 2d 171 (1986).* In such situations, Courts said there could be "conflict of duties" between the two offices and a "conflict of interest," or at least the potential for such conflict if the individual held both jobs. *Teros, Swailes, Claar, and Mead.* Some courts held that recusal from participating in such decisions was not a sufficient remedy; rather, one of the jobs must be relinquished. *Teros at 466.* It held that banning dual government employment under such situations "insures that there be the appearance as well as the actuality of impartiality and undivided loyalty." *Id. (citing Rogers; See also, O'Connor v. Calandrillo, N.J. Super., 285 A.2d 275, aff'd., 296 A.2d 325, cert. denied., 299 A.2d 727, cert. denied., U.S. Supr. Ct., 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed. 2d 399).* The common law rule also had application if the individual held a government post and a second job in the private sector. *63C Am. Jur. 2d Public Officers and Employees § 62.* The doctrine arises out of the public policy that an officeholder's performance not be influenced by divided loyalties. *Id.*

Subsequently, States began to change the common law by adopting statutes regarding concurrent employment in both the public and private sector. *63C Am. Jur. 2d Public Officers and Employees § 62, et. seq.*; *Annotation: Validity, Construction and Application of Regulations Regarding Outside Employment of Governmental Employees or Officers, 62 ALR 5th 671.* Regarding holding a second job in the public sector, the statutes identified certain positions where a government employee could not hold dual positions. In other situations, it permitted dual employment, but restricted the conduct of persons holding dual positions. *62 ALR 5th 671 and 63C Am. Jur. 2d Public Officers and Employees §§ 62 thru 70.* Moreover, Courts acknowledged the distinction between a "conflict of duties" and a "conflict of interest." *Claar at 217; Reilly v. Ozzard, N.J. Supr., 166 A.2d 360 (1960).* A "conflict of duties" inheres in the very relationship of one office to the other; but a "conflict of

interest" will not inevitably arise as an incident of the relationship of the two offices. Reilly; Dunn v. Froehlich, N.J. Super., 382 A.2d 686 (1978). "Conflicts of interest" could arise because of the "personal interests" of the officer in question. Dunn. It could depend on what legislation was being considered. Reilly. If there was a "conflict of duties," dual positions could be incompatible. But if there were a "conflict of interest," or the "potential for a conflict," they were "routinely cured through abstention or recusal on a specific matter." Claar (citing 56 Am. Jur. 2d Municipal Corporations § 172 (1971)); Reilly at 370.

This approach to dealing with concurrent employment was meant to allow citizens, including government employees, an opportunity to hold a second job to supplement their income and, in the case of dual government positions, permit them to more fully participate in politics. 62 ALR 5th 671 and 63C Am. Jur. 2d Public Officers and Employees §§ 62 thru 70.

Delaware's General Assembly adopted this less restrictive approach. In some instances, it identified government positions where dual occupancy is prohibited by law. See, e.g., 29 Del. C. § 5808 (b)(Public Integrity Commission members may not hold elected or appointed office under the government of the United States or the State or be a candidate for such offices; 15 Del. C. § 301(d) (Board of Elections Commissioner may not hold or be a candidate for office). Where dual government positions were not expressly prohibited, the General Assembly restricted the conduct of government employees. For example, when State employees also seek an elected office, the General Assembly restricted their conduct regarding political activity. See, e.g., 29 Del. C. § 5954 (no person shall use or promise to use, directly or indirectly, any official authority or influence, to secure or attempt to secure for any person an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration).

More significant to this Commission, is that the General Assembly, in enacting the statute, said the purpose was to insure that the conduct of such persons holds the respect and confidence of the people, and therefore such persons are to avoid conduct which violates the public trust or which creates a justifiable impression among the public that such trust is being violated. 29 Del. C. § 5802(1). However, it also recognized that it is both "necessary and desirable that all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed." 29 Del. C. § 5802(3).

To balance the protection of the public's interests and at the same time encourage citizens to take public office, it said that State employees must have the benefit of specific standards to guide their conduct. 29 Del C. § 5802(2). Among the "specific standards" is the restriction on "other employment." 29 Del. C. § 5806(b).

That standard provides that: No state employee, state officer or honorary state official shall...incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment ... under circumstances where such acceptance may result in any of the following:

(1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. *29 Del. C. § 5806(b)(emphasis added).*

As noted, we have held that"other employment" restriction applies if a State employee also holds elected office. *Commission Op. Nos. 97-06; 96-02; 96-22.* Those holdings are consistent with: (1) the plain language of the provision; and (2) the statutory purpose and intent. First, the plain language refers to "any" obligation in substantial conflict with performing official duties. The term "any" is all encompassing. *Commission Op. No. 95-006.* Also, the plain language does not refer to employment by a private enterprise, rather it refers to "other employment." Had the General Assembly desired to restrict the provision only to employment by a private enterprise, it could have said so because in other Code of Conduct provisions it clearly and specifically refers to standards to be followed where the individual is a State employee, and also has an interest in a private enterprise. *See, e.g., 29 Del. C. § 5805(a)(2)(b); § 5805 (b); § 5805 (c) and (d); § 5806(c) and (d).*

Reading those terms in the context of the whole statute, we note that the General Assembly inserted a specific subchapter addressing procedures to insure that persons holding elected positions and are "also employed" by the State are not paid by more than one tax-funded source for duties performed during coincident hours. *29 Del. C., subchapter III*. Thus, the General Assembly is presumed to have been aware of such dual positions when it enacted Title 29, Chapter 58. To hold that "other employment" did not include elected positions would not only be contrary to the plain language but would mean that State employees with a second job in the private sector would be subject to having their other employment curtailed if there was a conflict, while State employees whose second job was with another government agency would not be so curtailed. Such interpretation would ignore the fact that the law recognizes that conflicts can arise when the "other employment" is another government job. *See, Teros, et. al, supra.* Where an interpretation would lead to an absurd or unreasonable result, such interpretation could not be the expressed legislative intent. *Commission Op. No. 96-08; 96-14.*

Accordingly, we hold that "other employment" in the Code of Conduct applies to State employees who concurrently are General Assembly members because to do so is consistent with the plain language and the expressed statutory purpose. *(Commission Op. No. 99-35).* The effect of this interpretation is that the Commission can decide if the person in their full-time State job has a conflict of interest on that job. However, it does not mean that the Commission can decide if the person in their capacity as a member of the General Assembly has a conflict because conflicts for members of the General Assembly are governed by other laws. *See, Commission Op. No. 99-35, "Personal or Private Interests of General Assembly Members," supra at pp. 20-21.*

