

## **CONTRACTING WITH THE STATE 1991-2018**

**17-16—Contracting with the State (Waiver Granted)** *(when a waiver is granted, the opinion is printed in its entirety so the public may know that the conduct has been approved)*

**Hearing and Decision By:** *William F. Tobin, Jr., (Chair); Michele Whetzel (Vice Chair);  
Commissioners: Andrew Gonser, Esq., Dr. Wilma Mishoe, Jeremy Anderson, Esq.*

Dear Ms. Sullivan and Ms. Makransky,

Thank you for attending the Public Integrity Commission meeting on May 16, 2017. After consideration of all the relevant facts and circumstances, the Commission decided to GRANT your request for a waiver of the public notice and bidding requirement for all contracts awarded to State employees in excess of \$2000. The Commission's reasoning is set forth below. The Commission publishes all waivers so the public will know that the prohibited behavior has been reviewed and approved by the Commission.

### **I. FACTS**

Ms. Sullivan is employed by the Department of Education ("DOE") as a casual/seasonal investigator in the Child Protection Unit ("CPU"). Her duties include investigating teachers who have engaged in misconduct as defined by the DOE's statutes and reviewing license applications. Ms. Makransky is a Deputy Attorney General employed by the Department of Justice's Civil Division to provide legal advice to various state boards and commissions.

Ms. Sullivan would like to contract with the Delaware Interscholastic Athletic Association ("DIAA") to conduct an investigation into an incident that occurred at a basketball game between A.I. du Pont High School and the Delaware Military Academy on February 16, 2017, which involved allegations of racial slurs and other misconduct. The incident was reported the following day by various Delaware news outlets. In the days following the incident A.I. du Pont's school officials decided that their basketball team would forfeit the last game of the season and also declined to participate in an interscholastic basketball tournament.

The DIAA, a division of DOE, is responsible for promoting fair competition, sportsmanship and ethical behavior in interscholastic school sports<sup>1</sup>. A request for an independent investigation of the incident was first raised before the DIAA board on March 9, 2017 by a group of athlete's parents and Wilmington City Councilman Jay Street. Their request was approved at the April 13, 2017, meeting. The board voted to hire an independent, unbiased investigator from either Kent or Sussex County who had some familiarity with interscholastic athletics. DIAA contacted two licensed investigators but were unable to hire either of them due to illness and a possible conflict of interest. The deadline to complete the investigation, May 31, 2017, is necessary in order to interview witnesses and students before the end of the school year. A formal, written report is due on June 7, 2017.

---

<sup>1</sup> <http://www.doe.k12.de.us/diaa>

DIAA would like to contract with Ms. Sullivan to conduct the investigation. The anticipated amount of the contract is between \$5,000 and \$10,000. At the hearing Ms. Makransky and Ms. Sullivan indicated that the amount would likely be near \$6300. Ms. Sullivan based her estimated costs on the typical rate DOE pays to investigators, \$150/hour, and then cut that by 50% resulting in an hourly rate of \$75. Due to the impending May 31 deadline, DIAA requested a waiver of the public notice and bidding requirement for contracts awarded to State employees in excess of \$2000. The DIAA cited the nature of the allegations, the high profile nature of the investigation and the impending graduation of some of the witnesses/participants as reasons for the hardship waiver.

## **II. APPLICATION OF THE FACTS TO THE LAW**

### **A. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by the State. 29 Del. C. § 5806(d).**

Ms. Sullivan's written submission and her comments at the hearing constituted full disclosure for purposes of the Commission's consideration.

### **B. In their official capacity, honorary state officials may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

"A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). A person has a personal or private interest when they, or a close relative, have a financial interest in a private enterprise." 29 Del. C. 5805(a)(2). 'Matter' is defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7).

Ms. Sullivan's work for CPU is not related to her proposed work as an investigator for DIAA, nor do her CPU job duties involve DIAA or their personnel. As a result, she would not be placed in a position to review or dispose of matters related to DIAA while performing her regular CPU job duties. In addition, although DIAA and the CPU are both Divisions of DOE, the administration of the two Divisions is overseen by two different DOE Deputy Secretaries. As a result, Ms. Sullivan would not report to the same individual regarding the investigation as she does when working for CPU.

### **C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an

official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

According to Ms. Makransky, the DIAA tried to hire two other investigators before turning to Ms. Sullivan. Locating a qualified, licensed investigator who does not work in New Castle County (where the incident took place) is a very specific job description in a state with a comparatively small applicant pool. Ms. Sullivan’s background as a retired State Trooper, college athlete and coach, along with her familiarity of DOE investigatory procedure makes her abundantly and uniquely qualified to conduct the DIAA inquiry. In addition, while the work required by the DIAA contract is similar to Ms. Sullivan’s State job duties, there appeared to be enough geographic separation and subject matter distinction between the two roles that the public would not be suspicious that she was acting contrary to the public trust.

**D. State employees may not contract with the State if the contract is more than \$2,000, unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).**

Due to the impending deadlines for completion of the investigation and the report, the contract had not been publicly noticed and bid. The DIAA requested a waiver of this provision of the Code of Conduct. One of the reasons for the public notice and bidding requirement is to provide assurance that State contracts are awarded only after all individuals have had an equal opportunity to submit a bid. In this matter, the benefits of the public notice and bidding requirement were weighed against the DIAA’s need to quickly investigate the incident that occurred at the basketball game.

The Commission decided that the public’s interest in a thorough investigation into the allegations surrounding the basketball game outweighed that of the public’s assurance that the contract was equally available to everyone. Three factors that weighed in favor of the waiver were the facts that the DIAA had previously tried to hire other detectives, with no success; Ms. Sullivan was billing the State at 50% of the usual rate the DOE paid for investigative services, thus assuring that the State was paying fair market value for her services; the incident at the basketball game was covered by the media, raising the profile of the incident and increasing the number of persons interested in a full accounting of what actually happened.

**E. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

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

One reason cited by DIAA for the urgency was the impending graduation of witnesses/participants at the end of the school year. A.I. du Pont High School had nine seniors on the basketball team that competed against Delaware Military Academy in February. Their last day of classes is May 26<sup>th</sup>. Ms. Makransky stated that the witnesses would be harder to locate after graduation because the investigator would not be able to rely upon school records for current contact information. In addition, as Ms. Sullivan pointed out at the hearing, potential witnesses would likely be more cooperative and invested in the investigation if they are still students of the school at the time of their interviews because their high school experience would not be thought of as an event which is “over”.

Without a waiver the DIAA would be unable to move forward with the investigation until the public notice and bidding process had been completed. That would likely take at least 60 days. In the meantime, the school year will have ended, meaning the witnesses will have dispersed, making them more difficult to locate and less interested in participating in the investigatory process. If the investigation is completed before the end of the school year, most of the witnesses could be found in one of two locations (i.e. the two high schools) and the students preparing to graduate will still view themselves as members of the school community, making them more likely to cooperate with the investigation.

After considering those facts, the Commission decided that DIAA had justified its hardship by establishing the fact that the quality of the investigation was likely to be diminished if it was delayed any longer.

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

As stated above, the purpose served by publicly noticing and bidding a contract is to insure there is no favoritism, etc., in awarding a contract to a State employee, and that others have an equal opportunity to compete. However, the public has an equal, if not greater, interest in ensuring that those responsible for incidents like the above referenced basketball game are accountable for their actions.

**III. CONCLUSION**

The Commission GRANTS a waiver of the Code of Conduct provision requiring contracts awarded to State employees in excess of \$2000 to be publicly noticed and bid based upon the hardship presented by the DIAA.

Sincerely,

*/s/ William F. Tobin, Jr.*

William F. Tobin, Jr.  
Chair

cc: Patricia Davis, DAG

**17-09—Personal Interest and Contracting with the State:** [Employee] worked for a Division within the Department of Services for Children, Youth and their Families (“DSCYF”). She was employed [in an administrative capacity]. [Employee] was unable to attend the hearing but the Commission had sufficient facts upon which to decide the matter.

[Employee] applied to [a State program] administered by the Division of Social Services (“DSS”) within the Department of Health and Social Services (“DHSS”). Under the program, [Employee] could receive payment for providing [a service that would otherwise be paid to a vendor]. The program’s applicants were considered contracted service providers.

**A. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by the State. 29 Del. C. § 5806(d).**

[Employee]’s written submission constituted full disclosure.

**B. In their official capacity, honorary state officials may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). A person has a personal or private interest when they, or a close relative, have a financial interest in a private enterprise.” 29 Del. C. 5805(a)(2). ‘Matter’ is defined as “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7).

[Employee] did not work for DHSS, she worked for a different State agency. As a result, it was difficult to see how she would be required to review or dispose of matters in which she had a private interest.

**C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a). Additionally, State employees may not contract with the State if the contract is more than \$2,000, unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a “justifiable impression” of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code is being violated by an official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

In this instance, the contract was not publicly noticed and bid. One of the reasons for the public notice and bidding requirement is to provide assurance that State contracts are awarded only after all individuals have had an equal opportunity to submit a bid. However, in this instance, the program itself required the applicant to be a relative of the child. Therefore, the underlying public policy which supported public notice and bidding was not adversely affected. Nor would allowing [Employee] to contract with the State create an appearance of impropriety. The program was created to allow relatives to provide [services] to their family members without incurring a financial burden while doing so.

**16-47--Contracting with the State & Waiver Request:** [State Employee] worked for [a specific Department] in their Public Relations Division.

[Employee] was asked by [a different Department] to privately contract with them on a special project with a 2017 deadline]. Although the terms of the contract had not been finalized, it was anticipated that [Employee’s private contract] would be for approximately \$50,000. [Employee]’s position at [her employing agency] did not include any duties related to [the

Department offering the private contract]. [Employee] stated she would not use State time or resources to work on the private contract.

[A representative of the Department offering the private contract contacted Employee at the recommendation of another State employee who works on similar projects]. According to [the Department's representative], in order for [the special project to be completed in 2017] he would need to contract with [Employee almost immediately]. He asked the Commission to consider a waiver of the public notice and bidding requirement for contracts awarded to State employees that exceed \$2000 to avoid any delays. [The Department's representative] relied upon the advice of [another State employee] to determine an appropriate dollar amount for the contract.

**A. State employees must file a full disclosure if they have a financial interest in a private enterprise that does business with, or is regulated by the State. 29 Del. C. § 5806(d).**

[Employee]'s written submission and her comments at the Commission meeting constituted full disclosure. If she accepted the private contract with [the Department] she would be required to complete a formal Ethics Disclosure pursuant to the above statute.

**B. In their official capacity, honorary state officials may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).**

"A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of the person's duties with respect to that matter." 29 Del. C. § 5805(a)(1). A person has a personal or private interest when they, or a close relative, have a financial interest in a private enterprise." 29 Del. C. 5805(a)(2). 'Matter' is defined as "any application, petition, request, business dealing or transaction of any sort." 29 Del. C. § 5804(7).

[Employee]'s proposed work for [the other Department] would not place her in a position to review or dispose of matters related to the [project] while performing her [regular State] job duties. [Employee]'s State job duties did not involve [the other Department] or their personnel.

**C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a). Additionally, State employees may not contract with the State if the contract is more than \$2,000, unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. No. 97-23 and 97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an

official, while not “unduly circumscribing” their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

At the time of the Commission meeting, the contract had not been publicly noticed and bid. One of the reasons for the public notice and bidding requirement is to provide assurance that State contracts are awarded only after all individuals have had an equal opportunity to submit a bid. Without public notice and bidding, awarding the contract to [Employee] would undermine the Code of Conduct’s goal of promoting transparency and would simultaneously increase suspicion among the public that the contract was the result of favoritism and inside dealings. That was especially true given the fact that [Employee] was selected to perform the work, and the dollar amount of the contract was set, based solely on information provided by [another State employee]. Without public notice and bidding of the contract [the Department offering the private contract] would have no way of knowing whether there were other, equally qualified, individuals who could provide the same services or what the fair market value for such services would be.

In sum, public notice and bidding of the contract would diminish the appearance that [Employee] was awarded the contract because of favoritism and ‘back-room’ dealings while also assuring [the Department] that they had ample opportunity to explore all available options in reaching [their completion goal of 2017]. At the meeting, [the Department’s representative] asked several questions about the State’s bidding requirements. The Commission recommended that [he] consult with the procurement professionals at [his agency] so that they could provide the appropriate guidance and advice.

**D. Waivers may be granted if there would be an undue hardship on the State employee or State agency, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

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

[The Department’s representative] believed his agency qualified for a hardship waiver because of the need to [complete the project in 2017]. He stated that If the agency was required to publicly notice and bid the contract it was unlikely the [project would be ready before the end of 2017]. In considering whether the time constraints qualified as an “undue hardship,” the Commission asked about the process leading up to the decision [to complete the special project]. According to [the Department’s representative], the impending milestone had been in the back of his mind for the past five years. Over those five years, [there had been a great deal of turnover in the agency’s leadership]. [The representative] stated that he would raise the topic of [the special project] with each [new administrator] and then would have to begin the process over again when another [administrator took their place]. While those circumstances were not under his control, to grant a waiver based upon those facts would create a precedent where every agency could qualify for a waiver simply by postponing decisions until the last minute. Furthermore, while [the special project] was laudable and deserved, it was not critical to the functioning of the agency. As a result, the Commission decided that [the agency] would not suffer an undue hardship if the waiver were not granted.

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

The purpose served by publicly noticing and bidding a contract is to insure there is no favoritism, etc., in awarding a contract to a State employee, and that others have an equal opportunity to compete. Failure to publicly notice and bid the contract, in the absence of a hardship, would create the impression that the State had acted inappropriately by preselecting a candidate for a \$50,000 contract without allowing others the opportunity to bid. In addition, because the contract was only offered to one person, there was no way for the agency to gauge whether the dollar value of the contract was reflective of the local market for that service. Consequently, application of the law was necessary to serve the public purpose underlying the public notice and bidding requirement in the Code of Conduct and the waiver was denied.

[Employee] did not have a conflict of interest which would prevent her from contracting with [the Department offering the private contract]. The request for a waiver of the public notice and bidding requirement was denied.

**14-37 Contracting with the State—Jeff Reed & Capt. Darren Short (WAIVER GRANTED):**

As a waiver was granted, the Commission's opinion becomes a matter of public record so the public will know why the waiver occurred. 29 Del. C. § 5807(a).

November 19, 2014

Jeff Reed, Engineer  
DelDOT  
M&O- South District  
23697 Dupont Blvd.  
Georgetown, DE 19947

Captain Darren Short  
DSP Aviation South  
20 Rudder Lane  
Georgetown, DE 19947

**14-37 Contracting with the State—WAIVER GRANTED**

**Hearing and Decision By:** *William F. Tobin, Jr., Chair, Mark Dunkle, Esq., Vice Chair; Commissioners: Lisa Lessner, Jeremy Anderson, Esq., Wilma Mishoe and Bonnie Smith*

Dear Mr. Reed and Captain Short,

Thank you for attending the hearing on November 18, 2014. The Commission reviewed Cpt. Short's request for a waiver to allow the State Police Aviation Unit to contract with Mr. Reed, a DelDOT employee, for the use of his private airplane. Based upon the comments at the hearing and the facts contained in the written submissions, the Commission decided to grant the waiver request.

**I. Facts**

Jeff Reed works as an engineer for DelDOT. He owns a private business, Sussex Aero Maintenance, in Georgetown, Delaware. The Delaware State Police (DSP) Aviation Unit wants to contract with Mr. Reed for the use of his airplane. The FAA requires compensated pilots to be commercially certified and DSP's insurance carrier also requires pilots to be commercially certified. In order to be commercially certified, pilots must receive 10 hours of training on an airplane with retractable landing gear. While the Aviation Unit owns an airplane, it does not have the type of landing gear required by the FAA. As a result, the Aviation Unit must rent an aircraft with the proper equipment so new pilots may satisfy the commercial certification requirement.

Captain Short, head of the Aviation Unit, explored available rental options in the area. He anticipates the contract with Mr. Reed will be for \$3900 which represents 10 hours of training for three pilots at \$130 per hour. Mr. Reed's airplane is located in close proximity to DSP in Georgetown and as a result, DSP would not incur any travel expenses or lost man hours due to the travel time. A similar aircraft is available at Dover Air Force Base but the rental is higher at \$180 per hour and DSP would lose man hours and incur travel expenses. Delaware State University is another option at the same rental rate of \$130 per hour but would also add travel expenses and lost man hours.

## **II. Applicable Law**

**State employees, with a financial interest in a private enterprise that does business with a State agency, must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d).**

Mr. Reed works for DelDOT. He will be contracting with the Delaware State Police for the rental of his private aircraft. He filed a written disclosure of the proposed arrangement. His disclosure, along with his remarks at the hearing, constituted the required disclosure.

**Under 29 Del. C. § 5806(d), State employees may not accept other employment if it may result in:**

**1. Impaired independence of judgment in performing official duties.** The law precludes State employees from reviewing or disposing of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). Mr. Reed does have a "personal or private interest" through the contract to rent his aircraft. However, the contract is with a different agency. In his State position, Mr. Reed does not make decisions about DSP's Aviation Unit, or the private contract. As he does not review or dispose of such matters, the contract would not violate this provision.

**2. Preferential treatment to any person.** The rule above is meant to preclude Mr. Reed, personally, from showing preferential treatment to his own private interest while performing his State duties. As discussed above, that will not occur. Other provisions also address this purpose.

**(a) State employees may not represent or assist a private enterprise before their own State agency. 29 Del. C. § 5805(b)(1).** This is to preclude Mr. Reed's

agency colleagues or co-workers from making preferential decisions pertaining to his private business. That will not occur, as he has no private dealings with his own agency.

**(b) State employees may not contract with the State if the contract is:**

- (1) less than \$2,000 unless there is arms' length negotiations; or**
- (2) more than \$2,000 unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).**

Captain Short estimated the amount of the contract to be approximately \$3900. Because the amount exceeds the \$2,000 threshold, the Code of Conduct requires the contract to be publicly noticed and bid.