Having concluded that we have jurisdiction, the next issue is whether participating in decisions regarding the salary of a superior creates an obligation "in substantial conflict" with performing public duties and/or whether the other employment may result in: (1) impaired judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. *29 Del. C. § 5806(b).*

Here, because of the dual employment, a State official was in a position to influence his supervisor's salary at hearings in the General Assembly.[1] His supervisor has the authority to hire, promote, or fire him in his State position. Thus, actions he may take on the matter could impact on his own full-time employment. Consequently, it could appear that he had a "personal or private interest" in the matter. The statutory remedy under the Code of Conduct, *29 Del. C. § 5805(a)(1),* if there is a personal or private interest which tends to impair independent judgment, is that the State employee not participate.[2] *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993).* The question of whether an interest is sufficient to warrant recusal is an issue of fact. *Prison Health.*

Applying the facts to the "other employment," we must decide if his participation "may result in":

(1) Impaired Independence of Judgment - Where an official makes decisions on his superior's salary, his independent judgment may be comprised in two ways. First, his personal or private interest in insuring his own job security has the potential of not only affecting his superior's salary, but ultimately his own because the supervisor has the power to hire, fire, and promote him. *See, Teros; Swailes; and Mead.* Second, it creates, at least the appearance, that the supervisor could use his supervisory role as leverage to influence the official or maybe take retaliatory action against the official if he did not vote as his supervisor desired. *Township of Belleville v. Fornarotto, N.J. Super., 549 A.2d 1267, 1274 (1988).*

(2) Preferential Treatment to Any Person--Preferential treatment could also arise in two ways: (a) it could appear that the elected official would give preferential treatment to his employing supervisor because he can hire, fire or promote at will; and (b) the supervisor could give the dual employment holder preferential treatment with respect to his employment conditions. *Fornarotto at 1274.* Under these circumstances, not only could it result in preferential treatment, but it could appear that either or both of them were using public office to secure unwarranted privileges, private advantage or gain, which is prohibited by *29 Del. C. § 5806(e).*

(3) Official Decisions Outside Official Channels–It could, at a minimum, appear that the dual employment holder could operate outside official channels to obtain the salary increase for his supervisor; or that the supervisor could use his authority and power over the employee to obtain such decision.

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[1]We stress that this is not a situation where the decision affects a broad class or group. Rather, it individually addresses the supervisor. As we must base our decisions on a "particular fact situation*." 29 Del. C. § 5807(a)*, we do not address what conduct would be appropriate if a class or group were involved.

[2]The restriction on State employees participating where there is a personal or private interest appears broader than a similar restriction on General Assembly members. State employees may not participate **on behalf of the State** in matters **pending before the State** if they have a personal or private interest. *29 Del. C. § 5805(a)(1).* Legislators may not debate or vote **on any measure or bill pending in the General Assembly** if they have such interest. *29 Del. C. § 1002(a).*

(4) Any adverse effect on the public's confidence in the integrity of its government-- This provision and the one against raising suspicion among the public that a State employee is engaging in conduct violating the public trust, *29 Del. C. § 5806(a)*, are basically an "appearance of impropriety" test. *Commission Op. Nos. 98-11; 98-23; 98-31.* This is not to say that, in fact, his judgment would be impaired, or that he would give or receive preferential treatment, etc. However, the law does not require an actual violation. *Commission Op. Nos. 97-11; 98-14.* It only requires that it "may result in an adverse effect on the public's confidence" or that it may "raise suspicion"that the dual employment holder is acting in violation of the public trust. *Id*; *See also, 29 Del. C. § 5811(2)(public officers and employees should avoid even the appearance of impropriety); 63C Am. Jur. 2d Public Officers and Employees § 252 (actual conflict is not the decisive factor; nor is whether the public servant succumbs to the temptation; rather it is whether there is a potential for conflict).* Courts have held that there is at least a potential for a conflict of interest when a government employee is a subordinate to another government employee, and in his other government position would have the opportunity to make decisions regarding his superior's salary. *See, cases cited herein.*

Because of at least the potential for a conflict of interest, the remedy mandated under the Code of Conduct is that: No State employee may participate on behalf of the State in the review or disposition of any matter pending before the State in which he has a personal or private interest which tends to impair his independent judgment. *29 Del. C. § 5805(a)(1). See, Beebe Medical Center v. Certificate of Needs Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996)(interpreting 29 Del. C. §5805(a)(1) as requiring State official to recuse himself, where a conflict was "assumed," although his participation consisted of neutral comments and he did not vote on the matter); Prison Health Services v. State, Del. Ch., C.A. No. 13,010, Hartnett V.C. (June 29, 1993)(interpreting 29 Del. C. § 5805(a)(1) as requiring that State official should not have participated in a meeting, even though he was not the final decision maker and did not vote on the matter).*

Dual State Positions *- Commission Op. No. 01-18*

A State employee asked if he could serve as an appointee to a Commission while holding a full-time State job. Based on the following facts and law, he could hold the dual State positions if he recuses himself from the types of matters identified herein.

The State employee was being appointed to the Commission pursuant to a State statute which required that certain persons be appointed. The Commission has some oversight of certain appeals presented to the Commission by the State employee's supervisor. The Commission also selects the individual who holds the supervisory position. Its other functions, which are its primary duties, do not entail decisions about or affecting the supervisor.

The Code of Conduct prohibits State employees from accepting other employment if it may result in:

(1) impaired independent judgment in performing official duties;
(2) preferential treatment to any person;

(3) official decisions outside official channels; and

(4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b).*

"Other employment" includes secondary positions with the State. *Commission Op. No. 99-35*. In that opinion, the Commission held that it would be a conflict for a State employee to render decisions that had significant impact on his supervisor, and accordingly he should recuse himself. Here, the State employee, to avoid violating the restriction on participating in decisions where his judgment might be impaired, will recuse himself when the Commission makes decisions about his supervisor. As he will recuse himself, nothing indicates he would be able to give preferential treatment to his supervisor, or make official decisions outside official channels.

The Code also prohibits State employees from incurring any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. *29 Del. C. § 5806(b).* We understand that his Commission duties will not substantially interfere with the performance of his State job.

If a person holds a full-time State job and also a paid appointed position with the government, he cannot be paid more than once for overlapping workday hours. *29 Del. C. § 5821, et. seq; See also, Ethics Bulletin 009 on the "anti-double dipping" law.* He was advised to review the law, our prior opinions interpreting the law, and if necessary seek further guidance.

Dual Compensation from State Agencies - *Commission Op. No. 00-08*

A State employee asked if she could be paid for attending meetings of a State Council to which she was appointed, if she takes leave from her full-time State job to attend the meetings. Based on the following law and facts, the Commission held that she could be paid for attending the Council meetings when she was on leave from her full-time State job.

The "double dipping" law was passed in 1986 because, in some instances, it was believed that State officers were being paid from one fund for discharging their appointed or elected duties, and simultaneously, were paid from other public funds for regular State employment. *Att'y Gen. Op. No. 87-I016.* The General Assembly expressly provided that the State should not pay an individual more than once for **coincident** hours of the workday. *29 Del. C. § 5821(emphasis added).*

To insure that persons holding dual State positions are not paid from two sets of public funds for coinciding hours, the law sets procedures to follow when holding dual positions, such as: requiring additional time records; audits of those records; and referral by the State Auditor to this Commission or the Attorney General if false records or discrepancies are revealed in the audits. *29 Del. C. § 5822 and §5823.*

Regarding payment, the statute states:

> "Any person employed by the State...who also serves in an elected or paid appointed position in State government...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." *29 Del. C. § 5822(a).*

Thus, the statute does not prohibit her from being paid by the Council; rather, her full-time State salary **could** be prorated *(emphasis added).* However, the statute then expressly excludes vacation time from being prorated. It says: "Any hours or days during which an employee uses vacation or personal days to which he or she is entitled **shall not** constitute hours or days which fall within the scope of this subchapter." *29 Del. C. § 5822(e)(emphasis added).*

Accordingly, the language is clear--if she is on vacation or personal days when she attends the Council meetings, then her State salary is not prorated for the time she is absent from her full-time State position.

Copies of the Merit Rules, which also have provisions on dual employment by State agencies, were included in the information sent to us. *See, e.g., Merit Rules 5.0400 and 5.0500.* We cannot interpret the Merit Rules as our jurisdiction is limited to Title 29, Chapter 58. *Commission Op. No. 96-17.*

We also are not ruling on whether her second position with the State creates a conflict of interest; only interpreting the law on "double dipping." The employee was advised that the Code of Conduct has a specific provision on accepting "other employment." *29 Del. C. § 5806(b).* We have held that "other employment" includes a second position with the State. *Commission Op. No. 99-35.* Further, she was advised that as an appointee she is considered an "honorary State official." Thus, her conduct in her full-time State position is governed by the Code of Conduct provisions as they apply to "State employees," and her conduct as an appointee is governed by the provisions as they apply to "honorary State officials."

While generally advisory opinions are confidential, the State Auditor's Office has authorized release of this opinion.

May 8, 2006

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Advisory Op. Nos. 05-39, 05-40 and 05-41 - Dual Compensation Agency Policy, Use of

Compensatory Time, Use of Lunch Time

Dear Ms. Stoughton:

The Auditor's office audited time records of employees with dual government jobs. *29 Del. C. § 5824.* As a result, you sought advice on the Dual Compensation law. *29 Del. C. § 5822, et. seq.* Among other things, an agency paid an employee and did not prorate as required; paid an employee for sick leave to go to the 2d government job, etc. This is not the first audit with discrepancies by this agency. Your office previously recommended that the agency establish procedures. It said it would. This audit resulted in the same recommendation. The agency disagrees and says clear policies and procedures are in Section 5822 of Title 29.

By law, the "State" must "have in place clear policies and procedures" on the law. *29 Del. C. § 5821(c).* "State" is "the State of Delaware and includes any State agency." *29 Del. C. § 5804(10) and (11).* That gives a State agency authority to create polices and procedures on the law. If it does, the polices and procedures cannot be less stringent than the State law. *See, Nardini v. Willin, 245 A.2d 164 (Del., 1968).*

The law has broad policies and procedures. They are not tailored to particular employees or agencies. "Clearly," the law refers to other laws and rules, e.g., the Fair Labor Standard Act (FLSA) and Merit Rules, but gives no procedures related to those references. Moreover, the employee's status (Merit, casual/seasonal, exempt, contractual, etc.) impacts on applying the law. The agency's discrepancies may be because the law is not so "clear."

Based on the legal complexities below, the Commission advises the agency to adopt the Auditor's recommendations to have policies and procedures to insure compliance and raise the public's confidence that government employees are *not* "double-dippers" misusing tax-payer's funds.

(I) Background to Decision

(A) Original dual compensation law:

General Rule: "Any person employed by the State...who also serves in an elected or paid appointed position...shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal *workday* or during the course of the employee's normal *workweek* while serving in an elected or paid position which requires the employee to miss any time which is normally required of other employees in the same or similar positions. *29 Del. C. § 5822(a). (emphasis added).*

"No employee shall be permitted to make up time during hours other than the normal *workday* for purposes of compensation." *29 Del. C. § 5822(d)(emphasis added).*

Exception: "Any hours or days during which an employee uses *vacation or personal days* to which he or she is entitled shall not constitute hours or days which fall within the scope of

this subchapter." *29 Del. C. § 5822(e)(emphasis added).*

(B) Circumstances Resulting in Amendments:

In 2001, the Auditor's Office, conducted its annual audit. It showed that a State employee, who was also an elected official, used compensatory (herein afer "comp time"). earned at his State job to perform his elected duties. He used comp time to go to his elected position during "normal workday" hours, but his pay was not prorated because he used comp time. He had asked his agency if that was allowed, and it said it was permitted. On finding this application of the law, the Auditor's Office requested an Attorney General (AG) opinion on whether he could use comp time like vacation or personal days to avoid a prorated salary.

The AG's office said comp time was not an enumerated exception in *29 Del. C. § 5822(e). Att'y Gen. Op., May 18, 2001, 2001, (Atch. 1).* Further: "No employee shall be permitted to make up time during hours other than the normal *workday* for purposes of compensation." *29 Del. C. § 5822(d) (emphasis added).* It said: "comp time by its very nature can only be earned outside the employee's normal working hours." *Att'y Gen. Op., 2001.*

This Commission did not know of the agency's or the AG's opinion. After the opinions, House Bill 311, was introduced and rapidly passed.[3] The Commission was not part of that process either. In July 2001, after reviewing the Auditor's report, the Commission met with him to discuss how to achieve better compliance. Of concern was that State employees were obtaining conflicting opinions. An Ethics Bulletin was issued, advising agencies that, by law, the Commission is the single source for interpreting the law. *Ethics Bulletin 009. Atch. 2.*

(C) The Amended Language and the Merit Rules

House Bill 311 amended the law to add "compensatory" time in the exception to the general rule. H.B. 311, *Atch 3*. It also added references to the Merit Rules to define "work day" and "work week." *Id.*; *see also*, *29 Del. C., ch. 58, subchapter III, Ethics Bulletin 009,(Atch 2 above).* Using Merit Rule references as definitions creates problems:

(1) Merit Rule 5.0200 did not define "workday." It defined "Standard Work Week."