Under the State Procurement law, the contract would not require public notice and bidding. That is because the Contracting and Purchasing Committee establishes the usual thresholds for public notice and bidding, 29 Del. C. § 6913(d)(4). Under its directive, the lowest threshold for public notice and bidding for Materiel and Non-Professional Services is for contracts of \$25,000 or over. For professional services, the amount is \$50,000 or more. <http://gss.omb.delaware.gov/contracting/spp.shtml>. Under either of those requirements this contract would not require public notice and bidding. Even if the contract met those thresholds, an agency head may waive the requirement when it is in the best interest of the agency. 29 Del. C. § 6907(a) and (b). Additionally, it may be waived if only 1 source meets the requirement. 29 Del. C. § 6925(a). When public notice and bidding does not occur based on those provisions, the agency must document the reasons, and the efforts put forth to determine the availability of another source. 29 Del. C. § 6907(b)(2) and 29 Del. C. § 6925(b). It is only because Mr. Reed is a State employee and the contract will exceed \$2,000, that public notice and bidding would be required. 29 Del. C. § 5805(c). It applies regardless of whether a conflict exists under any other Code provision; regardless of any additional costs associated with public notice and bidding, or delays in obtaining services; and regardless of whether sources are limited, absent a waiver from this Commission.

The low threshold for State employees, like the restrictions on no self-dealing and no dealing with their own agency, was enacted after Delaware Courts noted that: "The award of [State] contracts has been suspect, often, because of alleged favoritism, undue influence, conflicts and the like." *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748 (Del. Ch., 1971). In that case, a State official wanted to contract with his own agency, and the Cabinet Secretary rejected his bid because of his connection to the agency. The Court, upholding the Secretary's decision, noted that there was no State statute dealing with conflicts of interest. A few years later, in 1974, the Code of Conduct was enacted barring State employees from contracting with their own agency. It also included the \$2,000 threshold for public notice and bidding. However, like the Procurement law, which gives an agency head authority to grant waivers, this Commission also was given waiver authority. 29 Del. C. § 5807(a).

**(c) Waivers may be granted if there is an "undue hardship" on the State employee or the State agency, or if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).**

Mr. Reed is not requesting the waiver. He purchased his aircraft shop in 2008. No facts suggest he anticipated DSP would need that type of aircraft. The need for a

waiver is driven by the fact that DSP does not own an aircraft which meets the FAA's and their insurance carrier's requirements for certification of commercial pilots. In deciding how to resolve the need, Captain Short followed the normal procurement law procedure of seeking available sources, and costs; documenting the reasons, and the efforts put forth to determine the availability of another source. 29 Del. C. § 6907(b)(2) and 29 Del. C. § 6925(b). The hardship on the agency is that after checking for alternative sources, the other available options would cost more in either actual rental fees or in travel expenses associated with travel to and from the airfield.

In considering the public purpose, the Commission considered both the purpose of the procurement law and the Code of Conduct provision, because the procurement law requires compliance with the Code of Conduct in contracts with State employees. 29 Del. C. § 6903(g). The procurement law's purpose is to obtain materials and services at the best possible price to maximize the purchasing value of public monies. 29 Del. C. § 6901(1). Captain Short's request is consistent with the public purpose of saving monies because the alternative would cost more. He also complied with the procurement rules which establish how the public purpose will be served—e.g., checking sources and costs, documenting those findings. He was not in any manner acting to circumvent the procurement law.

The purpose of the Code's contracting provision is to insure contracts are not awarded out of favoritism, undue influence, conflicts and the like. The full disclosure of the facts in this matter do not suggest favoritism and undue influence, as the decision to pursue a contract with Mr. Reed was made after seeking out other sources, and based on a calculation of the additional costs that would be incurred if the training were in Dover or Maryland. Moreover, when waivers are granted, the dealings become a matter of public record. 29 Del. C. § 5807(b)(4). This insures the public is aware that the possibility of favoritism, etc., was addressed by an independent agency, and that judgment was exercised in use of public monies. Accordingly, the Commission waives the requirement for public notice and bidding. This waiver is valid for one year, beginning on the date the contract is signed.

**3. Official decisions outside official channels.** No facts suggest this would occur because as noted above, the official channels were followed in terms of the procurement law and Code of Conduct compliance.

**4. Any adverse effect on the public's confidence in the integrity of its government.** This is basically an appearance of impropriety test. The test is whether a reasonable person, knowledgeable of all relevant facts, would still believe that a State employee could not perform their State duties with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del., 1997).

Nothing in the above facts suggests Mr. Reed could not properly perform his State duties as a result of the private contract. Moreover, he will not use State time or resources to fulfill the State contract.

### **III. Conclusion**

Based on the above facts and law, we grant a waiver of the public notice and bidding provision for a one-year period. Pursuant to statute, this opinion will be

published in its entirety to provide public notice that all of the appropriate reviews have been undertaken and approved. 29 Del. C. § 5807(b)(4).

Sincerely,

*/s/ William F. Tobin, Jr., Chair*

Public Integrity Commission

Waiver granted removing the requirement for public notice and bidding due to lack of cost-effective alternatives.

**14-14 – State Employee Contracting With His Agency—Waiver Request:** [Employee] attended the hearing accompanied by [two senior officials from his agency]. [Employee] worked for the Division of Services for Children, Youth and Families (DSCYF) as a casual/seasonal worker. He worked 29 hours per week at [a specific facility]. He wanted to work full-time but the State was under a hiring freeze and his agency could not authorize more hours under his current position. He was asked by [a supervisor] if he would consider contracting with the State for additional work [in his department] to supplement his income. The additional work would be at [a facility] in Smyrna and [another facility] in Middletown. Between the two buildings he would be able to add 16 hours per week to his work schedule. However, the buildings were also [managed] by DSCYF. In essence, he was asking permission to contract with his own agency, a violation of the Code of Conduct. He believed he qualified for a waiver of the restriction based upon hardship. He claimed he needed extra hours to supplement his income.

As to any hardship suffered by the agency, [an official from one of the facilities] indicated he had been unable to hire [anyone] willing to perform the work because the contract was for so few hours per week. Previously, the work was done by a retired gentleman for \$12.50 per hour. Since then, he had inquired with various establishments about their rates and had found the cost to be too high. Businesses charged service fees, a higher hourly rate, and required all work to be scheduled in advance. [A supervisor] stated they had offered the contract to various individuals but, unlike [Employee], they were unwilling to obtain the required license and insurance. At the time, the work was being done by DSCYF workers in Wilmington which required a great deal of wasted travel time.

#### **A. The Law**

Under the Code of Conduct, employees may not: (1) review or dispose of matters if they have a personal or private interest which would tend to impair judgment. 29 Del. C. § 5805(a); (2) represent or assist a private enterprise before their own agency. 29 Del. C. § 5805(b); (3) contract with their government unless public notice and bidding requirements or arms' length negotiations requirements are met. 29 Del. C. § 5805(c); (4) use public office to secure business for their private enterprise. 29 Del. C. § 5806(f); (5) improperly use or disclose confidential information; 29 Del. C. § 5806(f) and (g); or (6) hold other employment if it may result in impaired judgment in performing official duties; preferential treatment to any person; official decisions outside official channels; or any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

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

## **B. Application of the Facts to the Law**

[Employee] did not have decision-making ability in his State position. Therefore, he did not review contracts or make decisions related to vendors. It did not appear the acceptance of the contracted position would impair his judgment.

“Private enterprise” is “any activity by any person, whether for profit or non-profit.” 29 Del. C. § 5804(9). The restriction against representing or assisting a private enterprise before one's own agency is to insure that State employees do not obtain an unfair advantage as a result of receiving preferential treatment in decisions made by their colleagues. In this case, the private enterprise would be the private contract with DSCYF. As a private vendor entering into and fulfilling the contract, [Employee] would be representing and assisting his business before his own agency. Because the contract was offered to several individuals before it was offered to him it was unlikely that he received an unfair advantage in this situation. Rather, it appeared to have happened out of necessity for the agency. However, in future contract negotiations, the possibility existed [Employee] would have an advantage over other applicants because he already worked with the decision-makers in his State position. In order for him to contract with his own agency, he would need a waiver of the restriction. When the circumstances are warranted, the Commission has previously issued waivers of this provision. *See Commission Ops. 07-03; 99-03.* But the Commission has also denied waivers. *See Commission Ops. 06-04; 06-37.*

For all contracts in excess of \$2000, public notice and bidding are required in order for a contract to be awarded to a State employee. 29 Del. C. § 5805(c). The standard applies even if the State employee did not work for the department offering the contract. Delaware Courts have held that in judging the fairness of a government contract when a government employee seeks the contract, that the price “is not the exclusive test by which a vendor is chosen” because when government employees seek contracts with their governmental entity, the concern is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” *Commission Op. No. 98-23 (citing W. Paynter Sharp & Son v. Heller, Del. Ch. 280 A.2d 748, 752 (1971)).*

In this case, the contract would be for \$20,800 per year (roughly \$25 per hour). Even though the amount of the contract far exceeded the \$2000 threshold, it was not publicly noticed or bid. At the hearing, [both officials] indicated they were unaware of the notice and bidding requirement. Public notice serves the purpose of creating an even playing-field for all bidders. Basically, it removes the possibility the State employee gained an unfair advantage over other competitors because of inside knowledge about the existence of the contract. The failure of the agency to provide public notice created the perception [Employee] used his influence to gain an unfair advantage over other potential competitors.

[Employee] received the offer to contract with the State because his supervisors knew he was seeking additional work hours. While it may not have been his intention to use his State position to benefit himself, the reality was that it did. If [Employee] had not already been employed by DSCYF he wouldn't have known about the existence of the contract but for his relationship with his supervisors.

In his current position, it did not appear [Employee] had access to any information which was confidential in nature. However, [Employee] had received preferential treatment because he was offered a contract the public did not know about. Additionally, the State did not have the benefit of multiple bids for comparison purposes. The fact he would be contracting with his own agency, without the benefit of public notice and bidding, would have an adverse effect on the public's confidence in its government because it would appear he had received an unfair advantage over other potential competitors.

The Commission determined that neither [Employee], nor the agency, had established a hardship which would justify a waiver of the Code of Conduct restrictions against an employee contracting with his own agency and the public notice and bidding requirement. The work was being completed by staff from Wilmington and a waiver required more than mere inconvenience. Further, the Commission determined that under the circumstances, the enforcement of the restrictions were necessary to serve the public purpose.

### **C. CONCLUSION**

The Commission found the standard for a hardship waiver was not met in this case. Nor was there any evidence that the application of the restrictions in the Code of Conduct would not serve the public purpose. As a result, the request for a waiver was denied.

**12-42 and 12-43 – Dr. Imran Trimzi; Dr. Mary Diamond; Steve Yeatman – Contracting with State agency. – Waiver Granted** so proceedings are a matter of public record. 29 Del. C. § 5807(a). As a waiver was granted, the Commission's opinion becomes a matter of public record so that the public will know why the waiver occurred. 29 Del. C. § 5807(a).

**January 31, 2013**

Imran Trimzi, M.D.  
Residency Program Director  
DE Psychiatric Center  
DHSS  
1901 North DuPont Highway, Springer Rm. 223  
New Castle, DE 19720

Mary Diamond, D.O., M.A., M.P.A  
Chief Psychiatrist, DE Psychiatric Center  
DSAMH Medical Director  
1901 North DuPont Highway, Springer Rm. 7  
New Castle, DE 19720

### **12-42 and 12-43 – Contracting with the State**

***Hearing and Decision by:*** Wilma Mishoe, Chair; Commissioners: William Dailey, Mark Dunkle, Esq., Lisa Lessner and Jeremy Anderson, Esq.

Dear Doctors Trimzi and Diamond, and Mr. Yeatman:

The Public Integrity Commission (PIC) reviewed the Department of Services for Children, Youth and their Families (DSCYF) request for a waiver to allow it to privately contract with Doctors Imran Trimzi and Mary Diamond. Based on the following law and facts, a waiver is granted until the beginning of the new fiscal year, because of the dire need to provide psychiatric services to children at the Terry Children's Center. It is our understanding that the positions will be publicly noticed for bidding at that time.

### **I. Applicable Law and Facts**

**(A)** State employees who have a financial interest in a private enterprise that does business with, or is regulated by, the State must file a full disclosure with PIC as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). Doctors Trimzi and Diamond's private contract with the State constitutes a "private enterprise" and their employment constitutes a "financial interest." 29 Del. C. § 5804(9) and § 5804(5)(b). Both have complied with this requirement.

**(B)** State employees may not review or dispose of State matters if they have a personal or private interest in the matter. 29 Del. C. § 5805(a)(1). Here, the State matter was their private contracts. However, Dr. Trimzi and Dr. Diamond work for a totally separate Department—Health and Social Services (DHSS). Thus, they were not in any manner responsible for the contract, as that was a matter handled by Mr. Yeatman and others at DSCYF.

**(C)** State employees may not represent or otherwise assist a private enterprise before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). As noted, the Doctors work for a totally separate agency, DHSS, so they will have no occasion to deal with their own agency.

**(D)** State employees may not contract with the State if the contract is for more than \$2,000 unless there is public notice and bidding. 29 Del. C. § 5805(c). Here, the agency has not yet publicly noticed and bid the contracts, and requests that a waiver be granted.

On the written request of any State agency, or an individual subject to the Code, the Commission may grant a waiver to the specific prohibition if the Commission determines that the literal application of the law is not necessary to serve the public purpose, or would result in an undue hardship on an employee, officer, official or State agency. 29 Del. C. § 5807(a).

Here, the agency seeks a waiver based on the following facts: In early 2012, it lost two full-time Child Psychiatrists who worked in the Terry Children's Center. Such psychiatrists are required to have an additional two years of training in Child and Adolescent Psychiatry over psychiatrists not in that specialty. As a result, they usually have increased payments to be made on student loans, so the salary can be a critical issue. As far as State of Delaware employment, these positions have a lower salary than the rate paid to full-time Psychiatrists in DHSS, even though those positions do not require the additional 2 years for training required for Child Psychiatrists. Pulling from other States also is difficult because there has been a recognized national shortage of Child and Adolescent Psychiatrists in studies identified to DFYCF in September 25, 2012, and this shortage has been on-going since at least 2006, and is expected to continue. Moreover, due to changes in Delaware laws that require a more stringent background investigation of Physicians who deal with children, it can take longer for out-

of-State licensees to receive a State of Delaware license which they must have for the positions.

Efforts made to fill the full-time positions included multiple job notice advertisements in the Regional Council of Child and Adolescent Psychiatry of the Delaware Valley (Philadelphia and Southern New Jersey region) and the Regional Council of Child and Adolescent Psychiatry of Delaware. The agency also distributed the job notice to members of the Psychiatric Society of Delaware, and contacted provider services including Delaware Guidance, Psychiatry at Crozier-Keystone Health System, and Child Guidance Resource Center, and had the Director of the Department of Child and Adolescent Psychiatry at Jefferson University Hospital assist in recruiting attempts. The only applicant for the full-time State job would not even accept an interview because of the pay offered.

Other attempts to solve the problem included contracting with, as opposed to direct hiring of, a full-time child psychiatrist to work at the Terry Center, but he only worked for approximately 4 months: February – June 2012. During that time, a State Task Force had completed a report on Child Mental Health Needs in Kent and Sussex County, which identified a need to recruit two psychiatrists to Sussex County, because the Terry Center presently provides child and youth residential services <http://ltgov.delaware.gov/taskforces/cmhtf/finalreport.shtml> That report was submitted to the Governor, the Speaker of the House of Representatives, and the President Pro Tem of the Senate on March 12, 2012.

The agency continued trying to recruit child psychiatrists for the Terry Center, and was able to hire a part-time Child Psychiatrist in July 2012, who continues to work there. However, that is insufficient for the caseload at the Terry Center. In the meantime, the agency had lost other full-time Child and Adolescent Psychiatrists in other programs, such as at the Stevenson House Detention Center and the Youth Rehabilitation Services, in October 2012. Two other full-time Child & Adolescent Psychiatrists with whom DSCYF contracted, left their positions at Delaware Guidance in August and September 2012. Another part-time contract child psychiatrist is not able to provide additional time. The agency again sent job announcements to the Regional Council of Child & Adolescent Psychiatry of Delaware and the Psychiatric Society of Delaware; personally contacted practicing psychiatrists; and had a potential hiring of one psychiatrist who decided not to pursue their offer.

Beyond the difficulties encountered in trying to find replacements, the agency had to consider the impact on children in need of services by the Terry Children's Center. It has a capacity to provide services to 12 residential clients, 24 day treatment clients, 15 intensive outpatient clients and up to 4 crisis clients. That dictates that the facility have psychiatric services year round, 24 hours per day. Without a psychiatrist to work with the children and issue medications, their health and welfare could be affected. As a result, the agency turned to Dr. Trimzi and Dr. Diamond to see if they would contract for part-time services to insure the facility remained operational and could meet the needs of youth in care. The agency said it is continuing to try to find other sources for services. It also plans to work toward having a more competitive salary so it can attract full-time employees, and plans to publicly notice and bid the contract in the next fiscal year, which starts in July 2013.

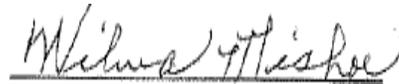
While it is conceivable that public notice and bidding of the part-time contract may have attracted others who would be willing to contract part-time, as Dr. Trimzi and Dr. Diamond have done, we recognize the agency's focus was on obtaining full-time employees due to the operational nature of the Terry Center. Also, the time spent on trying to find either full-time, part-time or contractual hires has apparently identified the reality of the shortage in a manner not fully recognized before because the 2 full-time employees who left at the beginning of the year had been working for the State for almost 2 decades. Further, there has been an increased need for assistance to children identified not only during the Bradley investigation but also as a result of dangerous behaviors such as suicides of youth, which dictates timely evaluations and treatment for children, which is not as readily attainable at present without the assistance of Doctors Trimzi and Diamond.