> "Standard Work Week for all full-time employees in the classified service shall be 37½ hours. Any changes made to accommodate the requirements of the Fair Labor Standards Act must be approved by the [Personnel] Director. Any other deviation must be approved by the [Personnel] Director with the concurrence of the Budget Director."

[3] H.B. 311 reported out of House Committee, 6/21/ 2001; passed by the House, 6/26/ 2001, reported out of Senate Committee, 6/28/2001; passed by the Senate, 6/30/2001; signed into law, 7/17/2001. *73 Del. Laws, c. 190.*

(2) Merit Rule 5.0210 did define "*work schedule*. " That word is not used in the compensation law, except to be defined.

(3) *"Work Week,"* is used in the compensation law, but is not defined. It has no Merit Rules reference. However, Merit Rule 5.0200 defined *"work week"* as: "Work schedules shall be established by the appointing authority to meet operational needs."

(D) The Revised Merit Rules

The definition problems above were compounded when the Merit Rules were revised effective January 1, 2004. Most of Chapter 5 became a new Chapter 4, "Pay Plan." "Standard Work Week, " is now in Merit Rule 4, with some changes. "Work Week," not previously defined in the Merit Rules, but used in the compensation law, was added. *Rule 4.13.3.* It adopted most of Merit Rule 5.0200, with changes as indicated.

" '*Standard work week*' for full-time employees shall be 37½ hours **or 40 hours as provided by the Budget Act."** *(Bold Words added).* Changes to accommodate the FLSA still were approved by the [Personnel] Director. Other deviations were deleted.

" '*Work Week'* is a period of 168 hours during 7 consecutive 24-hour periods."

The Merit Rules still do not define "workday" but it *is* used in the compensation law. "Standard work schedule" in the Merit Rules is not part of the "work week" definition. The compensation law still refers to Rules 5.0200 and 5.0210: incorrect references.

As the terms are ambiguous, we look to H. B.311 and the Merit Rules for "intent." *1 Del. C. § 301.* The stated purpose of H.B. 311 is to:

"recognize the prerogative of an agency director to establish a *work week* that may vary from a *normal work schedule*, and to add compensatory time for use when performing other State duties." *(emphasis added).*

The Merit Rules were revised to "add .. language to recognize the use of flexible and compressed work schedules."

As agencies may adopt flexible or compressed work schedules, it is logical that "workday" is no longer defined. It can vary from employee to employee and agency to agency, based on the mission and an agency's prerogative to use flex or compressed work schedules, etc., that affects the meaning of "workday" or "workweek." To illustrate:

EXAMPLE: State employee "A" "Work week": Monday through Friday; "work day": 8:00 a.m. to 4:30 p.m. Takes off Friday, 2:30 to 3:30, to go to 2d government job. **General rule:** A's pay is prorated for the time when she left her 1st job until she returns from the 2nd job as the time she is

normally working coincides with the hours at the 2d job. **Exception:** "A" can avoid proration if: (1) A is "entitled" to vacation, personal, or comp time; and (2) A's agency approves the use of her accumulated vacation, etc.

EXAMPLE: State employee "B": "Work week": compressed. 5 days (Monday- Friday); Saturday-Sunday off; then 4 days (Monday - Thursday), then Friday - Sunday off. "Workday" may be 9 hours long some days to insure the total number of hours, equals 37.5 or 40, whichever applies to that particular employee, B takes the 2nd Friday to go to elected job. **General Rule:** Does not apply; day is not a "workday" or part of B's "workweek." **Exception:** Even if "entitled," B does not use vacation, personal, or comp time, as the elected office hours do not coincide with his "workweek" or "workday."

As noted, flex or compressed work schedules are encouraged. That is an agency decision; not this Commission's.

Agencies also have discretion on use of vacation, personal, or comp time. If employee "A" is "entitled" to, and has earned vacation, etc., the agency does not have to approve a specific date or time for vacation, etc., just so "A" can go to the 2d job, or any other place.

Having laid the ground work on the language, the intent, and identifying an agency's control over the employee's work schedule, we address your three issues.

(1) Is a State agency able to allow only elected officials to earn comp time for the purpose of offsetting hours worked in their official capacity? If yes, should this policy be addressed in writing by the state agency?

General Rule: *Any person* who holds dual positions shall have their pay prorated for hours or days missed during the course of the employee's *normal workday*. *29 Del. C. § 5822(d).* This rule is "clear"--it applies to anyone with dual jobs whether elected or appointed to the 2d job.
Exception: Not prorated if "*an employee* uses vacation, personal, or comp time to which they are entitled....*29 Del. C. § 5822(e).* However, "*No employee* shall be permitted to make up time during hours other than the *normal workday* for purposes of compensation for the 2d job. *29 Del. C. § 5822(d).* Looking at the exception shows the complexities that are not "clear" in just reading the statute.

The exception is limited to *"employees" who are "entitled"* to vacation, personal, or comp time. Like the "normal workweek" which is particular to each employee, "entitlements" are particular to employees. **EXAMPLES:** Casual/seasonal employees: not "entitled" to vacation, so they cannot use it to avoid prorated pay. Merit Employees: May be "entitled" to comp time depending on the mission, Merit Rules, etc., but usually exempt employees are not "entitled." Thus, whether this official may use comp time to avoid proration depends on the employee" status which determines if they are"entitled" to comp time. The statute does not identify who is "entitled." The agency has that knowledge. It must identify the "employee" status; if employees in that position are"entitled"

to comp time; polices on when comp time is or is not available, policies on flex or compressed "*work schedules*,"; procedures in keeping time records as required; etc. If not "entitled," the exception does not apply.

"Entitlement" to comp time must result from the employee's status being one that can accrue comp time and the agency's approval of comp time, usually in advance, before the time is actually worked. Comp time cannot be created just to avoid proration. In other words, comp time is not based on the employee's need because of a 2d job; it id based on the agency's need. *See, AG Op. (Atch.1, supra, and 29 Del. C. § 5822(d).*

Assuming"entitlement" and agency approval to use properly earned comp time for the time and dates of the 2d job, the agency needs to identify other rules on comp time for its particular employees. **EXAMPLE:** Merit employees must take comp time in a certain number of days, and they have accrual limits. *Merit Rule 4.13.7.* For non-Merit employees, applicable comp time laws and rules should be identified, e.g, FLSA, contract terms with persons such as teachers, etc. Again, the agency has that knowledge on its particular employees.