Also, as waivers become a matter of public record, the public will have access to this information on why the need was critical and be assured that actions are being taken to insure uninterrupted service to the Terry Center's children.

## II. Conclusion

Based on the above facts and law, we grant a waiver to the agency to continue with these private contracts until the new fiscal year, beginning July 1, 2013, when public notice and bidding is expected.

FOR THE PUBLIC INTEGRITY COMMISSION

  
Wilma Mishoe, Chair

CC: Steve Yeatman, Deputy Director, DSCYF

**10-13 Bus Contract with State Agency:** A State employee, who worked for a school district, privately contracted with the District's School Board to provide student bus transportation. He filed a disclosure as required by 29 Del. C. § 5806(d). He did not draft, write, review, etc., the contract. The contract exceeded \$2,000. It was not publicly notice and bid. Normally, State employees cannot enter contracts of more than \$2,000 without public notice and bidding. However, the General Assembly made a specific exemption for school bus transportation. 29 Del. C. § 5805(h). It provides: "Except for transportation supervisors for any school district within this State, nothing in this section shall prohibit an employee or the employee's spouse or children (natural or adopted) from contracting for the transportation of school children. Such transportation contracts may be entered into by an employee or the employee's spouse or children without public notice and competitive bidding as is provided in § 6916 of this title." The Commission decided there was no violation as the employee was not a supervisor, and thus was entitled to the exemption.

**08-63 – Contracting with State to teach Federally Required Program:** The Federal

government passed a law that required a State Branch to develop a training program for business owners and operators which it regulated. State agencies that developed the program would get Federal dollars. The Federal Government must approve the program under its law and rules. The Branch collaborated with an institution of higher learning on the courses. The institution would hire; registration fees would go to the institution; the teachers would develop and present the course. It was a one- time course for owners/operators, unless violations occurred. Then, the business owners could be sent back for training. The agency asked if staff or regulators that worked in the branch could apply to teach.

Under a federal law, the agency was required to develop the training. That law also set a specific deadline by which the regulated operators must complete the course. The agency worked in conjunction with an institute of higher learning in developing the course. The agency would create the standard curriculum, and the institute of higher learning would hire the trainers. Thus, the agency would not have its employees evaluating other employees in the agency for the job. A further reason for the use of such employees is that the agency expected its course would be the sole source provider for the next five years. The agency would not benefit from the registration of the regulated operators, as the registration fees for the course would go to the institute of higher learning. The Commission found no conflict in the State employees applying for the job. However, it recognized that it was possible that if selected, they may encounter a conflict, and should seek advice as needed. NOTE: The Commission must base its opinions on the particular facts, not hypotheticals, or speculative facts. 29 Del. C. § 5807(c).

**08-35 - Local Official Contract with Local Government; Waiver Granted; opinion is public record. 29 Del. C. § 5807(b)(4).**

#### **Advisory Op. No. 08-35 - Local Official's Contract with County**

**Hearing and Decision by:** *Vice Chair Barbara Green; Commissioners: Barbara Remus, William Dailey and Wayne Stultz*

Dear Ms. [Susan] Webb: (Sussex County Finance Officer)

The Public Integrity Commission (PIC) completed its review of Register of Wills David Wilson's disclosure, and Sussex County's waiver request for contracting with him for more than \$2,000 (\$500 over), without public notice and bidding as required. 29 Del. C. § 5805(c). The County decided Mr. Wilson's auction house was the sole source in Sussex County.

**APPLICABLE LAW:** Waivers may be granted if the official or agency have an undue hardship or literally applying the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). Waivers are based on each case's particular facts. *Id.*

**AGENCY HARDSHIP:** The County said: (1) it followed procurement laws by contacting other vendors for the job without success; (2) it specifically contacted O'Neal's Auction and Watson's Auction, but O'Neal's does not sell autos at its Laurel location, and Watson's stopped selling autos at auction; (3) no other car auction houses are in Sussex County except Wilson's; (4) if held outside the County, the County would incur additional trailer or tow truck costs to transport many of the vehicles; and (5) the County has tried to sell on its own premises in the past with sealed bids "but did not do well at all."

**PUBLIC PURPOSE:** Here, facts show compliance with all other provisions and efforts to insure the public purpose, insuring contracts are not given based on favoritism or unwarranted privileges. 29 Del. C. § 5806(e); *W. Paynter Sharp & Son v. Heller*, 280 A.2d 748 (Del. Ch., 1971).

(1) In his official capacity, Mr. Wilson did not review or dispose of the contract. The County's Executive offices--agencies with vehicles for auction (mainly Paramedics); Procurement Office, and the Finance Department--made the decision. As he made no official decision, he did not engage in self-dealings nor have impaired judgment which the Code prohibits. 29 Del. C. § 5805(a)(l) and § 5806(b)(1).

(2) In his private capacity, Mr. Wilson did not represent or assist his auction house before his own agency. 29 Del. C. § 5805(b)(l). Before this provision was enacted, Delaware Courts upheld a Cabinet Secretary's decision not to contract with an appointee to one of his agency's Board. *Heller, supra.*, 280 A.2d 748. The basis was a conflict of interest, and the Court specifically noted the public's suspicion of intra-agency dealings. *Id.* The purpose of not dealing with one's own agency is to reduce the possibility of undue influence on colleagues and co-workers. By avoiding such conduct, he complied with the literal terms of the law, and the public purpose of the law.

(3) Mr. Wilson filed a disclosure with PIC of his financial interests in a private entity that does business with the County, complying with 29 Del. C. § 5806(d)(1). This insures the public that PIC, an independent body, reviews financial connections between an official and their government.

(4) While the County did not publicly notice and bid the contract as needed by 29 Del. C. § 5805(c), it did follow its procurement rules. Like the Code, procurement laws are meant to build the public's confidence in fair and equitable treatment in awarding of contracts. See, e.g., 29 Del. C. § 6901. It also has the purpose of insuring quality goods, materials and services. *Id.* Before he was elected, Wilson's Auction successfully handled the vehicle auctions, so the work quality was known.

(5) Taxpayer costs were reduced by using Wilson's Auction House as compared to the costs involved if the County had to transport the vehicles to locations outside the County. Part of building the public's confidence, is "maximizing the purchasing value of public monies." *Id.*

(6) Waiver decisions are "open to public inspection," so they understand what occurred and why a waiver was granted. 29 Del. C. § 5807(b)(1).

**CONCLUSION:** Balancing all the facts, we grant a waiver in this particular case which has already occurred. This is not a blanket authority to assume future waivers if Mr. Wilson continues as a County official. We recommend seeking auctioneers who can come to the County, reducing transportation costs. If they are not available, that information should be in any filing. Also, as stated in our prior opinion to the County, if there is Code compliance, officials contracting with the County need only to file annual disclosures. "However, if either the individual or the agency cannot comply with the Code, then the Commission must be notified immediately." *Commission Op. No. 98-23.*

**Original Signed by Vice Chair Barbara Green**

**08-23, 24, 25 - Local Officials Contracting with Local Government:** Three local officials filed disclosures of their private business dealings with their local government. 29 Del. C. § 5806(d).

Two of the filings were for contracts of less than \$2,000 so they did not have to be publicly noticed and bid. 29 Del. C. § 5805(c). The contracts were not with the agency for which they worked. 29 Del. C. § 5805(b)(1). The officials did not participate in any official decisions about the contracts. 29 Del. C. § 5805(a). The officials provided services at cost, no labor. The Commission found no conflict for those officials. The other official entered a contract for more than \$2,500 so public notice and bidding was required 29 Del. C. § 5805(c), unless there was an undue hardship for the agency. 29 Del. C. § 5807(a). The Commission found it needed more facts from the agency about his contract. That information was subsequently provided and a waiver was granted. See *Commission Op. No. 08-35*.

**07-45 – State Contract as Trainer:** A State employee disclosed that she wanted to contract with a State agency; but not her own. 29 Del. C. § 5806(d). In her State job, she was in no manner involved with the agency with which she wanted to contract. 29 Del. C. § 5805(a)(1). In her State job, she was a counselor; under the contract, she would be a trainer. There would be no overlap in clients. She expected that she might make more than \$2,000 a year. The contract was publicly noticed and bid, which is required for a State employee to seek a contract of more than \$2,000. 29 Del. C. § 5805(c). The Commission found no violation.

**07-31 – Foster Care Contract:** The Commission noted that there had been a pattern of recent reviews dealing with State employees from the Department of Services for Children, Youth and their Families contracting with its own employees. The Code bars State employees from privately dealing with their own agencies. 29 Del. C. § 5805(b)(1). This employee also worked for the contracting Department. She would not be providing care to any of her State clients. She was not involved with the foster care contracts or administering foster care in her official capacity. A waiver would be needed if she was to provide foster care because the contract would be with her own Department. However, at the time, she had no foster care client, so no violation was occurred. The Commission concluded she should not enter future contracts with her own agency.

**07-07, 07-12; 07-16, 07-17, 07-21 thru 07-25, 07-31 - Foster Care Contracts with the State:** Ten State Employees filed disclosure statements on their private contracts with the State as foster care providers, as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d). State employees may not contract with their own agency, 29 Del. C. § 5805(b)(1); and may not seek State contracts of more than \$2,000 unless they were publicly noticed and bid. 29 Del. C. § 5805(c). Most of the disclosures showed that the contracts were with the State employees' own agency, the Department of Health and Social Services (DHSS). All of the disclosures showed that there was no public notice and bidding of the contracts and all were valued at more than \$2,000. DHSS was notified of those problems in an opinion issued in 2003. *Commission Op. No. 03-37*. It still has not publicly noticed and bid the contracts to cure at least that violation. It also was offered the opportunity to seek waivers to these laws if there were an undue hardship. After the Commission's 2003 ruling, DHSS had a provision added to its epilogue language in the budget law, Section 188, to allow it to continue its contracts with its own employees, despite the Code of Conduct restrictions. This did not negate the requirement for the employees to file a disclosure, and the agency was so advised.

For the individual State employees who filed the disclosure, the Commission noted its concerns about the following:

(a) 07-07 - his foster care clients are clients from the State Hospital where he works. Contracting with own agency, and obtaining clients from his own section.

(b) 07-12 - Overlap between her State job and foster care position may require better separation.

(c) 07-21 and 07-24 - Are not contracting with their own agency, but still have

problem in that DHSS did not publicly notice and bid the contracts. Also, the submissions were unclear on whether the two foster care providers are at the Sussex Consortium.

**(d)** 07-23 – No longer a State employee and post-employment law does not apply; filing of disclosure does not apply.

Pursuant to its authority to work with agencies on Code of Conduct compliance, 29 Del. C. § 5809(10) & (13). Where both the public notice and bidding and/or the dealing with own agency rules would apply, PIC deferred the matters until the next meeting because of the absence of a record on why the agency cannot comply with the public notice and bidding, or show a demonstrable hardship for not doing so and/or for contracting with its own employees. A letter will be sent to the Cabinet Secretary, Division Directors and other Senior level staff members who have been involved in this matter over the years. The letter will also go to all applicants.

**07-03 - State Contract as Nurse; Waiver Granted. A waiver was granted so the opinion is not confidential. 29 Del. C. § 5807(b)(4).**

**Advisory Op. No. 07-03 – Contracting with a State Agency**

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

Dear Ms. Stanley:

The Public Integrity Commission granted a waiver for you to privately contract as an Advance Practice Nurse with your own Department's Division of Substance Abuse and Mental Health. Our decision was based on the following facts and law.

You work in the Long-Term Care Division, Department of Health and Social Services. You are an Advance Practice Nurse at the Delaware Hospital for the Chronically Ill. The contract as Psychiatric Advanced Practice Nurse is not with your Division. Your hospitalized clients would not be treated outside their facility.

The Code restricts State employees who seek to privately contract with the State:

(1) A full disclosure must be filed with this Commission. 29 Del. C. § 5806(d). You have complied.

(2) In your State job, you may not review or dispose of matters related to this contract. 29 Del. C. § 5805(a)(1). Your disclosure said you will not because a separate division handles the contract.

(3) In your private job, you may not represent or otherwise assist a private enterprise before your agency. 29 Del. C. § 5805(b)(1). "Private enterprise" is "any activity by any person, whether for profit or non-profit." 29 Del. C. § 5804(9). [State] "Agency" includes Departments. 29 Del. C. § 5804(11). As a vendor entering and fulfilling the contract, you would "represent and otherwise assist" your own enterprise before your Department. We had to waive this provision.

(4) Waivers may be granted if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). The purpose of the restriction we waived is to insure you do not unduly influence co-workers and colleagues in making their contract decisions. Based on your disclosure, that possibility is remote. You are in a

separate division; your private job and State job do not overlap; the clients are different; and the job would be during non- State work hours.

Based on the above facts and law, we waive the one provision of non-compliance as the public purpose can still be served. This waiver applies only to the specific facts of this case.

**Original signed by Chair Terry Massie**

**06-63 – Foster Care Contract with Own Agency - Current and Post-Employment: Waiver granted; opinion public record. 29 Del. C. § 5807(b)(4).**

**Advisory Op. No. 06-63 - Contracting with Own Agency - Foster Care**

Dear Mr. and Mrs. Fisher:

The Public Integrity Commission (PIC) grants a waiver for Mr. Fisher to remain a foster parent to State clients, based on your disclosures, the letter from Tim McFeeley, Director, NorthEast Treatment Centers (NET), a private entity, and your statements at PIC's October 17, 2006 meeting.

NET contracts with the Department of Children, Youth and Family Services--Mr. Fisher's own agency. In effect, he privately subcontracts with his own agency. State employees may not represent or otherwise assist private entities before their own agency. 29 Del. C. § 5805(b)(1). Mr. Fisher needed a waiver of this rule to remain a foster parent.

Waivers may be granted if a literal application does not serve the public purpose. 29 Del. C. § 5807(a). The rule's purpose is to insure the public that State employees do not: (1) receive preferential treatment from their agency; (2) influence agency decisions when they have a personal interest; and/or (3) use public office for personal benefit or gain. The particular facts show that these events are too remote to preclude a waiver: (a) Your experience as a Juvenile Parole and Probation Officer has greatly benefited children you have fostered, including one who will soon leave your care; (b) NET asked you to take another child with special needs that your experience and knowledge as a Juvenile Probation and Parole officer will provide; (c) Such children are hard to place; (d) Your State job is unrelated to foster care case decisions, funding, etc. When you foster children on probation or parole, your office insures you do not make decisions about the child's probation or parole compliance. An Officer in another district monitors that progression; (e) NET personnel, not foster parents, represent or assist NET on its contract with the State agency. A State case worker may visit your home, is not an employee with whom you work; (f) You have fully complied with the other Code sections: e.g., no official decisions about foster care; foster contract publicly notice and bid; filing of disclosure, etc.; (g) Mrs. Fisher, also a State employee, has fully complied with the Code, so needs no waiver.

Based on the total circumstances, the public concerns--improper use of public office; undue influence on colleagues; or preferential treatment—are too remote to require a literal application of the law.

We grant a waiver for you to remain a foster parent as long as you are not involved in overseeing your foster child on probation and parole compliance. If the parameters of your State employment change, you may return to the Commission for additional advice.

### **Original signed**

**06-48 - General Guidance on State Contracts:** A State employee sought guidance on restrictions on State employees contracting with their own agency. He did not plan to do so, but wanted guidance if the issue arose for now and the future. He did not ask for any waiver if there was a bar to such contracts. The law is clear that a State employee cannot contract with their own agency, 29 Del. C. § 5805(b)(1), unless a waiver is granted. 29 Del. C. § 5807(a).

**06-47 - Was There a Contract with State?** In e-mail correspondence with an agency representative, Commission Counsel learned that it might be possible that a State employee was privately contracting with their own agency. 29 Del. C. § 5805(b)(1). The agency representative did not think it necessary at this time to seek advice from the Commission. Counsel's duties include the responsibility of bringing suspected violations to the attention of the Commission. 29 Del. C. § 5808(A)(3) and (4). The Commission directed Counsel to contact a Senior Level officer in the agency about the issue of whether the employee was, in fact, contracting with their own agency.

**06-40 – Contracting with a Different State Agency:** A State employee filed a disclosure that showed that he had privately contracted with a State agency. 29 Del. C. § 5806(d). It was not with his own agency, which would have been prohibited. 29 Del. C. § 5805(b)(1). The contract was publicly noticed and bid. 29 Del. C. § 5805(c). In his State position, he was not in any manner responsible for matters pertaining to the private contract. 29 Del. C. § 5805(a)(1). The Commission found that he had complied with the requirement to file a disclosure and that the contract did not result in any conflict.

**06-37 – No Contract with own Agency:** A State employee wanted to contract with her own agency. The statute bars contracting with one's own agency, 29 Del. C. § 5805(b)(1), absent any facts that established a need for a waiver. Waivers may be granted if there is an undue hardship on the State agency or State employee, or the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a). As the contract benefitted the State employee, if awarded, she could not speak on behalf of the agency's need for a waiver. The agency had been given an opportunity to submit facts that would support a waiver on this matter, if it needed such waivers, but no facts were submitted. Absent any facts from the agency establishing a need for a waiver, the Commission would not waive the provision barring her from contracting with her own agency.

**06-04 Private Contract with Own Agency Denied:** State employee wanted to privately contract with her own agency. The law bars State employees from representing or otherwise assisting a private enterprise before the agency with which they are associated by employment. 29 Del. C. § 5805(b)(1). [Note: The Commission previously held that the broad definition of "private enterprise" included private contracts with the State. "Private enterprise" is defined as: "any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property." 29 Del. C. § 5804(7).

**06-04 – Contracting with Own Agency Reconsideration; Again Denied:** A State employee asked the Commission to reconsider its decision, Advisory Opinion 06-04, in which it concluded that it would not grant a waiver for the employee to contract with the employee’s own agency, which is prohibited. 29 Del. C. § 5805(b)(1). The Commission affirmed its previous decision as no facts had been provided by the employee or agency indicating any “undue hardship” that would justify a waiver under 29 Del. C. § 5807(a). The agency had had more than a year to provide such facts.

**01-36 – Contracting with the State: Note: When a waiver is granted, the proceedings become a matter of public record, and are no longer confidential. 29 Del. C. § 5807(a). In the following case, a waiver was granted.**

September 26, 2001

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

**WAIVER GRANTED**

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

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

Dear President George:

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

Where a State official seeks to contract with his own agency, the official then has a “personal or private interest” in the matter. *Commission Op. No. 98-11*. When an official has a “personal or private interest,” the Code requires that he not, in his official capacity, review or dispose of matters related to the contract. 29 Del. C. § 5805(a)(1).

Also, officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. 29 Del. C. § 5805(b)(1). Accordingly, Mr. Mariorano should not participate in his official capacity on matters concerning the contract. However, as he wrote his company’s response to the College’s request for proposals, his actions would constitute representing or otherwise assisting his private enterprise before his own agency.

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

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

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

The public purpose served by prohibiting State officials from contracting with their own agency was noted in a 1971 Court opinion. *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748 (1971). In *Heller*, the Court said that when State officials contract with their own agency the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." The Court noted that, at that time, the State had no conflicts of interest law. Subsequently, the Code of Conduct was passed, and restricted officials from dealing with their own agency. 29 Del. C. § 5805(b)(1). This insures that officials do not use their influence with their agency to affect decisions by their colleagues or employees or use access to information or other influence to obtain preferential treatment, unfair advantage, or unwarranted privileges, private advantage or gain. *Commission Op. No. 00-32*.

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

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

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

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

No facts indicate any hardship on Mr. Mariorano. However, as there were no other bidders, it appears that Del Tech could not go forward with its study tour if Mr. Mariorano’s company is not granted the contract. Accordingly, since the possibility of the contract being awarded out of favoritism, undue influence and the like has been diminished by the College’s actions in publicly noticing and bidding the contract, and as there is a hardship on the agency, a waiver is granted.

**01-22 – Board Member Contracting with State: Note: When a waiver is granted, the proceedings become a matter of public record, and are no longer confidential. 29 Del. C. § 5807(a). In the following case, a waiver was granted.**

July 24, 2001

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

**WAIVER GRANTED**

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

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

Dear Mr. Rose:

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

**(A) Applicable Law**

Honorary State officials are prohibited from reviewing or disposing of matters before the State where they have a personal or private interest. 29 Del. C. § 5805(a)(1). A personal or private interest is one which tends to impair judgment in performing official duties. *Id.* Honorary State officials may not represent or otherwise assist a private enterprise on matters before the agency to which they are appointed. 29 Del. C. § 5805(b)(1).

**(B) Application of Law to Facts**

The Developmental Disabilities Council (“the Council”) is a State agency created to insure self-determination, independence, productivity, integration, and inclusion in community life of persons with disabilities. It achieves its purpose, in part, by issuing mini-grants to persons or entities that can help accomplish its mission. During its most recent mini-grant cycle, it publicly noticed the opportunity to submit funding proposals. The Council received only one

proposal. Theda M. Ellis submitted a proposal on behalf of her employer, the University of Delaware's Center for Disabilities Studies ("the Center"). By law, the Center must have a representative on the Council. 42 U.S.C. § 15025(b)(1)(C)(4)(II). Ms. Ellis serves as its representative.

The Center seeks a Council grant to contract with Phyllis Guinivan and Gary Mears to teach a course to University of Delaware undergraduates, consumers and family members on "Family Support, Self-determination and Disability." Phyllis Guinivan and Gary Mears are also Council members. This means the Council would award the grant to its own member's employer, who will then turn around and contract with two other council members.

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

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

### **(C) Background to the Proposal**

The Center is part of the National Network of Centers for Excellence in Developmental Disabilities Education, Research and Services created by federal law. 42 U.S.C. §15063. Among other things, it trains individuals with developmental disabilities, their families, professionals, para-professionals, policy makers, students, and other community members. *Id.*

Earlier this year, it offered a free six-day course to consumers and parents of children with developmental disabilities on "Family Support, Self-Determination and Disability." The course was advertised Statewide. Though not mentioned in the ad, the Center planned to have students who completed the course serve as instructors for the same course which it now seeks to pay for with the Council's mini-grant. All 25 students who took the course were offered the chance to teach. Ms. Guinivan and Mr. Mears took the course as they have children with developmental disabilities. They were the only ones interested in contracting.

### **(D) Terms of the Proposal**

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

### **(E) "Personal or Private Interests" of Ms. Ellis, Ms. Guinivan and Mr. Mears**

Honorary State officials (appointees to Boards and Commissions) may not review or dispose of matters if they have a personal or private interest which tends to impair judgment in performing official duties. 29 Del. C. § 5805(a)(1). The personal or private interest of Ms. Ellis is that she wrote her employer's proposal. As an employee, she has a duty and vested interest in the proposal she wrote for the Center. See, e.g., *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996) (improper for appointee to participate in decision when his employer was entering a business alliance with applicant appearing before the Board). Ms. Ellis' interest is more direct than the appointee in *Beebe* as her employer (through her) is directly applying for the grant. Similarly, Council members Guinivan and Mears have a "personal or private interest" in the grant as they will benefit financially. See, *Commission Op. No. 00-32* (appointee to Delaware Heritage Commission should not participate in its decision to award him a contract).

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

#### **(F) "Representing or Otherwise Assisting" a Private Enterprise before One's Own Agency**

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

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

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

The question of whether the University of Delaware is an agency of the State is a vexing one because of its mixed proprietary activities and public funding. *Parker v. University of Delaware*, 31 Del. Ch. 381, 75 A.2d 225 (1950); *City of Newark v. University of Delaware*, Del. Ch., 304 A.2d 347 (1973). [However,] "In the contractual area its status appears to have been legislatively defined. In 1964, by specific enactment, the General Assembly conferred upon the University's Board of Trustees 'the entire control and management' of its affairs including 'the manner of awarding contracts.' 14 Del. C. § 5106."

Based on that law, the Court held that the University of Delaware was **not** a "State agency," but a private entity when it engaged in awarding contracts. *Id.* Thus, it is arguable that in this situation, as the Center is contracting, it could be considered a "private enterprise." Assuming it is a private enterprise, the next issue is whether Ms. Ellis "represented or otherwise assisted" the Center before her own agency. Here, Ms. Ellis wrote the proposal she submitted to

her Council. Beyond that, if the Council has questions when it considers the proposal, it wants Ms. Ellis to answer the questions. As she has “represented or otherwise assisted” the Center before her own agency, and might continue to do so if the Council has questions about her proposal, it would violate the Code unless a waiver is granted. It also is possible that Ms. Guinivan and Mr. Mears could end up representing or otherwise assisting the Center before their own agency. By law, the Council must conduct a comprehensive review and analysis of the services offered, including descriptions of how entities funded through it collaborated and contributed to the purpose of the law. 42 U.S.C. 15024(c)(3)(A) and (D). For example, if the Council has to inquire how the grant monies were used by Ms. Guinivan and Mr. Mears; look at whether they properly performed the contract; etc., or if Ms. Guinivan and Mr. Mears have to report on the success of the course to the Council, for the Council to complete its comprehensive review and analysis, then the Council would evaluate its own members’ performance, and the Council members would be addressing their private work before their own Council.

### **(G) Request for a Waiver**

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

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

The purpose of the Code of Conduct is to instill public confidence in the integrity of its government. 29 Del. C. § 5802(1). This is accomplished by setting specific standards to guide the conduct of State employees and officials. 29 Del. C. § 5802(2). The specific standards at issue are: (1) reviewing or disposing of matters if there is a personal or private interest; and (2) representing or otherwise assisting a private enterprise before one’s own agency.

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

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

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

In the context of State officials contracting with their own agency, Delaware Courts have noted that when State officials contract with their own agency the concern is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict

and the like.” *Commission Op. No. 00-32 (citing W. Paynter Sharp & Son v. Heller, Del. Ch., 280 A.2d 748,752 (1971))*.

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

We also note that if the two Council members are permitted to teach the course that 20-45 persons are expected to attend. According to the proposal, attendees could subsequently teach the course. That would mean the Council would not have to continue dealing with its own council members to fulfill subsequent contracts. Those facts serve the public purpose--insuring that the contract is not granted out of favoritism, undue influence, and the like.

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

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

### **(H) Conclusion**

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

**01-04 – Roommate Contracting with State:** The Commission was asked if it would violate the Code if a program director’s roommate contracted with his agency. Based on the following law and facts, the Commission determined that, at a minimum, it would raise an appearance of impropriety.

### **(A) Applicable Law**

No State employee may review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 Del. C. § 5805(a)(1).

No State employee may engage in conduct which will raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect favorably upon the State and its government. 29 Del. C. § 5805(a).

## **(B) Application of Law to Facts**

### **1. Restriction on Program Director's Participation**

A concern was raised by an agency's contract administrator about awarding a State contract to the roommate of a program director who headed one of several sections in a particular branch. The branch chief was aware that the contractor was the director's roommate. The contract purportedly would require the roommate to develop a web site for the branch, including the section headed by the program director who was his roommate. Because the program manager would normally have oversight of that portion of the contract dealing with his section, the contract administrator was concerned that there might be a conflict of interest. That concern was legitimate.

The Code of Conduct prohibits State employees from reviewing or disposing of matters in which they have a personal or private interest which tends to impair independent judgment. 29 Del. C. § 5805(a). Delaware Courts have recognized that a "personal or private interest" can arise from familial relationships, financial interests, business and social relationships, etc. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996) (no direct financial benefit to State official, but decision could affect company which was entering a business alliance with his private employer); *Prison Health Services v. State*, Del. Ch., C.A. No. 13,010, Hartnett, V.C. (June 29, 1993) (no direct benefit to official, but spouse's employer would benefit from contract decision); *Campbell v. Commissioners of Bethany Beach*, Del. Supr., 139 A.2d 493 (1958) (value of decision makers' property could increase from favorable decision for applicant); *Shellburne, Inc. v. Roberts*, Del. Supr., 238 A.2d 331 (1967) (alleging "personal interest" or "conflict of interest" where church of decision maker would benefit from decision).

Here, the director's roommate would receive the direct benefit of the contract, but the benefit would also accrue to their shared household. This was similar to the situation in *Prison Health*. It was also similar to a situation where a State employee gave her roommate State contracts. *Ford v. Department of Public Instruction*, Del. Super., C.A. No. 96A-01-009, J. Gebelein (January 16, 1998) (because of improprieties in the contracting was fired from her job and prosecuted for misconduct in office). The Court specifically noted that the relationship created a "conflict of interest." Thus, a State official need not receive a direct financial benefit from the decision in order to have a "personal or private interest" in the matter. When such interests arise, the official is not to review or dispose of the matter.

Where such personal or private interests exist, the official's participation is improper even if that participation consists only of "neutral and unbiased" comments, and even if the official does not vote on the decision. *Beebe*. Even where the official's participation was "indirect and unsubstantial" the Court held that even such limited conduct was improper. *Prison Health*.

Here, the program director and the branch chief said that the program director had not been and would not be involved in decisions relating to the award of the contract to his roommate. However, the program director said he received an e-mail about the contract. No

facts were given on what the e-mail consisted of, whether it required a decision, etc. It was unclear whether the branch chief sent the e-mail to the program director or had an employee send the e-mail to him. Regardless of how it occurred, it appeared that the branch chief or the staff communicated with the director about the contract. Moreover, at another point, the branch chief said the director's roommate, "talked to me, the fiscal person, and **met with the program directors** just to develop an understanding of the scope of the work" (*emphasis added*). Since the branch chief's statement did not indicate that the particular program director was excluded from that meeting, if he met with his roommate to discuss the scope of the work, then he would be "reviewing or disposing" of a matter in which he had a personal or private interest. The actual conduct appeared to indicate that there were communications with the director about not only the contract, but about the scope of the work. This seemed to contradict other statements by the branch chief and the director that he had not been involved in the contract. However, for purposes of this opinion, we assumed that the director was not in any manner involved in the contract.

## 2. Conduct of the Branch Chief - Appearance of Impropriety

On the face of it, isolating the director from the contract decision--e.g., writing the contract, awarding the contract, overseeing the contract for the scope of work, etc.-- would appear to remedy his conflict as the Code provides that a violation occurs *if* the person who has the personal or private interest reviews or disposes of the matter. However, that is not the end of the inquiry. Not only does the Code restrict the director from reviewing or disposing of the matter, it provides that:

**"Each State employee** ...shall endeavor to pursue a course of conduct which will not **raise suspicion** among the public that he is engaging in acts which are in violation of the public trust and which will not reflect unfavorably upon the State and its government." 29 Del. C. § 5806(a) (*emphasis added*). This is basically a test of whether there is an appearance of impropriety. *Commission Op. No. 92-11*. The significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." 29 Del. C. § 5806(a). Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably. *Commission Op. No. 92-11*.

Accordingly, we looked not only at the director's conduct, but the course of conduct engaged in by each State employee involved in the decision. That required us to consider the branch chief's conduct and whether it would raise suspicion that the public trust was being violated or would reflect unfavorably on the State.

Delaware Courts have long recognized that the awarding of State contracts involves a responsibility to safeguard the public trust. Specifically, the statutes and rules dealing with public contracts are meant to protect the public against the wasting of money. *C&D Contractors v. Delaware Tech. & Community College*, Del. Ch., 318 A.2d 142 (1974); *W. Paynter Sharp & Son, Inc. v. Heller*, Del. Ch., 280 A.2d 748 (1971); *Fetters v. Mayor and Council of Wilmington*, Del. Ch., 72 A.2d 626 (1950). The rules and statutes on obtaining State contracts seek to prevent waste through favoritism. *Fetters*, 72 A.2d at 326. As noted by the Court, the award of State contracts "has been suspect, often because of alleged favoritism, undue influence, conflicts and the like." *Heller, supra*. Consequently, there are statutory provisions and rules to follow in awarding contracts to avoid those suspicions. Here, the very rules and provisions meant to avoid allegations of favoritism, etc., were not followed.

### (a) Three Quote Rule and Lowest Bidder Rule

State procurement laws and rules require that if a contract exceeds a certain threshold the agency must obtain three written quotes. *See, Purchasing and Contracting Advisory Council Rules on Small Purchase Procedure and Thresholds*. The branch chief said the three quote rule applied to this contract, and supplied documents which he said supported compliance with the rule. He said the director's roommate was the lowest of the three bidders.

Delaware Courts have recognized that the public has a desire to see that public officials granting State contracts have work done as cheaply as possible. *Fetters* and *Heller*. Obviously, the contract price plays a role in achieving that goal. However, the fact that someone is the "lowest" bidder does not guarantee the award of the contract. *Fetters; Heller* and *C&D*.

Specifically in *Heller*, where there was a possible appearance of a conflict, the Court said "the saving of money, which is certainly desirable, is not the exclusive test by which a vendor is to be chosen." *Heller*. It said that while awarding the contract to the lowest bidder would save the State \$9,000, such savings could not be said to be more important than the confidence the public must have in the integrity of the agency's decisions. *Heller*. The Court found "there is nothing whatever in his record" to show that the contract resulted from anything other than submitting the lowest responsible bid, but "it is vital that a public agency have the confidence of the people it serves, and for this reason, it must avoid not only evil but the appearance of evil as well." Thus, the dollar amount bid must be placed in the context of whether the branch chief's conduct insured public trust and confidence in the agency's decision.

Was his bid, as a matter of law, the "lowest bid"? Under Delaware law: "A contract cannot be said to have been let to the lowest and best bidder unless all bidders have been invited to bid upon the same specifications." *C&D*. Aside from the Court's recognition that all bidders must bid on the same specifications, the Purchasing and Contracting Advisory Council rules required three quotes on the **same** purchase order. The branch chief's course of action on this contract did not result in all bidders having the same specifications or the same contract/purchase order. The documents he gave the Commission dealt with contracts with the director's roommate, and two other companies ("Company A" and "Company B"). They had three different prices, but clearly were not for the same contract or specifications.

Company A bid on a web site solely for one section of the branch. The proposal in no way responded to a request for bid on a web site for all five branch sections, which was offered to the director's roommate. The branch chief said he later asked Company A about the price for a web site for all five sections, and they reduced their price by approximately \$10,000. He provided a second proposal from Company A which had a lower price. But the text of the proposal did not support the assertion that the lowered price in the second response was in any way a bid for a web site for all five branches. Just like the first response, it dealt only with a site for one section. Certainly, if the second proposal were meant to cover all five branches, there would have been a change in the substance of the response.

The other "bid" the branch chief provided was to develop a web site for a Division of the agency by Company B. It had nothing to do with the five sections of his branch. Rather, it was a bid to build a site on a subject for which his branch had no responsibility. Nothing showed that Company B was asked to bid on a contract for a web site for his five branches.

Finally, the "bid" he provided that was to be the contract with the director's roommate consisted of eight pages of boilerplate materials copied almost verbatim from Company B's

contract. In fact, the branch chief said, "I drafted a simple contract for him to carry out this work." It was clear from the documents the branch chief submitted that he merely took the Division contract for a web site which had nothing to do with his branch and inserted the director's roommate's name and the dollar amount. The eight pages of boilerplate language covered such things as insurance liability coverage; indemnification clauses; licensing standards; compliance with Civil Rights acts and other laws for regarding discrimination; termination process; limits on subcontracting; resolution of disputes; etc. Those pages had no substance of the contract except to say he was to be paid \$35,000 a year.