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As noted, the amended law and Rules encourage flex and compressed time, etc. For those not "entitled," to comp time, an agency reviews the *work schedule* to decide if flex or compressed schedules are appropriate.

EXAMPLE: "A" wants off on Tuesday from 2:00 until 4:30 to go to the second job; those hours coincide with A's "*normal workday*." **General Rule Applies:** Prorated pay. **Exception:** Only vacation or personal time may be used if "A" is not entitled to comp time. "A" may avoid proration if the agency, in its discretion, approves a "*normal workday*" as a flex day on Tuesday from 5:30 a.m. to 2:00 p.m, so "A" may leave early on that day to go to the 2d job. Alternatively, the agency, in its discretion, may make A's "*normal workweek*" on Tuesday from 8:00 to 2:00, and then on Monday through Friday, extend the "*workday*" hours to still earn 37.5 or 40 hours during that *workweek*, or 168 hours during 7 consecutive 24-hour periods. **EXAMPLE**: Casual/seasonal or part time employees, normally work less than 37.5 hours. Again, the agency knows how many hours its employees work, and they may vary.

Clearly, other laws and rules govern many aspects of this one issue. The statute alone does not address employee particularities, how the agency applies discretion, etc. Policies and procedures could clarify such items, for dual employees, supervisors who verify time, payroll personnel, etc.

Issue 2: Is an agency policy needed for tracking which hours are prorated?

The statute sets forth a "policy" of how time will be tracked. *29 Del. C. § 5822*. If the hours coincide for the 1st and 2nd jobs, and the dual employee uses vacation, personal time, or comp time so that they can be paid by both entities, the law mandates two requirements: (1) time records be kept and (2) time records be verified by supervisors "at least once every pay period." For school

administrators whose *normal work schedule* requires them to work during summer months, and hold dual jobs, the law identifies who manages the time if there is no immediate supervisor.

There are no detailed procedures or particular forms or format for the time records; no specified time for verification except that it is "at least once every pay period"; no procedures on who will be the "immediate supervisor" (other than for School Administrators) for others who have no immediate supervisor; no procedures are given to insure the time used is properly verified, properly paid or prorated, etc.

Despite the "clear" language which the agency believes exists, and says no policies or procedures are required, actual practice resulted in a miscalculation of time and an over payment to an employee holding dual jobs. Another employee used sick time to attend to legislative duties. That part of the law is *very clear:* no where does it allow the use of sick leave to avoid prorated pay. Yet, the "clear" law was not followed. The agency assured the Auditor that the funds will be recovered. The Auditor recommended that the agency adopt written policies and procedures, and identified particular areas to address. One was the time line for submission of employee records and the posting of vacation/comp time charges. The compensation law says a time record verification is to occur "at least once every pay period." A different rule is set for School Administrators who do summer work. The statute gives only the minimum time. Some agencies adopted a verification of every seven days, which means it would verify twice during the pay period. Again, the agency decides on any policy regarding the time verification.

We will not dictate the time by which a particular agency verifies time records, as long as it occurs within the statutory time. We do enclose the Commission's synopses of opinions on the law, which includes a sample time tracking form as developed by another agency.

(E) Auditor's Authority and Relationship to the Commission

While we will not micro-manage such aspects, we note the Auditor's legal authority to make recommendations, as has occurred. The scope of audits is *not limited* to the assurance that reasonable efforts were made to collect all moneys due the State.... and that all expenditures are legal and proper and made only for the purposes contemplated in the funding acts or other pertinent regulations. *See*, *29 Del. C. § 2907(a) and (b)*. The State Budget and Accounting Manual says auditing principles and practices are to be "a well designed system of internal controls [and] must include written policies and procedures to ensure that each control objective is met." The Auditor's reports are not only to identify illegal or unbusinesslike practices but are to give "recommendations for greater simplicity, accuracy, efficiency and economy," or other "recommendations as the Auditor of Accounts deems advisable and necessary." *29 Del. C. § 2907(9).*[4] As the Auditor's authority

[4]The Auditor recommended that when an agency employee goes to the second job as an elected official that the individual sign in and out of the meeting. The agency states that the individual is not seated as committee member, but is an alternate, and his practice is not to attend in its entirety if not seated as a member. It adds that he is not separately paid as an elected official for those specific committee meetings. First, the compensation law does not apply based on whether the pay from the 2d job is specifically for a particular meeting. It applies if *any person*

relates to this Commission, the agency's records have had discrepancies for at least two audits. The Auditor identified particular areas to address. That is to insure compliance with the law, so that tax-funds will not be spent to "double-dip," and so penalties are not imposed for non-compliance. *29 Del. C. § 5821(c) and 5823(b)*. The Auditor is the expert on recommending procedures, which if ignored can result in tax-payers' funds being misspent, misused, etc. This Commission's expertise is in interpreting the law on a case by case basis to advise employees and agencies on the law itself, not their procedures and policies for accounting.

Based on the Auditor's report, the agency has a spreadsheet or database to record time, as the Auditor recommended that those documents be defined. Turnovers occur in personnel and defining the location, name, etc., of spread sheets or data bases, is a reasonable piece of information to include. Despite these documents, discrepancies in tracking, verifying, paying, etc., occurred. It was not caught by the employee who used the time; the "immediate supervisor" who is required to verify the time, nor someone in the finance office who did not prorate the salary. Thus, policies and procedures that cover even "clear" statutory language apparently are not known by the persons who are part of the procedures.

Issue 3: Can lunchtime be used to offset the proration?

You asked if a State employee can use lunch time, to which they were entitled, on the first job to conduct business related to the second job as a permissible way to avoid proration.

"Personal time" is an exception in the law. If an employee is entitled to a lunch break that is "personal time" which they may use for anything they see fit.

Again, the first question is whether or not they are "entitled" to lunch.

Generally, by law, an employer must allow employees an unpaid meal break of at least 30 consecutive minutes, if the employee works 7 ½ or more consecutive hours. The meal break must

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holds a State job and also serves "in an *elected* or paid appointed position." *29 Del. C. § 5822(a)* If the hours "coincide," then the pay from the *1st job* (not the 2d job) is prorated, unless the elected official uses comp time, vacation or personal time. *29 Del. C. § 5822(a) and (e).* The General Assembly is presumed to know how its elected officials are paid. Had it wanted to make an exception because its members are not paid for a particular committee meeting, it certainly was aware of, and could have made such a distinction. Further, the law makes no distinction on whether the person attends as an alternate or a seating member. It applies when an "elected" position "requires the employee to miss any time which is normally required of other employees in the same or similar positions." *29 Del. C. § 5822(a)*.