Attached as Appendix B to the boilerplate contract was the "Service and Budget Description." That three-page document was, again, virtually a verbatim copy of the information submitted by Company B on a totally different web site, merely changing such things as the name and amount. Since the roommate's "contract" was just a copy of Company B's proposal for a totally different web site, it might well raise a question of whether the roommate made a viable bid on the five branch web site, on which he was supposed to be bidding. We assumed that it was.

However, even assuming that the copied document was a viable bid, he couldn't be considered the "lowest bidder." That is because Company A and Company B were never asked to bid on a contract to design a web site for all five branches. Company A was only asked to respond with a proposal on a web site for one section in both instances. Company B was never asked to bid on any contract for the branch. As Company A and Company B did not bid on the same contract and specifications as was offered to the director's roommate, it was clear that he did not give the "lowest bid of three," he gave the **only** bid for a contract for all five branches.

A three quote requirement gives some indicia of integrity and fairness in the decision to award the contract. Complying with that rule aids in removing those long held suspicions that government contracts are awarded out of favoritism because the rule provides an objective measurement of fairness--the price as compared to others. Ignoring that most basic requirement--getting three quotes on the **same** purchase or contract--raises suspicion that there was a violation of the public trust because the very rule that could help remove suspicion of unfair dealings was circumvented.

### **(b) The Need for the Lowest "Responsible" Bidder**

Even if the three companies had bid on the same contract, a State agency is not restricted to dealing with the company who makes the lowest bid. Rather, the law and rules require consideration of factors other than money. Officials must decide if the bidder is the "lowest responsible bidder." *Fetters and C&D*.

Public officers cannot lawfully ask each bidder to make his own plans and specifications and to base his bid thereon, and then, after the bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid. Such a procedure would destroy competitive bidding and give public officials an opportunity to exercise favoritism in awarding contracts. *C&D*.

In dealing with Company A, one branch section met with the company to discuss specific needs for that section's web site. Based on the documents the branch chief submitted, the meeting involved more than just a discussion or meeting with a program manager. It included the agency's computer specialist. Subsequently, Company A submitted a clear and specific proposal identifying such things as the software it would use, definite time tables for completion, end goals such as training classes, training manuals, a series of objectives, etc. Courts have

recognized that when State contracts have plans, specifications, and estimates, and insure that information is passed to all persons interested in bidding, this enables bidders to prepare their bids intelligently and on a common basis. *C&D*. Like the three quote rule, the use of specifications insures fair competition and instills public confidence in the integrity of its government's decision making process because there is some objective information on which the official can base his decision.

That clearly did not occur with the director's roommate. After Company A bid on one section's web site, the branch chief initiated a call, soliciting the director's roommate to give a cost to design a web site for all five sections. The branch chief said he happened to remember him from a meeting some time ago and recalled that he did web site design. The branch chief expressed his own limited knowledge about the technical aspects of web sites. While he said that the director's roommate met with him, the fiscal officer, and the program managers; no facts indicated that he met with the agency's computer specialists who could assist in an area where the branch chief admittedly had limited expertise. Moreover, no definite plans or specifications came from either the phone call to him or the meeting. Further, while the branch chief noticed a substantial difference between the roommate's price and Company A's, he had no idea why there was such a difference. He speculated that it might be because the director's roommate works out of his home and might charge less per hour than Company A. It was pointed out to him that without any specifications in the director's roommate's contract it would be hard to see how the price difference between his costs and Company A's costs were connected to technical content, creative content, or some other aspect of the contract. His response was: "I totally agree."

In other words, without any specifications it could not be ascertained if the bid is lowest, nor can it be ascertained if it is a "responsible" bid. The branch chief said that "sometimes the harder we try to define what the product is that we want to buy, the closer we come to making it unnecessary that we hire someone." He went on to say that: "I can say what it is I want, but I can't design a web site." The problem here is that his agency was certainly able to work with Company A to define what it needed on one section's web site. Specific needs were identified by the agency; specific approaches to those needs were identified by Company A, etc. This shows that there could be specs; that other contractors were required to develop specs based on the agency's needs, etc. Yet, the director's roommate was not asked to develop such specs. In effect, the branch chief asked each bidder to make his own plans and base his bid thereon. He offered Company A the chance to bid for a web site for one section. After receiving that bid, he called the director's roommate and offered a completely different contract--one for all five sections. He then compared the costs of unlike contracts, and proceeded to adopt the plan that had no specifications.

As noted by Delaware Courts, the procedures for selecting a contractor can be destructive of competitive bidding and give public officials an opportunity to exercise favoritism in awarding contracts. Here, the public could well suspect that "competitive bidding" was destroyed because the companies did not bid on the same contract. Moreover, even if they had bid on the same contract, since one contractor did not have to develop any specifications it could not be ascertained whether the bidding was "competitive." If one contractor is not "responsible" for giving any specifications, it is difficult to see how he could be the "lowest responsible bidder."

This is not to say that the director's roommate does not have the ability, expertise, etc., to do the job. Given a true competitive opportunity it was possible he could be the "lowest responsible bidder." However, the branch chief's course of conduct in selecting him denied a

true competition among bidders.

### **(C) Conclusion**

Even if the director recused himself, the branch chief's course of conduct raised suspicions that the integrity in the selection process was compromised. First, he failed to follow procedures to get three quotes on the same contract. That requirement would help insure public trust in the system by insuring fair prices, fair competition, etc., were considered rather than a selection based on non-existent or purely subjective criteria. Second, he failed to get any specifications from the director's roommate. Specifications insure not only that the bidders are bidding on the same contract, but insure a plan that is definitely sufficient so that there is less of a chance that the award is based on something other than the merits. As with the three quote rule, the need for all competitors to bid on the same contract, etc., are meant to instill public confidence in the conduct of its government, circumventing those procedures clearly "raises suspicions" that his conduct violated the public trust.

It is not just a matter of circumventing the rules meant to protect the public trust. The course of conduct he pursued---not only personally soliciting the director's roommate when he knew there was a question about a possible conflict---but then proceeding to shepherd the selection process for him by drafting his contract; not requiring specifications from him while requiring that of Company A; not having him meet with computer specialists who were technically qualified to make decisions, when the branch chief admitted that his own knowledge of the technical aspects of web sites was limited; not being able to produce objective criteria for his selection, etc., raises suspicions that the director's roommate was receiving preferential treatment and that the contract may have been awarded out of favoritism.

Thus, even if the director's conflict were remedied by removing him from the process, the branch chief's course of conduct failed to achieve what the Delaware Courts deem "vital" for a State agency when there is a question of a conflict in the awarding of a State contract--"the confidence of the people it serves." Under those circumstances, the program manager's roommate could not be awarded the contract.

**01-03 – Local Officials Contract with Local Government:** A local official submitted the details of business dealings that his private enterprise had with the town in which he held an elected position, to comply with our prior ruling that he annually file a "full disclosure," pursuant to 29 Del. C. § 5806(d). *Commission Op. No. 98-11*. "Full disclosure" is meant to insure that no conflict of interest arises from such dealings. *Id.* Based on the following law and facts, we find no conflict.

The contract his company had with the town was for less than \$2,000. Such contracts must reflect arms' length negotiations. 29 Del. C. § 5805(c). Arms' length negotiations require sufficient distance between the parties to insure fairness in the transaction, e.g., no self-dealing, no undue influence, fair market price, etc. *Commission Op. No. 98-23*.

Arms' length distance is established in part by the restriction against government officials reviewing or disposing of matters where they have a personal or private interest. 29 Del. C. § 5805(a)(1). This provision prohibits self-dealing. *Commission Op. No. 98-23*. The official said that he did not review or dispose of the decision. Arms' length distance is further established by the restriction on representing or otherwise assisting a private enterprise before one's own agency. 29 Del. C. § 5805(b)(1). This restriction is to insure that officials do not use

their influence with their colleagues and co-workers in their own agency to secure a contract. *Commission Op. No. 98-23*. He identified the agency with which he contracted and it was not his own agency.

A further aid to test for “arms’ length” negotiations is to ascertain how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *Id.* (citing e.g., *Oberly v. Kirby*, Del. Supr., 592 A.2d 445 (1991) (in finding arms’ length negotiations, court noted that “the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions”)). The contract resulted from an emergency when a water main broke and the town’s employees could not handle the repair. He is asked to do emergency work when other contractors are not available or the cost is too high because other companies charge for the travel to and from the work site, while he does not. Thus, an alternative transaction would have cost more.

Finally, he stated that he did not use confidential information in obtaining the contract and/or use his public office to secure the business dealings. 29 Del. C. § 5806(e), (f) and (g). He is entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff’d*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).

Accordingly, he submitted a “full disclosure” as required by 29 Del. C. § 5806(d), and he comported with the Code of Conduct requirements in those dealings.

**01-02 – Spouse’s Business Seeks to Contract with the State:** A State employee’s spouse’s private enterprise wanted to provide services through a State agency. The State employee was not employed by that agency, but in his official capacity he periodically filed court documents for it. The documents related to the services provided by private enterprises, including his spouse’s. The agency told his spouse that she could not do business with it because of her husband’s State job. The agency told her to obtain an opinion from this Commission. Based on the following law and facts, the Commission held that: (1) a private enterprise cannot seek an advisory opinion interpreting the Code of Conduct; and (2) if the State employee did not give opinions on which private company the agency would use, or evaluate the merits of the services of his wife’s company or her competitors, then the Code would not be violated.

**Issue 1: Advisory Opinions to Private Parties:** Can a private enterprise obtain an advisory opinion from the Commission?

Only State employees, officers, honorary officials, or State agencies may seek advisory opinions. 29 Del. C. § 5807(c). Thus, a private person or enterprise cannot. Here, the company owner’s spouse was a state employee, so he could seek an opinion or the agency could have.

**Issue 2: Restrictions on State Employee’s Conduct:** The Code of Conduct does not restrict private enterprises from contracting with the State on the mere basis that a close relative of a State employee owns the private enterprise. Rather, it restricts the conduct of the State employee whose relative owns the private enterprise. Specifically, State employees cannot:

(A) review or dispose of matters if they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 Del. C. § 5805(a)(1). If a “close relative’s” private enterprise will benefit to a lesser or greater extent than other like

enterprises, as a matter of law, the State employee has a “personal or private interest,” and therefore cannot review or dispose of the matter. 29 Del. C. § 5805(a)(2). “Close relative” is defined to include “spouses.” 29 Del. C. § 5804(1).

(B) represent or otherwise assist a private enterprise on matters involving the State before the agency by which they are employed. 29 Del. C. § 5806(b)(1).

Here, the “personal or private interest” arises from the State employee’s spouse’s “private enterprise.” Her company is one of four that provided certain services to a State agency. He did not participate in any way in the agency’s decision on which entity would be selected as the service provider. He did not give the agency advice on those matters. Thus, he did not review or dispose of the matter of which private enterprise the agency selected. Also, no facts suggested that he represented or assisted his spouse’s company before the agency by which he was employed, as he was employed by a State agency other than the one that selected the provider. Even assuming that filing court documents for the agency which selected the provider resulted in being “employed” by that agency, no facts suggested that he represented or assisted his wife’s private enterprise before that agency.

Once the agency selected the provider, the Court must approve it. Within that context, he became involved. He had no discretion or influence on who the agency selected. He did not express any position on the merits of any of the companies which the agency may select. He described his position as the filer of the paperwork as a ministerial function. For a government official to have a “personal or private interest” that tends to impair judgment, the individual must have some ability to exercise judgment. *Darby v. New Castle Gunning Bedford Education Assoc.*, Del. Supr., 336 A.2d 209 (1975). A “matter” is “ministerial” when the duty is prescribed with such precision and certainty that “nothing is left to discretion or judgment.” *Id.* at 211. Here, he had no discretion about which company was selected. He merely filed the paperwork reflecting the agency’s choice. Without discretion on which company the agency would use, his judgment could not, as a matter of law, be impaired. Thus, he could engage in ministerial conduct related to the court filings.

However, if an issue arose and he had to go beyond such ministerial conduct, then he could not review or dispose of such matters. A specific example discussed was that if it came to his attention that any of the service providers were not properly fulfilling their responsibilities, etc., that he should recuse himself from participating, either formally or informally, in those matters. If such a situation occurred, another advisor could be assigned to the matter. Also, if his State duties were redefined, he was advised to further assess his situation.

**Issue 3: Appearance of Impropriety:** State employees may not engage in conduct which may raise suspicion that the public trust is being violated or that will not reflect favorably upon the State. 29 Del. C. § 5806(a). This is basically an appearance of impropriety test. *Commission Op. No. 92-11*. The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant facts that a reasonable inquiry would disclose, a perception that the official’s ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams*, Del. Supr., 702 A.2d 825 (1997).

In deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. *See, e.g., Commission Op. Nos. 97-23 and 97-42*. First, as long as he restricted his conduct as indicated above, there was no actual violation of the prohibitions. Second, he had no discretion on which company was selected, so his judgment could not be

impaired. Third, he would recuse himself from situations where judgment would be involved. Fourth, he was entitled to a "strong presumption of honesty and integrity," under the Code of Conduct. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd.*, Del. Supr., No. 304, Veasey, J. (January 29, 1996).

Based on the totality of the circumstances, the relevant facts indicated that, with the restrictions imposed, he could perform the ministerial function of filing court papers for the agency without it impairing his impartiality and competence.

**00-51 – Contracting with Local Government:** The Code requires that employees and officers with a financial interest in a private enterprise file a full disclosure with the Commission if the private enterprise which they own or are employed by does business with, or is regulated by the State. 29 Del. C. § 5806(d). The Commission reviewed disclosures on the private business dealings of two local government officials, which were submitted to comply with a prior ruling that they file an annual disclosure, pursuant to 29 Del. C. § 5806(d). *Commission Op. No. 98-23*. "Full disclosure" is meant to insure that no conflict of interest arises from such dealings. *Id.* Based on the following law and facts, we found no conflict.

The contracts with the officials were for less than \$2,000. Such contracts must reflect arms' length negotiations. 29 Del. C. § 5805(c). Arms' length negotiations require sufficient distance between the parties to insure fairness in the transaction, e.g., no self-dealing, no undue influence, fair market price, etc. *Commission Op. No. 98-23*. Here, arms' length distance was established in part by the restriction against government officials reviewing or disposing of matters where they have a personal or private interest. 29 Del. C. § 5805(a)(1). This provision prohibits self-dealing. *Commission Op. No. 98-23*. The local officials submitted documentation that they did not review or dispose of the decision.

Arms' length distance is further established by the restriction on representing or otherwise assisting a private enterprise before one's own agency. 29 Del. C. § 5805(b)(1). The restriction insures that officials do not use their influence with their colleagues and co-workers in their own agency to obtain preferential treatment. *Commission Op. No. 98-23*. The officials said that they did not deal with their own agency. Also, a letter from the local government's finance officer expressly identified the agencies that they contracted with and they did not contract with their own agency.

A further aid to test for "arms' length" negotiation, is to ascertain how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *Id.* (citing e.g., *Oberly v. Kirby*, Del. Supr., 592 A.2d 445 (1991) (in finding arms' length negotiations, the court noted "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions")). The financial officer said that, as in the past, prices were checked by several sources within the local government. Specifically, the head of the Department seeking to contract; the Finance Office's purchasing agency; the Accounting Department, and by the Finance Director, reviewed the prices.

Finally, the officials said they did not use confidential information in obtaining the contracts and/or use public office to secure the business dealings. 29 Del. C. § 5806(e), (f) and (g). They are entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v.*

*Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996).

Accordingly, we found they had submitted a "full disclosure" of their business dealings as required by 29 Del. C. § 5806(d), and they had comported with the Code of Conduct requirements in those dealings.

**00-06 & 00-40 – Contracting with School District:** A School District employee was provided with the District's policy on conflicts of interest, which included specific reference to the State Code of Conduct. He signed a statement verifying that he read the policy and that he had a financial interest in a private enterprise. Subsequently, an audit revealed that his private business had contracts with his own District and other State agencies. The District sought an advisory opinion on the possible conflict, providing information from the audit and its own investigation. The request did not have details on all of the contracts, and the District's policy, in some instances, appeared to conflict with the Code of Conduct. The District was notified that the Commission needed more details before it could act, and that some of the information might not be within the District's knowledge, but rather within the employee's. The District then directed the employee to seek an advisory opinion. The details of the employee's private business contracting with his own District and other State agencies are discussed below in applying the law to the facts.

## **I. ISSUES, FACTS AND APPLICABLE LAW**

### **(A) Issue 1: FULL DISCLOSURE REQUIREMENT**

**LAW:** Any State employee who has a financial interest in any private enterprise which does business with any State agency shall file with the Commission a written statement fully disclosing the same. 29 Del. C. § 5806(d). The requirement for such disclosure is a condition of commencing and continuing employment. *Id.*

**FACTS:** The State employee had a financial interest in a private corporation which contracted with a number of State agencies from 1997 through 1999. No written statement of these dealings was filed with the Commission. Thus, the Commission found that the employee's conduct did not comport with 29 Del. C. § 5806(d).

### **(B) Issue 2: REPRESENTING/ASSISTING A PRIVATE ENTERPRISE BEFORE HIS OWN AGENCY**

**LAW:** No State employee may "represent or otherwise assist" a private enterprise with respect to any matter before the State agency by which he is employed. 29 Del. C. § 5805(b)(1). Based on the following law and facts, the Commission found that this provision was violated.

**FACTS:** The District where the employee worked bought some products from the employee's private company. The transcript of the interview notes from the District's investigation stated that the employee did not think his conduct was improper because he did not "solicit" his agency. He confirmed that belief with the Commission. He said that to him, "solicit" meant someone would approach him and ask if he could get them certain items and a price from his company, and they then would try to use that communication more or less to try to get the best price. The remaining circumstances of that transaction are detailed in the analysis below.

ANALYSIS: The Code of Conduct does not use the term "solicit." Rather, it uses the terms "represent or otherwise assist." Those terms are not defined in the Code. The Delaware rules of statutory construction require that terms be read in their context and given their common and ordinary meaning consistent with the manifest intent of the General Assembly. See, e.g., *Commission Op. No. 96-87* (citing, 1 Del. C. § § 301 and 303).

Ordinary meaning: "Represent"--"to act in the place of or for, usually by legal right." Merriam Webster's Collegiate Dictionary, p. 993 (10th ed. 1993); "Assist"--"to give supplementary support or aid to or be present," *Id.* at 70; and "Solicit" -- "to make petition to; to try to obtain, usually by urgent requests or pleas." *Id.* at 1118.

Intent of the General Assembly: In its findings of fact in passing the Code of Conduct, the General Assembly said the purpose was to insure the public's confidence in its government employees and officials by setting specific standards. 29 Del. C. § 5802. The specific standard at issue here is that State employees shall not "represent or otherwise assist" a private enterprise before their own agency. Delaware Courts have noted that when a State official seeks to contract with their own agency, the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). Thus, the restriction is meant to insure that the public does not suspect that a contract was awarded out of favoritism, undue influence, or the like. Having established the ordinary meaning and the public purpose of the Code, the conduct is placed within that framework.

In interpreting a similar provision in the federal ethics law, Courts have noted that when the purpose is to instill public confidence in the government, "otherwise assist" is broadly defined to include even what may be considered "passive action." *United States v. Schaltebrand*, 11th Cir., 922 F.2d 1565 (1991). In fact, Courts have expressly rejected the argument that mere presence as a passive observer does not constitute acting as an agent, attorney or "otherwise representing." *Schaltebrand* (citing *United States v. Coleman*, 3rd Cir., 805 F.2d 474 (1986)). In *Coleman*, the court said that nothing in the legislative history of the federal ethics law supported the argument that "otherwise represents" is limited to "professional advocacy." *Id.* at 480. The *Schaltebrand* and *Coleman* Courts said that mere presence can possibly influence government colleagues. It was noted that a major goal of the Ethics in Government Act was to avoid the appearance of impropriety. In speaking of appearance of impropriety, *Schaltebrand* noted that where a government employee's private enterprise will benefit by a decision by employees in his agency, that kind of conduct can make citizens "suspicious" of their public officials. *Id.* Similarly, the Delaware Code prohibits conduct that may "raise suspicion" that the public trust is being violated. 29 Del. C. § 5806(a).

Here, there was more than mere presence. The State employee is the corporate secretary of the private business. Thus, he legally stood in the place of the corporation. He spoke directly with another State employee at his agency about the order. He said she later approached him and asked how it was going. He shipped the goods to his agency without a purchase order, although he was aware of the requirement. After a number of weeks, he called her and another State employee pursuing payment for the order. He said he shipped without the purchase order because he did not think it would be a State check. However, it appeared that no effort was made to ascertain the real purchaser at the time of the order. The contract was awarded to him without the agency obtaining other bids as required by its own policy. The employee expressed knowledge of that policy, but asked how he would know if bids were obtained since the agency was to obtain the bids. The District had not paid the company

because it believed the business dealing violated the State law on after-the-fact purchase orders and the District's policy requiring three bids when dealing with a State employee. The employee said: "we found out that it was going to be a State check because communications in the office went awry..... Well, when the whole thing washed out, then we realized we needed to have the purchase order and that's when we submitted it."

Whatever the rationale for not knowing who would pay for the goods, the Code of Conduct, through its phrasing- "No State employee... may represent or otherwise assist any private enterprise..."--places the responsibility on the State employee not to represent or assist a private enterprise before their own agency. That responsibility would entail ascertaining if one was dealing with one's own agency, especially when the goods were shipped to the employee's agency and he was communicating about the order with other agency employees. To the extent the State employee asserted that he did not know the statutory requirements, the record showed that he read and signed the policy which specifically referred to the State Code of Conduct. Even assuming he was unaware of the law, in Delaware, ignorance of the law is not generally an excuse. *Kipp v. State*, Del. Supr., 704 A.2d 839 (1998).

Thus, based on the meaning of representing and otherwise assisting, the State employee's personal dealings with his own agency constituted a literal violation of that restriction. Moreover, the public could well suspect that he acted in violation of the spirit or purpose of the law which is to insure contracts are not awarded out of favoritism, undue influence, etc., because he represented and assisted his private enterprise before his own colleagues, contrary to the Code of Conduct, and neither side complied with the procurement procedures (requirement for three bids and purchase order) which they knew to exist.

### **(C) Issue 3: CONTRACTS WITH OTHER AGENCIES--ARMS' LENGTH DEALINGS/PUBLIC NOTICE & BIDDING**

Aside from contracting with his own District, the audit showed that his company contracted with the other State agencies. Between 1997 and 1999, he contracted with seven other agencies. Some contracts were for less than \$2,000, others were for more than \$2,000.

LAW: The Code of Conduct provides that if a State employee or their private enterprise contracts with the State, if the contract is for less than \$2,000 there must be arms' length negotiations and if the contract is for more than \$2,000 there must be public notice and bidding. 29 Del. C. § 5805(c).

(1) Contracts of Less than \$2,000: Was there arms' length negotiations?

FACTS: The State employee's private enterprise contracted with a number of School Districts, other than his own, and with other State agencies from 1997 through 1999. By statute, each School District is considered a separate entity. Thus, while the State employee may not represent or assist his private enterprise before the school district by which he is employed, he may do so with other districts, as long as his conduct comports with other Code provisions. He also contracted with State agencies other than the School Districts. Many of the contracts were for less than \$2,000. Thus, the issue was whether those contracts met the requirement for arms' length negotiations, pursuant to 29 Del. C. § 5805(c).

ANALYSIS: Arms' length transactions are those negotiated by unrelated parties, each acting in his or her own self-interest, which form the basis for a fair market value determination. *Commission Op. No. 97-17*. The Commission has noted that one indicia of whether there is

arms' length negotiations is to compare the price paid with the price likely to be available in alternative transactions. *Id.* (citing, e.g., *Oberly v. Kirby*, Del. Supr., 592 A.2d 445 (1991)). The computer printouts of the contracts did not indicate any information about such matters. The State employee was asked to give the Commission any information on competitive prices. The information submitted consisted of such things as his own price list, his own pricing philosophy, etc. He said that he did not know how competitive his prices were with others in the same business because "we don't make a habit of calling up the competition and finding what prices are out there." He stated that: "We have a catalog price that is suggested by the institute and we delete 10%, 15% from that. That's usually consistent; we don't go any lower than that because of all the overhead involved." But for some of his company's products, he said that the prices are based on quantity and "the higher amount that a person orders, obviously the price changes."

Because the contracts covered a period from 1997-1999, we were unable to ascertain in late 2000 what the market rate would have been in those years to know what price would have been available in alternative transactions. In the context of an advisory opinion, the burden of showing competitive market prices is on the State employee as his obligation is to file a "full disclosure" with the Commission, pursuant to 29 Del. C. § 5806(d). "Full disclosure" means sufficient information for the Commission to decide if the individual complied with the Code restrictions on conduct where a financial interest is involved. *Commission Op. No.98-23*. The State employee said his company's price for catalogue items were usually 10% to 15% off of the catalogue price, while the State contract with the Division for the Visually Impaired listed a 30% discount on items in its catalogue. This may be indicia that his product prices were not competitive with the mandatory State contract. However, as he did not "fully disclose" the business dealings at the time of the contracts (1997-1999), the Commission could not ascertain the fair market price to use as an aid to decide if there were arms' length negotiations, as required by 29 Del. C. § 5805(c). Thus, as to those contracts, the only violation for which there was substantial evidence was the provision requiring State employees with a financial interest in a private enterprise which does business with the State to fully disclose such dealings. 29 Del. C. § 5806(d). We already held that his conduct violated that provision.

(2) Contracts for more than \$2,000: Was there public notice and bidding?

FACTS: Over a period of years, there were several contracts for more than \$2,000 with two agencies. The State employee was asked to provide additional details on whether the contracts for more than \$2,000 were publicly noticed and bid. He questioned how he was supposed to know if an agency publicly noticed and bid a contract. He was informed that if it were publicly noticed and bid, his company would have submitted a response to a request for proposals (RFP). Again, the statute imposes on the State employee the responsibility for complying with the Code--in this instance, not seeking State contracts of more than \$2,000 unless there is public notice and bidding. Apparently, no response to an RFP was completed, as the only information he provided was the price quote, an invoice, a purchase order, etc. He said that an employee from one of the agencies came by his company and asked for a quote. The employee seeking the quote was previously assigned to the same School District as this employee. The audit confirmed that the contracts were for more than \$2,000 and not publicly noticed and bid.

ANALYSIS: Like the requirement for arms' length negotiations for contracts of less than \$2,000, the purpose of requiring public notice and bidding if a State employee seeks a State contract for more than \$2,000, is to insure that State employees are not awarded contracts out of favoritism, undue influence and the like. The public could well suspect that since the contract

dealings were through an employee who previously worked at the same School District, and the Code of Conduct requirements for public notice and bidding were not met, that the contract was awarded out of favoritism. Accordingly, we find a violation of the restriction against a State employee seeking a contract with a State agency of more than \$2,000 when the contracts were not publicly noticed and bid.

### (3) Contracts with State Agencies Since the Audit

Before the Commission meeting, the State employee was asked to provide any additional information on contracts his company has obtained with the State since 1997-1999. No additional information was provided by him. However, the Commission obtained a more recent printout of his company's contracts with the State. It showed that in 2000, his private enterprise had five contracts with four State agencies for less than \$2,000. As those were not with his own agency, there was no violation of the provision against representing or assisting before one's own agency. As they were less than \$2,000, public notice and bidding was not required. However, arms' length negotiations were required, but, again, insufficient facts were available on what the going market rate would be. Again, we found that while there was insufficient evidence to decide if there were arms' length negotiations, there was sufficient evidence to hold that the State employee failed to comply with the requirement to file a full disclosure with the Commission.

## II. CONCLUSION

Based on the above facts and law, we found that the State employee's conduct violated the following Code of Conduct provisions:

- (1) the restriction on State employees "representing or otherwise assisting" a private enterprise before his own agency, 29 Del. C. § 5805(b)(1);
- (2) the restriction on State employees seeking a State contract of more than \$2,000 when there was no public notice and bidding, 29 Del. C. § 5805(c);
- (3) the requirement for State employees to file a full disclosure with the Commission when they have a financial interest in a private enterprise, 29 Del. C. § 5806(d).

Violations of (1) and (2) above can result in up to one year in prison and/or up to \$10,000 in fines. 29 Del. C. § 5805(f)(1). However, having considered all the facts, we concluded that based on the law and the facts we would not refer the matter to the Attorney General as is authorized by 29 Del. C. § 5807(d)(3) and § 5809(4). Rather, based on the particular facts, we found that the violations were sufficient to warrant a recommendation for a written reprimand by his District.

Based on past activities, it appeared that his business may in the future do business with the State. He needs to remain aware of the State Code of Conduct provisions discussed herein, and fully comply with the statutory restrictions on his conduct. Moreover, he must meet the requirement to fully disclose future business dealings with the State, as "the filing of such disclosure statement is a condition of commencing and continuing employment or appointed status with the State." 29 Del. C. § 5806(d) (emphasis added). Pursuant to the Commission's authority to provide assistance to State agencies under 29 Del. C. § 5809(10), it also was recommended that the agency review its policy to insure that it was not in contravention of the State Code of Conduct.

**99-53 – Part-Time Contract with Another State Agency:** A State employee wanted to privately contract with a State agency, other than her own. The Code of Conduct requires that a State employee who has a financial interest in a "private enterprise" which does business with any State agency must file a "full disclosure" with the Commission. 29 Del. C. § 5806(d). "Private enterprise" includes private contracts entered into by State employees with a State agency. *Commission Op. No. 94-10*. "Full disclosure" requires sufficient information for the Commission to decide if the State employee's business interest raises a conflict of interest. In deciding that a conflict of interest did not exist in her situation, the Commission based its opinion on the following law and facts:

(A) State employees may not review or dispose of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties. 29 Del. C. § 5806(a). Here, the personal or private interest is the financial interest in a private contract with the State agency. She said that in her official capacity she did not review or dispose of the contract decision. In fact, the contract was not issued by her division or agency, as it was issued by another agency. The substance of the contract was for her to conduct medical chart audits as required for: (1) clients of the agency who filed grievances about medical care and (2) departmental concerns. These were not matters that arose in her full-time State employment.

(B) State employees may not represent or assist a private enterprise before the agency by which they are employed. 29 Del. C. § 5806(b). Here, she was contracting with another agency, and would not be representing or assisting her private enterprise before her own agency.

(C) If a State employee contracts with a State agency, the contract must be publicly noticed and bid if it is for more than \$2,000; if for less than \$2,000, "arms' length negotiations" are required. 29 Del. C. §5805(c). The agency said it would pay her on an "as needed" basis, with \$1,800 being the maximum amount she could earn during a year. Thus, arms' length negotiations were required. Arms' length transactions are those negotiated by unrelated parties, each acting in his or her own self-interest; which form the basis for a fair market value determination. *Commission Op. No. 97-17*. To test for "arms' length" negotiation, it must be ascertained how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *Id. (citing e.g., Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991) (in finding arms' length negotiations, the court noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions"))*. She would be paid \$50 per hour, and said the average rate for such services were \$75-\$150 per hour.

(D) The Code restricts State employees from having any interest which may be in substantial conflict with the State employment. 29 Del. C. § 5806(b). Moreover, their other employment is restricted if it may result in: (1) impaired independence of judgment in performing 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. *Id.*

She would audit medical charts and anticipated that her audits would result in her being called as a witness in a grievance proceeding or litigation. The Commission has held that to insure there is no "substantial conflict" with performing official duties, the individual should not perform functions related to the outside employment during the hours when the individual is obligated to be performing State duties. *See, e.g., Commission Op. Nos. 95-13, 95-30, 95-39, 96-48*. As litigation most likely would occur during a normal workday, and the time to prepare as

a witness to testify about government records could be time-consuming, she was asked when she would be able to perform the work. Both she and the contracting agency's representative said that the total number of audits that would be conducted was not substantial. Accordingly, she would perform the work during hours when she was not working for the State, e.g., after normal duty hours; while on leave status, etc.

The issue of whether her judgment would be impaired in performing official duties was addressed by earlier comments that her official duties did not require making judgment decisions about medical chart audits for another agency. Thus, it did not appear that her judgment would be impaired. Nor did it appear that in her State position she would be able to give preferential treatment or make official decisions outside official channels to persons such as the clients whose charts she would audit as her official position did not entail any work with the population which constituted those clients.

Finally, the issue of whether her private contract would result in "any adverse effect on the public's confidence in the integrity of its government," required that we considered the total circumstances. *Commission Op. No. 98-31*. The Commission already concluded that her other employment was not in technical violation of any of the above provisions, regarding reviewing or disposing of matters; contracting with her own agency; etc. Additionally, we discussed with her and the other agency's representative if testifying at grievance hearings or in litigation could place her in direct opposition to the agency because the Commission has held that where a State employee wanted to have outside employment as an expert witness, and that role could result in his testifying against the State, that it would be improper for him to engage in that other employment. *Commission Op. No. 91-19*. Her role as a contractor with the agency would be to review the medical charts and give her opinion on whether certain medical care should be provided. The medical care was provided by another contractor. There could be a difference in opinions between her and the medical care contractor. The agency might be asked to resolve the matter at a grievance hearing or the Court may have to resolve the matter in litigation. Based on those facts, we concluded that, unlike the individual in 91-19, she would not be testifying in direct opposition to the agency.

**99-36 – Disclosure of Contracts of Local Officials:** Correspondence and the financial disclosure worksheets were filed by certain local government officials who had contracted with their local government. The submissions must constitute "full disclosure." "Full disclosure" requires sufficient information for the Commission to decide if a conflict of interest exists. *Commission Op. No. 98-23*. Having reviewed the submissions, based on the following law and facts, the Commission found that the filings constituted "full disclosure" and no conflicts of interest were present.

#### **(A) Applicable Law**

Under the Code of Conduct, the officials may not: (1) review or dispose of matters if they have a personal or private interest which would tend to impair judgment. 29 Del. C. § 5805(a); (2) represent or assist a private enterprise before their own agency. 29 Del. C. § 5805(b); (3) contract with their government unless public notice and bidding requirements or arms' length negotiations requirements are met. 29 Del. C. § 5805(c); (4) use public office to secure business for their private enterprise. 29 Del. C. § 5806(f); (5) improperly use or disclose confidential information; 29 Del. C. § 5806(f) and (g); or (6) hold other employment if it may result in impaired judgment in performing official duties; preferential treatment to any person; official decisions outside official channels; or any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

## **(B) Application of Facts to Law**

None of the contracts were for more than \$2,000. Thus, public notice and bidding were not required. However, arms' length negotiations were required. 29 Del. C. § 5806(c). Arms' length negotiation means "transactions negotiated by unrelated parties, each acting in his or her own self-interest; which forms the basis for a fair market value determination." *Commission Op. Nos. 97-17; 98-23*. Delaware Courts have held that in judging arms' length negotiations, "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Commission Op. No. 98-23 (citing Oberly v. Kirby, Del. Supr., 592 A.2d 445 (1991))*. The local government obtained prices from several sources, other than from the public officials, for small purchases. Additionally, the purchase decisions were reviewed not only by the agency head, but also by the local government's employees who dealt with financing. The information was also submitted at open meetings of the local government's council.