As noted, the Auditor has authority to make such recommendations for accuracy, efficiency, and economy. Recommending that the official sign in and out benefits the tax-payers; assuring them that the official was, in fact, at the meeting, and did not just show up for a minute just so he would get paid from both sources for coinciding hours. Moreover, it protects the official if his attendance is questioned. This is especially true when the agency admits that the official's practice is not to attend the entire meeting if, as an alternative, he is not seated. Whether the documents might also be useful in the event that his status is questioned as a result of some injury while traveling to and from the meetings or while at the meetings, resulting in workers' comp or other liability issues is not a question for this Commission.

be given some time after the first 2 hours of work and before the last 2 hours. *19 Del. C. § 707.* If the employee works less than 7½ hours, they are not legally entitled to an unpaid meal break. **EXAMPLE:** If they work 4 hours on one job, and then leave for the second government position, they may not be legally entitled to an unpaid meal break.

Again, the appropriate laws, rules and procedures governing "entitlement" to lunch must be identified and applied. This Commission has no jurisdiction over which individuals are or are not entitled to lunch, except for its own employees. Even assuming "entitlement," it is in the agency's discretion to approve the time of day for the lunch, as long as it is within the first two hours of work and before the last 2 hours if that legal time frame that applies to a particular employee.

(II) Conclusion:

We find that the statute is not as "clear" in all policies and procedures as the agency asserts. Further, the State Auditor has authority to make recommendations to insure compliance on how tax payers' funds are spent. Discrepancies are to be reported to the Commission as a complaint and/or to the Office of the Attorney General for possible prosecution. *29 Del. C. § 5823(b).* Rather than filing the discrepancies as a complaint or for prosecution, an advisory opinion was sought to clarify the law for the Auditor and the agency. It is this Commission's advice that the agency undertake the Auditor's recommendations and incorporate necessary laws, rules, and procedures as they relate to any agency discretion identified in the compensation law.

Related Materials

See, Code of Conduct Opinion Synopses for decisions dealing with "Concurrent Employment" at www.state.de.us/pic. Those cases deal with the restrictions on second jobs in both the private sector and the public sector. *See also, Merit Rules, Chapter 4, Section 4.3.* www.state.de.us/hrm. As noted in decisions above, some State employees and officials are specifically prohibited by law from holding dual government positions. State employees and officials should check other Merit Rules, State laws and/or the Delaware Constitution to insure they are not prohibited from holding dual government positions.

Advisory Op. No. 07-06 - Tracking Dual Time

The Public Integrity Commission (PIC) was asked for time-keeping advice under the dual compensation law. PIC has noted that an agency may need to adopt policies, consistent with its mission, on time keeping for dual employees. *Commission Op. Nos. 05-39, 05-40, and 05-41(Dual Compensation Synopses attached, pp. 11-19).* Here, the Department had procedures for most of the issues addressed.

I. Facts, Law, and Policy:

The requestor was a State employee, and an elected official. The State job required travel, and the requestor has flexible hours ("flex time"). The issue was how the dual employee and the supervisor should track time in that particular situation.

(a) Time Verification: If dual employees miss time from the usual job for the second job, supervisors verify time, at least once a pay period. *29 Del. C. § 5822(a).*

The law does not give a specific tracking method; it only requires that it occur. Agencies can establish procedures, if they are at least as stringent as the law. *Synopses, p. 12 ¶ 2.* This agency's policy followed rules used for any of its employees.

(1) **"normal work schedule":** standard hours; flex time; or compressed time. Agencies have authority to set work hours, whether or not the employee has dual jobs. *Synopses, p. 14 ¶ 6 (prerogative of agency director).* Here, the agency set the dual employee's "normal work schedule" as flex time.

(2) **absence from work:** *Any* employee--whether leaving for an elected job or paid appointed job, or going to play at a beach—submits a leave request for days/hours used, and identifies the status, e.g., annual leave, so the State does not pay them as if they were at work. Thus, regardless of the reason, if hours are missed from the State job, a leave request must cover hours missed—that is true even if leave without pay is taken. If the appropriate leave is not taken from the job, that pay must be prorated—not the elected position pay. Examples of "normal work schedule," and how proration applies, are in a prior decision. *Synopses, pp. 14-16.*

(3) **verification:** Again, as with *any* employee, the agency decides if it will approve the leave request. A supervisor usually approves leave, just as in the Dual Compensation law. Here, the supervisor is not with the employee during travel for the State job. The issue was how the leave time should be verified. The law does not have an exact way to communicate the time an individual begins leave, whether traveling or not. Here, is also is not in the agency's policy. Some people track time by their computer log in and out times for the hours worked and the time they leave. Others use a separate time card just to track time. Whether calling, appearing before the supervisor, tracking time from a computer, etc., the method should be sufficient to identify the State hours missed; whether the hours are covered by annual leave, leave without pay, comp time, etc. The agency may wish to consider which approach to use for dual employees, as well as other employees, who leave.

A private Auditor, working for the State Auditor's office, found some small time discrepancies on the employee's time card between the time the employee left the State job and arrived at the

elected job.[1] The private Auditor did not think the employee was trying to get "double" pay for a few overlapping minutes. The employee asked PIC's advice on how to track time and how the supervisor would verify that time, before the Auditor even issued the final report.

Discrepancies can occur with ***any*** State employee's time card and not be an attempt to avoid the legal requirements. When errors happen, discrepancies are to be corrected. For dual office holders, usually, the Auditor's report recommends solutions to correct a discrepancy found during the audit. Outside of that audit, an agency may have a policy identifying who to work with if the employee, supervisor, or pay personnel detect a discrepancy.

No Dual Compensation violation based on all of the above facts and law.

[1] The Dual Compensation Law provides that the "workday" is determined by the Merit Rules.

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Appendix

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.

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

§ 5821. Findings

(a) There are numerous elected state officials and other paid appointed officials who are also employed by state agencies, educational and other institutions, and other jurisdictions of government within the State.
(b) The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday.
(c) The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday.

§ 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."

SAMPLE PIC LETTER TO CANDIDATE FOR STATE OFFICE

Dear Mr. _____:

This follows up on our conversation regarding the financial disclosure filing requirements for candidates for State office, and other laws that would apply to you as a current State employee, and if you are elected to State office.

First, under the Financial Disclosure Law, candidates for State office must file a financial disclosure report. *29 Del. C. § 5812(a)(3).* If elected, you must file the report on an annual basis. *29 Del. C. § 5813(c).* You may review the Commission's synopses of opinions interpreting the Financial Disclosure Law, and obtain the instructions and form, on its web site at: http://www.state.de.us/pic under the main heading "Financial Disclosure." A scan of the table of contents may give you an idea of what items are or are not reported.