Delaware Courts have held that in judging the fairness of a government contract when a government official seeks the contract, that the price "is not the exclusive test by which a vendor is chosen" because when government officials seek contracts with their governmental entity, the concern is that the award of such contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *Commission Op. No. 98-23 (citing W. Paynter Sharp & Son v. Heller, Del. Ch. 280 A.2d 748, 752 (1971))*. Thus, aside from the procedural precautions, the officials verified that they: (1) did not review or dispose of the matters; (2) did not represent or assist their private enterprise before their own agency; (3) did not use their public office to secure any business dealings for their private enterprise; and (4) did not improperly use or disclose confidential information for private gain, etc. Delaware Courts have also held that in interpreting the Code of Conduct, there is a presumption of honesty by government officials. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304, Veasey, J. (January 29, 1996)*. Also, the individual contracts were for *de minimis* amounts, which reduced the possibility of the appearance that they were using public office for private gain. *Commission Op. No. 98-23*. Additionally, in the case of the contracts with one official, the availability of another reliable contractor that could meet the local government's needs did not exist locally from any other source.

Based on the above law and facts, the submissions constituted full disclosure and no conflicts of interest were present.

**99-03A – State Employee Contracting with Agency to Transport Clients:** A State employee wanted to contract with a State agency to provide transportation to its clients. For the following reasons, the Commission concluded that he could seek the contract with the agency without violating the Code of Conduct.

The Code permits State employees to contract with the government if:

- (A) there is notice and public bidding if the contract is for more than \$2,000. 29 Del. C. § 5805(c);
- (B) the State employee does not represent or assist a private company before their own agency. 29 Del. C. § 5805(b);
- (C) the State employee does not review or dispose of the matter where they have a financial interest. 29 Del. C. § 5805(a);

(D) the State employee files a full disclosure with the Commission when they do business with the State. 29 Del. C. § 5806(a);  
(E) the State employee does not use public office for private gain; 29 Del. C. § 5806(e);  
(F) the State employee's other employment is not in substantial conflict with performing their State job and will not result in: (1) impaired independence of judgment in performing 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).

Here, the contract was publicly noticed and bid. Also, the contract was not with his own agency, and he was not involved with the contracting agency in his State capacity. Thus, he did not represent his private company before his own agency and would not review or dispose of the contract decision on behalf of any agency. Based on those facts, it did not appear that his judgment in performing official duties would be impaired or that he was in a position to make official decisions outside official channels regarding the contract. The contract provided that the agency "intends to contract with any and all companies licensed in the State of Delaware willing to accept the terms and conditions set forth by the Division." Also, he said that the agency would give its clients a list of all contractors so they could call any company they desired. Thus, it did not appear that his private company would receive any preferential treatment in the contract decision. Further, he would not work on the contract during hours when performing State duties. His drivers would provide the actual transportation, so he would not be called to provide transportation while on State time.

**99-03B – Contracting with State Agency—Waiver Granted:** The Commission may grant a waiver to Code prohibitions if the literal application of the law is not necessary to serve the public purpose or there is an undue hardship on a State employee, officer, honorary official, or a State agency. 29 Del. C. § 5807(a). When a waiver is granted, the proceedings become a matter of public record. 29 Del. C. § 5807(b).

Laurence Raichle, an employee of the Division of Public Health, gave the Commission a letter showing that he had contracted with the Department of Health and Social Services (DHSS) to provide transportation for Medicaid patients who were not in State facilities. He did not have the full contract details and gave authority to the Commission's legal counsel to contact the agency for details. Based on information from: Philip P. Soulé, Sr., Division of Social Services (DSS), Medicaid Director; Kay Wasno, EDS Corporation, Provider Relations Manager; and Mr. Raichle, the Commission granted a waiver so he could fulfill the contract.

The Code permits State employees to contract with the government if:

(A) there is public notice and bidding if the contract exceeds \$2,000. 29 Del. C. § 5805(c);  
(B) the State employee does not represent or assist a private company before their own agency. 29 Del. C. § 5805(b);  
(C) the State employee does not review or dispose of the matter. 29 Del. C. § 5805(a);  
(D) the State employee files a full disclosure with the Commission. 29 Del. C. § 5806(a);  
(E) the State employee does not use public office for private gain. 29 Del. C. § 5806(e);  
(F) the State employee's other employment is not in substantial conflict with performing their State job and will not result in: (1) impaired independence of 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 its government. 29 Del. C. § 5806(b).

Here, the State employee did not review or dispose of the contract decision. Thus, there was no violation of 29 Del. C. § 5805(a). Contract details were fully disclosed as required by 29 Del. C. § 5806(d). Mr. Raichle had no decision making authority in his position as a nurse at the Delaware Hospital for the Chronically Ill (DHCI), Division of Public Health, regarding transportation service for Medicaid patients and did not transport Medicaid clients who were in State facilities because the State transported them. Thus, it did not appear that his judgment in performing official duties would be impaired or that he could obtain preferential treatment for his company from the State; and no facts suggested that he would make official decisions outside official channels, as prohibited by 29 Del. C. § 5806(b). Additionally, before applying to be a Medicaid transportation provider, his company had privately contracted with private nursing homes to provide transportation for their cash clients. They suggested that as he was transporting their cash clients, if he could transport Medicaid clients at the same time from the private facilities it would be a better service contract. He also provided transportation for other activities, such as limousine service to airports, proms, etc. Thus, he did not create the business based upon reliance on a State contract, which diminishes the possibility that he used public office for private gain under 29 Del. C. § 5806(e).

The restrictions which were not complied with were: (1) public notice and bidding; and (2) the requirement not to represent or assist a private enterprise before the agency which employed him. Regarding the public notice and bidding requirement, the employee pointed out, and Mr. Soulé and Ms. Wasno confirmed, that any member of the public could seek to contract as a Medicaid transportation provider. According to the contract, the amount paid to providers was at the sole discretion of the Delaware Medical Assistance Program developed by a formula, based on the Federal Medical Assistance Program and/or Delaware Medical Assistance Program laws and regulations. (Contract p. 2 of 7, ¶ 3). The purpose of the public notice and bidding requirement is to insure that State employees do not obtain an unfair advantage over other competitors for the same contracting opportunity. Since any member of the public could seek the contract and the amount paid was apparently not negotiable, it did not appear that he would be able to obtain an advantage over competitors. Accordingly, the Commission waived that provision for the contract because there was substantial compliance with the other code provisions and because the literal application of this specific provision, in this case, was not necessary to achieve the public purpose. See, 29 Del. C. § 5807(a). However, for any future contracts, he was advised to stay alert to the public notice and bidding requirement when State employees seek State contracts of more than \$2,000.

Additionally, he contracted with DHSS, which was the Department that employed him. The restriction against representing or assisting a private enterprise before one's own agency is to insure that State employees do not obtain an unfair advantage as a result of receiving preferential treatment in decisions made by their colleagues. He said that he heard about the transportation contracts when he was in nursing school; not from the agency, and was not aware that the contract was with DHSS. The record reflected that the initial application was submitted and handled by EDS Corporation. According to Mr. Soulé and Ms. Wasno, EDS was a private company which contracted with the State to provide the service. EDS reviewed the applications for compliance with the contracting standards and then sent its recommendation to the agency. The application did not require applicants to indicate if they were a State employee. No facts indicated that EDS was aware that he was a State employee and worked for the agency which issued the contract. Additionally, the contract was with the Division of Social Services; not with his own Division. Thus, his immediate colleagues were not involved in the decision. The correspondence indicated his selection as a provider came from EDS. There was nothing to indicate that his selection resulted from preferential treatment because, among other things, EDS was not aware that he was employed by DHSS; the selection was not made

by his colleagues; and as noted, the amount paid was formula driven so he would not be able to negotiate a more favorable contract because of his State position.

The Commission noted that the EDS letter stated that the contract was with DHSS and the actual contract clearly stated that the contract was with DHSS. A more careful reading of those documents may have alerted him to the fact that the contract was with his own agency. However, he stated that he was not aware of the statutory restrictions. He said that when he mentioned his transportation business to a co-worker, the co-worker pointed out that he might want to come to the Commission to insure there was not a problem. While he had entered the contract, he had not provided any services, and immediately came to the Commission. Nothing indicated any intentional violation.

Based on those facts, while the letter of the law may have been violated, the spirit of the law--to insure that State employees do not obtain an unfair advantage over competitors or through contracts as a result of their State employment--was not violated and the Commission, therefore, granted a waiver.

**99-01 – Local Government Official Contracting with Local Government:** The State Code of Conduct applies to local governments which do not adopt their own Code of Conduct. 68 Del. Laws, c. 433 § 1. Thus, officials of such local governments must fully disclose business dealings with their government entity. 29 Del. C. § 5806(d). "Full disclosure" means providing sufficient details for the Commission to decide if the Code of Conduct was followed. *Commission Op. Nos. 98-11 & 98-23.*

Here, a town's representative and its official submitted a "Worksheet for Filing Disclosure of Financial Interests," and other information on three contracts which the official's company performed for the town: one for less than \$250; one for just over \$400; and one for just over \$325. Such contracts require "arms' length negotiations." 29 Del. C. § 5805(c). "Arms' length negotiations" means that "unrelated parties negotiated the contracts, each acting in his or her own self-interest, which forms the basis for a fair market value determination." *Commission Op. Nos. 98-23 & 97-17.* Also, Delaware courts, in ruling on arms' length negotiations, have said: "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id. (citing Oberly v. Kirby, Del. Super., 92 A.2d 445 (1991)).*

The official did not review or dispose of the matter in his official capacity and did not represent his private enterprise before his own agency; and filed a full disclosure as required by the Code. See, 29 Del. C. § 5805(a), (b), (c), § 5806(d). Regarding an alternative transaction, the town's representative said that in those types of contracts, when other firms were brought in, they charged not only for the actual work, but for man-hours for traveling to and from the site, and while at the site. He charged only for materials and labor at the sites. The town's representative said its employees did not have the expertise to perform the work and the nearest company he could have called would have been from Dover. As that firm would have charged man-hours for the travel time to and from and at the site, the official charged less than could have been obtained from an alternative transaction. Those facts did not create the appearance that he used his public office for private gain as prohibited by 29 Del. C. § 5806(e). Based on those facts, the Commission found no violation.

**98-23 – Local Officials Contracting with Their Local Government:** A local government asked how often, and with what detail, its officials must submit financial disclosures to comply with the "full" disclosure requirement when officials do business with their governmental entity.

Based on the following, the Commission concluded that the disclosures by the four local officials whose circumstances are discussed below, should file annually, unless situations arose where the Code of Conduct could not be followed. In that case, they should immediately notify the Commission so it could consider whether to grant a waiver. Also, their disclosures should not be prospective; should have more information; and should be personally completed and signed by the local officials, to comply with “full disclosure.”

## **I. Applicable Law**

As the local government had not adopted its own Code of Conduct, its employees and officials were subject to the State Code of Conduct. 68 Del. Laws. c. 433 § 1. Thus, they must file “a written statement fully disclosing” financial interests in a private enterprise subject to the regulation of, or doing business with, the local government agencies. 29 Del. C. § 5806(d). The disclosure shall be confidential and shall not be released, except as necessary to enforce the Code. *Id.* The filing shall be a condition of commencing and continuing employment. *Id.*

## **II. Frequency of Disclosure and “Full Disclosure”**

The Code does not say how often disclosures must be filed, so the Commission based its decision on a “particular fact situation.” 29 Del. C. § 5807(c). Thus, decisions on how often individuals must file must encompass the facts of that person’s business dealings with their government entity, which can only be known through disclosure.

As the statute does not define “full” disclosure, the plain and ordinary meaning is used, consistent with the manifest intent of the General Assembly. 1 Del. C. § 303, 301. “Full” implies the inclusion of everything that is wanted or required. *Merriam Webster’s Collegiate Dictionary*, p. 471 (10th ed. 1989). In the context of the General Assembly’s intent, “full” disclosure would include everything needed for the Commission to decide if the expressed intent of the General Assembly is achieved. That intent is for government employees/officers to “avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.” 29 Del. C. § 5802(1) and § 5806(a). Where government officials seek contracts with their governmental entity, the concern noted by Delaware Courts is that the award of such contracts “has been suspect, often because of alleged favoritism, undue influence, conflict and the like.” *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971).

When the General Assembly enacted the Code of Conduct, it said that government employees and officials should not act in an official capacity on matters where the employee or official has a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independent judgment, and should avoid even the appearance of impropriety. 29 Del. C. § 5811(2); 29 Del. C. § 5805(a); 29 Del. C. § 5806(a). To implement that purpose, the General Assembly adopted specific restrictions on conduct when the individual has a financial interest. See, e.g., 29 Del. C. § 5805(a) (cannot review or dispose of matters if there is a personal or private interest (including financial interests) which tends to impair independent judgment); 29 Del. C. § 5805(b) (cannot represent or assist private enterprise before agency associated with by employment or appointment); 29 Del. C. § 5805(c) (cannot bid on government contracts of more than \$2,000 without public notice and bidding); 29 Del. C. § 5806(b) (cannot have any interest in a private enterprise in substantial conflict with the proper performance of duties in the public interest).

While restricting official conduct where financial interests are involved, the General

Assembly also said it is: “necessary and desirable that citizens be encouraged to assume public office and employment, and that therefore, the activities of officers and employees should not be unduly circumscribed.” 29 Del. C. § 5802(3). Thus, to encourage citizens to assume public office, the General Assembly allows government officials to have business dealings with government agencies (assuming no conflict), but requires full disclosure of those dealings. That disclosure requirement should not be read as imposing a penalty on citizens who assume public office. Rather, it is a way to balance public concerns of alleged favoritism, undue influence, conflict and the like, without “unduly circumscribing” the activities of public officials.

Thus, “full disclosure” requires sufficient details for the Commission to decide if the official complied with the Code restrictions on official conduct where a financial interest is involved. Logically, common details are needed in all disclosures: (1) individual’s name and official capacity; (2) the financial interest (e.g., contract, grant-in-aid, etc.); (3) name of private enterprise; (4) contract amount and duration; (5) agency issuing the contract, etc. Most important are details which permit the Commission to decide if there is compliance with the Code. For example, if the contract was less than \$2,000 was there an arms’ length transaction? If more than \$2,000 was there public notice and bidding? Did the official avoid reviewing or disposing of matters where there was a financial interest? Did the official avoid representing or assisting the private enterprise before his own agency, etc?

### **III. Applying the Law to four Officials who contracted with their local government**

Regarding the contracts with the officials, the written disclosures did not appear to be “full disclosure” for a number of reasons: (1) no indication of the position the officials held with their local government; (2) no indication of the amount of each contract; (3) no indication of the actual number of contracts to which the information referred; (4) no indication of the duration of each contract, etc. More importantly, there was no information to aid the Commission in deciding if the individuals complied with the Code. That is because the documents submitted were primarily **prospective**, reflecting no specific contract information; only what they expected would occur if a contract opportunity arose. Because “full disclosure” requires the information needed to decide if the individual has complied with the Code, “full disclosure” cannot occur when the information is merely speculative.

In later discussions with the local government’s representative, additional information was provided that was not in the written statements. That information is used to illustrate what to include in disclosures.

**A. Arms’ Length Negotiations** -- Arms’ length transactions are those negotiated by unrelated parties, each acting in his or her own self-interest; which form the basis for a fair market value determination. *Commission Op. No. 97-17*. To test for “arms’ length” negotiation, it must be ascertained how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. *Id.* (citing e.g., *Oberly v. Kirby*, Del. Supr., 592 A.2d 445 (1991) (in finding arms’ length negotiations, court noted that “the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions”). Here, the local government had instructed its agencies to obtain prices from several sources, other than the public official, for small purchases of \$200-\$300 or more. That aids in judging the fairness of the transaction, but price “is not the exclusive test by which a vendor is chosen.” *Heller*, 280 A.2d at 751 (upholding DNREC decision not to contract with appointee to its Fish and Wildlife Council to avoid allegations of favoritism and undue influence although he was lowest bidder). Thus, the disclosure should also include details on:

**1. Representing or Assisting a Private Enterprise before the agency by which employed** -- This restriction aids in insuring that officials do not use their influence within their own agency to affect the decisions of their colleagues or employees. It was clear that one local official did not provide services from his private enterprise to his own agency. The remaining officials had included only prospective, speculative information. Prospective, speculative disclosure statements do not (and could not) provide details on whether the officials who contracted with their local government had observed this restriction.

**2. Reviewing or Disposing of Matters in Which there is a Personal or Private Interest** -- This restriction is to prevent "self-dealing." Prospective, speculative disclosures do not (and could not) address this issue.

**3. No contracts of \$2,000 or more unless there is Public Notice and Bidding** --Openness in government contracts reduces suspicions of favoritism or undue influence. Prospective, speculative disclosures do not (and could not) indicate if contracts with these individuals were greater than \$2,000 and, if so, whether the public notice and bidding requirement was met.

**4. Engaging in Conduct which will raise a suspicion among the public that the public interest is being violated** -- This is basically an appearance of impropriety test. Substantial information was provided at the Commission's meeting that was not in the disclosure statements which aids in addressing the issue.

First, the total contracts/purchases from one official's firm were: \$277 in 1996; \$709 in 1997; and \$64 in 1998. The totals reflect *de minimis* purchases. When government employees receive things of *de minimis* value, the likelihood of the perception that they are turning their public position into a private advantage is diminished. *Commission Op. No. 97-40*. Also, the local government did business with the company before the individual became a government official.

A second official, during that same time, received: \$694 (1996); \$6,000 (1997); and \$640 (1998). The 1997 jump over usually *de minimis* amounts was due to a special project. Also, during that time, the local government did business with other providers of the same type of services in the amounts of: \$29,595 (1996); approximately \$25,000 (1997); and \$16,000 (1998). Thus, it did not appear that the government's purchases of these services favored the official over competitors.