Second, as a State employee in the Executive Branch, you are subject to the State Code of Conduct, which is the ethics law for State employees. The Code of Conduct applies to you as a State employee, whether or not you are running for elective office. However, in the context of restrictions on your conduct while running for public office, there are Commission opinions on that issue. You will find them on the web site under the main heading "Code of Conduct." In the 1991-1995 Opinion Synopses, you will find a case on page 12. In the 1996-2000 Opinion Book, look in the Table of Contents of each year - except for 1998 - under the main heading of "Accepting Anything of Monetary Value," then the subheading of "Concurrent Employment" for cases dealing with State employees who are seeking or hold elective office. If issues arise and the cases do not give you sufficient guidance, you can obtain an advisory opinion from the Commission.

Third, as noted in some of the cases, a State law restricts political activity. *29 Del. C. § 5954.* This Commission does not administer that law, so if you have questions on it, you should contact State Personnel.

Fourth, if elected, when acting in your State employee capacity, you remain subject to the State Code of Conduct, but when acting in your capacity as a General Assembly member you would be subject to their ethics or conflicts of interest laws, which are in the Delaware Code, Title 29, Chapter 10. Having dual government jobs may sometimes result in a conflict. If elected, you may wish to read Opinion No. 99-33, *"'Other Employment' includes Dual State Employment*."

Fifth, if elected, you would be subject to the "anti-double dipping" law, which applies to, among others, persons employed by the State who also hold an elected position in State government. *See, Ethics Bulletin 009 and 29 Del. C. § 5822, et. seq.* You will find the statute, opinion synopses, and Ethics Bulletin 009 on our web site under the main heading "Compensation Policy."

All of the materials referred to in this letter are available in hard copy from this office. I hope this information is of use to you, and if you have any questions, please do not hesitate to contact me.

Sincerely,

Janet A. Wright
Commission Counsel

NOTE: State employees elected to local governments are subject to the laws referred to above, except: (1) they are not required to file a financial disclosure report with the Commission, and (2) if the local government has adopted its own Code of Conduct, as approved by this Commission, in their local government position they are subject to the local Code of Conduct. (Only six local governments have an approved Code–Dover, Newark, Lewes, Millsboro, and Wilmington, and New Castle County).

SAMPLE AGENCY LETTER TO PAID APPOINTEE TO STATE COMMISSION

Dear Ms_____:

I have recently been informed of your appointment to the _____ Commission by Governor Ruth Ann Minner effective July 8, 2003.

As a member of the _____ Commission you are entitled to compensation in the amount of $100.00 per meeting. A list of state pay days is attached. Additionally, you may submit Petty Cash Vouchers for mileage incurred to attend any commission-related function at 31¢ per mile. You can obtain this form from the Administrative Specialist assigned to your Commission. Additionally, you are eligible to participate in the State's group life insurance programs and blood bank.

If you are currently a full-time state employee serving in a classified position certain conditions apply to payment for commission meeting attendance. I am enclosing copies of §5821 and 5822, Title 29, Delaware Code which govern coincident hours. Please share this with your immediate supervisor, as it is the responsibility of an employee's home agency to comply with this law.

[Note: This is an extract of the first several paragraphs of an agency letter to a new appointee to a paid State Commission. The remaining portions dealt with payroll forms, etc., and is not included.]

SAMPLE AGENCY POLICY

DUAL EMPLOYMENT POLICY

Any person employed by the Office of the _____ who also serves in an elected or paid appointed position in state or local government shall have his or her pay reduced or vacation leave or compensatory leave reduced, on a prorated basis for any hours or days missed during the course of the employee's normal workday.

Said reduction will be recorded on the Dual Employment Leave Form. This form shall be submitted to the _____ for verification and approval Monday of every week to record time for the previous week. The _____ will forward the approved form to the _____ to be entered into the Employee Leave Program.

NOTE: The last opinion in this publication addresses agency policies at length. Commission Op. No. 05-39, et. al.

Sample Form
Dual Employment Leave Form

TO: _____ DATE: _____

FROM: _____

Day and Date *	**Compensatory Hours Earned**. Note time in/time out & total hours accrued	**Compensatory Hours Used** Note time in/time out & total hours used	**Vacation Hours Used** Note time in/time out & total hours used	**Sick Hours Used** Note time in/time out & total hours used	**Docking** Note time in/time out & total hours to be docked from pay	**Supervisor's Verification** At least once per pay period. *29 Del. C. § 5822(b).*
Monday +	-	-	-	-		
Tuesday +	-	-	-	-		
Wednesday +	-	-	-	-		
Thursday +	-	-	-	-		
Friday +	-	-	-	-		
Saturday +	-	-	-	-		
Sunday 0	-	-	-	-		

*Attach proof of additional hours worked, i.e. computer log in/out, sign in sheet from security etc. Give the time you work/do not work &s the hours. e.g. 3:00–5:00 p.m. -2.00 hrs.

All time is based on a 7.50 hour day. Subtract the hours worked from 7.50 to determine the hours used. Do not include your lunch hour in the calculation.

The time will be transferred to your personal leave record. Please review your balances each week to ensure that you have adequate time. Dockings will also be noted in the personal leave with no time deducted.

While serving as a Dual Employee do not use other office-approved forms such as the Vacation/Sick leave request form.

01IB09

May 16, 2001

Honorable R. Thomas Wagner, Jr.
Auditor of Accounts
Office of Auditor of Accounts
Thomas Collins Building
Dover, DE 19901 **D370A**

RE: Use of Compensatory Time to Offset Time Spent in Dual Employment

Dear Mr. Wagner:

You have asked whether a State of Delaware employee can use previously earned compensatory time ("comp" time) to make up for hours missed while serving in another position as an elected or appointed state official. For the following reasons, we believe that comp time cannot be used in this manner.

Subchapter III of Title 29, Delaware Code Annotated, establishes a general prohibition for State employees against receiving pay from more than one tax-funded source for work performed during coincident hours of the work day. Subsection (a) of 29 *Del. C.* § 5822 requires that any State employee--who also serves in a separate elected or paid appointed position--must have his or her pay reduced for hours or days missed while performing duties in the elected or paid appointed position during the employee's normal working hours. There is a further prohibition in subsection (d) against such employee making up those missed work hours outside of the normal working hours. The one exception to these prohibitions is in subsection (e), which allows the employee to use accrued vacation or personal days to offset the time that would otherwise have been deducted due to the employee's work at the elected or appointed position. In essence, you have asked whether this provision can be interpreted to include comp time.

When applicable to government employees, comp time is a unique benefit. Comp time is not merely a form of paid leave: it is earned on an hour for hour basis when an employee performs work-related duties under particular circumstances. *Johnson v. Department of Youth Services*, Ohio App., 2000 WL 1877572 (2000). For Fair Labor Standards Act ("FLSA") covered state employees, it can be used in lieu of overtime pay. 29 U.S.C. § 207(o)(1). Paid leave in the form of annual leave or sick leave, on the other hand, is generally a statutory entitlement that accrues based upon the number of months worked by an employee. 29 *Del. C.* §§ 5905 and 5933. Personal days as well are statutory entitlements reserved primarily for employees of the State's public school districts. 14 *Del. C.* § 1318(f).

There is no express statutory designation of comp time for State of Delaware employees in the Delaware Code. Pursuant to 29 *Del. C.* §§ 5914 and 5933(a), however, the Director of State Personnel is authorized to create the so-called "merit rules" for individuals

in the State's classified service, including, rules for "annual, sick and ***special*** leaves of absence...". (Emphasis added). Under the broad category of "special" leave, the merit rules contain provisions for comp time. Under Merit Rule 5.1320, an employee covered by the Fair Labor Standards Act ("FLSA") must be given either overtime pay or time off at one and one-half hours for every hour worked over the standard work week of either 37.5 or 40 hours. Merit Rule 5.1321 allows comp time for FLSA exempt employees in the classified service. This is provided on an hour per hour basis for work "required and authorized" beyond the standard work week hours. The Judicial Branch Personnel Rules 5.1220 and 5.1221 mirror the Merit Rules 5.1320 and 5.1321.

State employees who are in so-called "exempt" positions also have no specific statutory provision permitting them to accrue comp time. Unlike State employees in the classified service, however, exempt employees cannot avail themselves of the merit rule provisions pertaining to comp time. In accordance with 29 *Del. C.* § 5905, exempt employees are limited to accruing sick leave and annual leave. There is nothing noted in this section regarding the accrual of either overtime or comp time. This would be a logical omission, as the concept of accruing and banking comp time is at odds with the concept of the overtime-exempt, salaried employee. If an employee is paid a salary to do the work, no matter what the time required in any given day, there should be no reason to keep track of overtime or comp time. *Accord Johnson v. Department of Youth Services*, 2000 WL 1877572. Generally, therefore, comp time cannot be accrued as a matter of right if there is no statutory or regulatory authorization for it. *See State v. Bogenrife*, Alaska Supr., 513 P.2d 13, 16 (1973); *See also Baley v. State of Illinois*, Ill. Ct. Cl., 35 Ill.Ct.Cl. 663 (l982); *Contrast Kersh v. Montgomery Developmental Center*, Ohio App., 519 N.E.2d 665 (l987).

There are precedents, however, that establish a right to comp time through means of collective bargaining, individual contracts, and written government policy. *Accord King v. State*, Neb. Supr., 614 N.W.2d 341 (2000); *Dias v. State, Department of Institutions*, Colo. App., 740 P.2d 545 (1987). There have even been situations where the regular practice of a state agency has been sufficient to require the provision of comp time. *See also Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir., 1992). The unofficial practice of providing comp time to overtime-exempt, salaried employees exists in some agencies of the State of Delaware. *See, e.g.*, *State of Delaware v. Glascock*, Del. Super., No. 97A-01-001, Graves, J. (July 14, 1997)(Memorandum Opinion)(receipt of comp time by Internal Affairs Investigator at the Department of Correction--an exempt position--was factor in determining whether investigator's death was work related). Whether there is a legally enforceable right to utilize that comp time is not entirely clear.

For employees in the classified service who can accrue it validly(1), comp time may be used within a reasonable period after making a request if the use does not unduly disrupt the operations of the public agency. 29 U.S.C. § 207(o)(5). Comp time also must be used within a reasonable period of time of its accrual. Under Director of State Personnel's Rule #1, with certain exceptions, any comp time not used within 180 days of accrual is forfeited.

As to whether valid comp time can be used to offset time spent in a dual employment situation, one must first refer to the statute addressing dual employment. As previously noted, 29 *Del. C.* §§ 5821 and 5822 contain the general prohibitions against drawing two publicly funded salaries for work performed during coincident hours of the work day. The only exception to the pay reduction provision is for vacation and personal leave which are statutory entitlements.

In theory, comp time could be used in the same manner as vacation and personal leave to offset the time spent at the elected or paid appointed position for which a deduction would otherwise be made. The present statute, however, makes no exception for the use of comp time in the same manner as vacation and personal leave. Under the guidelines for statutory construction an exception for comp time cannot be inferred. As a general rule of statutory construction, where there is an enumerated exception in a statute, this indicates a legislative intent that the statute will be applied to all cases not specifically excepted. *See State Board of Medical Examiners v. Warren Hospital*, N.J. Super., 246 A.2d 78, 83 (1968); *Horner v. Andrzjewski*, 811 F.2d 571, 575 (9th Cir., l987); *See also Quinn v. Keinicke*, Del. Super., 700 A.2d 147, 160 (l996). Absent some history of a legislative intent to the contrary, no additional exceptions can be inferred. *Id*.; *Quinn v. Keinicke*, 700 A.2d at 156. This is the case here.

The Delaware General Assembly incorporated within the statute itself findings regarding dual employment. *See* 29 *Del. C.* § 5821. In subsection (c), the General Assembly states that "[t]he State should have in place ***clear*** policies and procedures to ensure that the taxpayers of the State ... are not paying employees or officials from more than 1 tax-funded source...." (Emphasis added). It must be presumed from the ***clear*** statutory provisions thereafter enacted that the legislature intended the specific exceptions for vacation and personal leave--and only those exceptions. Moreover, by stating in Subsection 5822(d) that time spent in the elected or paid appointed position cannot be made up during time other than the employee's normal working hours, the General Assembly has expressed an intent to exclude comp time as an exception. Comp time by its very nature can only be earned outside the employee's normal working hours. Consequently, until such time as the General Assembly amends the provisions of Section 5822 to include additional exceptions, no others may be inferred.

Should you have any further questions, please do not hesitate to contact me at my office.

Very truly yours,

Kevin R. Slattery
Deputy Attorney General

APPROVED:

Malcolm S. Cobin
State Solicitor

Xc. The Honorable M. Jane Brady
Attorney General

Mr. Philip G. Johnson
Opinion Coordinator

1. Under the Merit Rules, in order for comp time to be valid, it must normally be authorized in advance by the employee's supervisors. *See* Merit Rule 5.1310.