A third official, had few, if any, competitors for the type of services his firm provided. He received \$6,346 (1996); \$31,000 (1997); and \$530 (1998). The government agency which used his services tried to use other companies but could not find another local company able to do this type of work. When it used an out of state firm a number of years ago, the local government had to pay an employee for a day to drive there and wait for the work to be done. Also, there was usually a wait to get the work scheduled. Conversely, the government official recognized the local government's need to get its equipment operating as soon as possible and made the government's request a high priority. Those facts showed a hardship in obtaining other contractors, and demonstrated that the contracts did not flow to him out of preferential treatment. The 1997 jump was because of a one-time special project. The contract was entered before the individual became a government official, diminishing the possibility that it resulted because of his official position.

Regarding the fourth official, local government agencies made small purchases for

different offices, with approximately 150 purchases each year. His firm received: \$18,000 (1996); \$22,000 (1997); and \$2,590 (1998). He had provided services to the local government for more than 20 years--long before he was elected. Again, this diminished the possibility that he used his official position to obtain the contracts.

The local government had specific procedures for dealing with the companies owned by the officials to reduce any perception of preferential treatment. As previously noted, the agencies were to obtain prices from additional sources for purchases of \$200-\$300 when dealing with the companies. Where the companies were not involved, the agencies followed the local government's procurement law which required prices from several sources if the purchase was for more than \$3,000. As noted, that aided in establishing arms' length negotiations and diminished allegations of favoritism or undue influence. The dealings with the companies were reviewed not only by the agency's purchasing agent, but also the accounting department. The head of the government's finance section then reviewed it and provided a list to the local government's Council before payment. The information provided was public information. The review was undertaken by a number of people and the availability of the information to the public aided in eliminating suspicions that the officials were violating their public trust.

#### **IV. Conclusion**

Based on all of those facts, the Commission concluded that the individuals should fully disclose their dealings with their local government annually if there was no substantive change in the procedures used to review the purchases and used to inform the public. However, if either the individual or the agency could not comply with the Code, then the Commission must be notified immediately. For example, if an emergency arose leaving the agency without time to publicly notice and bid a contract of more than \$2,000 that was awarded to a public official, then it should be immediately disclosed so the Commission could decide if a waiver should be granted.

As a final note, the Commission realized that the information regarding the local government's procedures and the background on the local government's dealings with the private enterprises was information which people in accounting, finance or procurement would be more likely to have than the individual officers. While it was particularly helpful in addressing the appearance issues, we must emphasize that there was other information to be disclosed which was within the public officers' knowledge. Specifically, the critical issues of whether, in their official capacity, they reviewed or disposed of matters in which they had a financial interest or whether they represented or assisted their private enterprise before their own agency, were within their knowledge, as it was unlikely that the finance, accounting or procurement officials were present for every action they took. It was the individual's responsibility to comply with the Code and it was the individual's responsibility to file a full disclosure. Thus, the individual must insure that the disclosure included enough information for the Commission to review those issues and the individual must personally sign the disclosure.

**98-11 – Local Government Official Contracting with His Local Government:** A local government official who contracted with his local government asked: (1) if the information on his contracts constituted "full disclosure"; (2) how often he should file a "full disclosure"; and (3) if the Commission would grant waivers on two non-bid contracts which exceeded the \$2,000 threshold for public notice and bidding required when a government official contracts with their governmental entity.

A majority of the Commission, based on the following facts and law, concluded that: (1) the information provided constitutes full disclosure; (2) the official should file a “full disclosure” with the Commission once a year, unless the contracts would appear to violate the Code of Conduct, in which case an immediate disclosure must be filed; and (3) waivers were granted on the two contracts which exceeded the \$2,000 limit because of the identified emergencies.

At the Commission meeting, the Town Administrator and the official asked for guidance on how the local government should proceed in the future in non-emergency and emergency situations. Thus, the Commission addressed those particular facts in detail to aid in providing guidance.

### **I. What Constitutes “Full Disclosure”**

The Commission addressed the issue at length in an opinion issued earlier that year. *Commission Op. No. 98-23*. In that opinion, it noted that while all financial disclosure filings will have some common details, e.g., the official’s name, official capacity, contract amounts and duration, agency issuing the contract, etc., the most important details are those which permit the Commission to decide if there was compliance with the Code. Therefore, the Commission addressed the particular provisions of concern and its findings of fact as follows:

#### **A. Restriction on Reviewing or Disposing of Matters Where there is a Personal or Private Interest that Tends to Impair Judgment - 29 Del. C. § 5805(a)(2)(b).**

An official has an interest which tends to impair judgment if he participates in decisions where he has a financial interest in a private enterprise if the private enterprise would be affected to a lesser or greater extent than like enterprises. 29 Del. C. § 5805(a)(2)(b). From the correspondence and statements by the official, the local government’s attorney, and the local government’s administrator, the Commission understood that the official did not participate, in his government capacity, in decisions to contract with his firm. Also, he charged “at cost” prices. Thus, he did not review and dispose of the matter, and no facts indicated that his firm benefitted over like enterprises in these particular situations.

#### **B. Restriction on Representing or Assisting a Private Enterprise - 29 Del. C. § 5805(b).**

Officials may not represent or assist a private enterprise before the agency by which they are associated by employment or appointment. When the local government’s backhoe broke, it was announced at a public meeting that another company estimated more than \$4,000 to fix it. The local official offered to send one of his company’s mechanics to look at the equipment. The Commission first noted that even when an official has a personal or private interest, the Code permits him to respond to questions on the pending matter. 29 Del. C. § 5805(a)(1)(a). However, if his action could be considered representing or assisting his firm before the Council, we granted a waiver based on an emergency, which we discuss below.

#### **C. Arms’ Length Negotiations and Public Bidding Requirements - 29 Del. C. § 5806(c).**

Although government officials may contract with their government, absent conflicts, the General Assembly provided that if: (1) the contract is less than \$2,000, it must reflect arms’ length negotiations; and (2) it is more than \$2,000, it must be publicly noticed and bid. *Id.*

## **(1) The Contracts for less than \$2,000**

During an approximate three year period--May 26, 1995 to the present-- the official had 10 contracts with the local government for less than \$2,000. In 1996, there were seven, primarily to repair water leaks; in 1997 there was one water leak repair; and in 1998 there were two--one for topsoil and one for a hydrant leak repair. The smallest amount was \$45; the highest amount was \$1,255. The total of contracts for less than \$2,000 was \$ 4,236.30.

As noted, a contract of less than \$2,000 must reflect arms' length negotiations. The Commission previously ruled that "arms' length negotiations" means that unrelated parties negotiate the contracts, each acting in his or her own self-interest, which forms the basis for a fair market value determination. *Commission Op. Nos. 98-23 & 97-17*. Delaware Courts, in ruling on arms' length negotiations, have noted that "the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions." *Id. (citing Oberly v. Kirby, Del. Super., 92 A.2d 445 (1991))*. Here, the official charged only his firm's actual costs in fulfilling those contracts. No facts indicated that an alternative transaction would have resulted in an "at cost" price. Here, the former town administrator, now deceased, made the contract decisions. The Commission noted that the Council, on which the official served, was responsible for hiring and firing the town administrator. However, the official who obtained the contracts was not solely responsible for the hiring decision. Moreover, those contracts were *de minimis* in value and were small in number. In interpreting the Code of Conduct, there is a legal presumption of honesty and integrity in public officials. *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)*. Nothing indicated that those small contracts were sufficient to cause the town administrator to use the official's firm to insure his own employment or that he selected the official's firm so it would experience a financial gain, especially as the work was performed at cost.

## **(2) Contracts of More than \$2,000**

In October 1995 and again in September 1997, the official's firm entered two contracts of more than \$2,000 with the local government. Specifically, on October 2, 1995, his firm repaired the local government's backhoe for \$2,426 and on September 23, 1997, he demolished a property for \$4,945.50. The two contracts were not publicly noticed and bid as required by the Code of Conduct. See, 29 Del. C. § 5805(c). The Town believed that the threshold was \$5,000 but now clearly understands that it is \$2,000. The Commission was asked to grant a waiver. Waivers may be granted if literal application of the provision is not necessary to serve the public purpose or there is an undue hardship on the government agency or the government official. 29 Del. C. § 5807(a).

### **(a) The Backhoe Contract**

The Town was in the middle of a job at the town dump when the backhoe broke. The Town Administrator publicly announced at a Town meeting that an estimate of \$4,000 had been given for the repair costs. The backhoe was bought in the 1960s for about \$6,000. The official said he would send his company's mechanic to look at the backhoe for an opinion on what was wrong. His firm repaired the backhoe for \$2,426 and the Town proceeded with the job the next day. Aside from substantial costs savings, the Town had only two Public Works employees. If a project was beyond them or their equipment, the Town must bring in outside help. The official's firm was large, giving it more crews available to respond to emergency work; and was

nearby, which provided a quick response time, as the nearest competitor with similar capacities was in Dover. Additionally, the backhoe was old; had some mechanical difficulties and problems; and according to the town administrator, the Town usually had problems finding a mechanic. The official provided similar services to the Town for more than 15 years before he was elected to public office. He repaired the backhoe "at cost."

Delaware Courts have said that the purpose of public bidding statutes is to open the procurement process to protect the public against the waste of government money, and to prevent such waste through favoritism, because the award of public works contracts has been suspect "because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch. 280 A.2d 748, 752 (1071).

Here, nothing indicated the Town's money was wasted as the use of the official's firm resulted in substantial savings over the estimate given by another firm. However, Delaware Courts have noted that when a government official seeks a contract with his government, "price is not the exclusive test by which a vendor is selected." *Commission Op. No. 98- 23 (citing Paynter, supra)*. Here, the public's interest in the award of contracts was addressed by the following: (1) although not publicly noticed and bid, the backhoe's breakdown, the estimate by another firm, and the discussion to have the official's mechanic look at the backhoe were openly discussed at a public meeting; (2) there was no indication of waste of government funds because his firm performed the work at a greatly reduced cost; (3) the possibility of alleged favoritism, undue influence, conflict and the like were diminished by: the open meeting discussion; the quote from another firm; the fact that the official did not vote on the matter; and his firm did not profit from the contract as the work was performed at cost. Thus, a waiver was granted. In doing so, the Commission noted that when a waiver is granted, the records are no longer confidential. 29 Del. C. § 5807(b)(4). That was additional insurance that the public had access to the details regarding the award of the contract, the reason for non-compliance with the public bidding provision, and the reason for the waiver.

#### **(b) The Demolition Contract**

The "Morgan Property" was dilapidated and abandoned for some time. The Town tried to get the property owner to demolish it, but he could not come up with the funds--an estimated \$25,000. After negotiations, the property was turned over to the Town so it could have the building demolished. When the paperwork was in progress, the adjacent property owner called to say the building was leaning into his adjacent building. Town employees went to shore up the building, but the Town was concerned about liability if the building fell into the adjoining business. It was decided to immediately demolish the building without obtaining bids. The official did not participate in the decision. As previously noted, the Town thought the public notice and bidding threshold was \$5,000. His firm demolished the house for \$4,945.50. Again, he charged the Town only the "at cost" price, and did not make any money from the Town. No facts indicated that the contract resulted from favoritism or undue influence or that the official used his public position to secure personal gain or unwarranted privileges. Thus, a waiver was granted.

#### **D. Restrictions on Conduct if it May Raise Public Suspicion that the Public Trust is Being Violated -- 29 Del. C. § 5806(a).**

Government officials covered by the Code of Conduct are to "endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and

its government.” 29 Del. C. § 5806(a). This is basically an “appearance of impropriety” standard. First, the mere fact that a government official contracts with his government is not, in and of itself, sufficient to raise the appearance of impropriety because the General Assembly specifically provided that such officials may contract with their government, absent any conflict. Rather, it chose to restrict the official’s conduct to insure: (1) there is no self-dealing (e.g., restricted from reviewing and disposing of matters where there is a personal or private interest); (2) the official’s influence on his colleagues is avoided (e.g., restricted from representing or assisting the private enterprise before his own agency); (3) the public concerns regarding waste of government funds are protected (arms’ length negotiations and public notice and bidding); (4) officials do not secure contracts merely as a result of their public position (no self-dealing; no dealing with own agency; arms’ length negotiations and public notice and bidding; no use of public office for unwarranted privileges), etc. Thus, a decision on whether the conduct raises an appearance of impropriety, just like a decision on any other part of the Code, must be based on the particular facts. 29 Del. C. § 5807(c).

Here, the official was not prohibited by the statute from making a profit on contracts with the Town, absent any conflicts, but he chose not to profit by acting “at cost.” Additionally, most of the contracts were not for large amounts: \$45, \$85, \$120, \$130, \$269, \$316.80, \$719, \$1,092.50, \$1,255, \$2,426, and \$4,945.50. The number of contracts per year was also small: 1 in 1995; 7 in 1996; 2 in 1997 and 1 in 1998. Most of the contracts were related to water leaks, and the official’s firm was nearby, had sufficient crews to rapidly respond, and had expertise that the two Town employees lacked. On the larger contracts, which violated the notice and public bidding, the Town identified emergencies for using his firm and he performed both contracts “at cost.” His costs were less than other estimates. Those two situations, where the Code was unintentionally violated, are now a matter of public record and a waiver is granted.

## **II. Frequency of Filing**

We have held that because the Code does not say how often disclosures of business dealings must be filed, we must base our decisions on a “particular fact situation.” *Commission Op. No. 98-23*. In that opinion, we looked to the number and amount of the contracts, the frequency of the contracts, and the circumstances surrounding the contracts and held that those officials should file on an annual basis. There might be other fact situations which would require a more frequent review in order to decide if the Code of Conduct is being followed.

Here, the official contracted with the Town once in 1995 and in 1998; twice in 1997; and seven times in 1996. Most of the contracts were *de minimis*. Based on those facts, the Commission concluded that a yearly filing was sufficient. It further noted that two of those contracts violated the \$2,000 bidding requirement, as the result of emergencies. It previously held that where an emergency precludes officials from complying with the Code, they must immediately notify the Commission of all facts and circumstances pertaining to that contract. *Commission Op. No. 98-23*. That ruling recognized that the Commission usually only meets once a month and cannot be available to rule immediately on every emergency. Accordingly, it again held that if an emergency arose and the contracting source was a government official and the Code could not be complied with, a full disclosure must be immediately filed with the Commission.

## **III. Procedures in Non-Emergency and Emergency Situations**

During the Commission’s meeting, it was asked for advice on how the Town should proceed if it contracted with a government official in a non-emergency or an emergency

situation. The Commission has noted that regarding procurement procedures, “we cannot micro-manage or dictate each procedure that a local government wishes to implement.” *Commission Op. No. 98-23*. However, that ruling on past transactions should aid the town in deciding how to handle similar issues in the future. The Commission also noted that it offers training on the Code, and the Commission’s staff was available for questions. Also, the Commission has drafted a worksheet dealing with contracting with the government.

#### **IV. Conclusion**

For the foregoing reasons, a majority of the Commission concluded, based on the particular facts, that: (1) the information provided constituted “full disclosure;” (2) based on the particular facts, the official should file on an annual basis, unless his contract results from an emergency; and (3) waivers were granted for the two contracts where there was no public notice and bidding.

**98-10 – State Employee Contracting with State Agency:** A State agency publicly noticed a bid request for a building for the State to lease. The lease would be for more than \$2,000. One responder to the competitive bidding process was a State employee. See, 29 Del. C. § 5805(c) (where State employees or officers, or a private enterprise in which they have a financial interest, seek a State contract of more than \$2,000, there must be public notice and bidding).

In the individual’s official capacity, he did not review or dispose of the matter, nor did he represent or assist his private enterprise before the State agency by which he was employed. See, 29 Del. C. § 5805(a) and § 5805(b)(1). The Commission found that his letter detailing the facts, and a copy of the leasing agreement in its entirety comported with the requirement for State employees to fully disclose any financial interest in a private enterprise which does business with the State, as required by 29 Del. C. § 5806(d).

**98-05 - Contracting to Provide Services to Own Agency’s Clients:** The Commission concluded that it would violate the Code of Conduct for an agency’s employees to contract, in their private capacity, with their own agency to provide certain services, during their off duty hours, to persons who were their State clients. It also concluded that, in the situations given, the facts did not warrant a waiver.

The agency asked for guidance, not just for three employees who were seeking to be service care providers, but also for such events in the future. Thus, the Commission addressed at length the various ethical issues raised by such private contracts.

Under the State Code of Conduct, State employees may not:

**(a) Review or dispose of matters in which they have a personal or private interest which tends to impair independence of judgment in performing official duties. 29 Del. C. § 5805(a)(1).** See also, *In re Ridgley*, Del. Supr., 106 A.2d 527 (1954) (where State employee held outside employment and had a personal interest, Court said the reason for not having personal interests which are opposed to public duties is because “no man can serve two masters,” and that in choosing between the State and the outside employment, “the public duty commands precedence.”). See also, *Merit Rule 18.0220* (Merit employees are precluded from having a personal interest in any business transaction within their area of influence in State government).

The particular services which the employees wanted to provide was part of a package available for the agency's clients. One employee who wanted to contract with her agency to provide a service was, in her State job, responsible for arranging the same service for the agency's clients. Also, the agency was in the process of reorganizing its work force and expected to incorporate the responsibility for arranging this particular service for its clients into the duties of other workers. One of those workers also wanted to contract with the agency to provide the service to the State clients. Thus, two of the State employees, in their State job would arrange for State clients to obtain the same service which they would offer in their private capacity. The third employee monitored contractors who provided the service to the agency's clients. She also investigated complaints from the clients about the contractors. One of her relatives planned to operate a facility, and she proposed to be a private consultant to his facility. If her relative became a contractor, she could end up investigating his company, for which she also would be a private consultant.

Even if the agency could avoid having its employees who contract to provide the services in their private capacity from making referrals, investigating complaints, etc., so they would not review or dispose of such matters, this restriction is only one of many which the proposed activity appeared to violate.

**(b) Represent or assist a private enterprise before the agency which employs them. 29 Del. C. § 5805(c).** "Private enterprise" means "any activity conducted by any person, whether for profit or not for profit." 29 Del. C. § 5804(8). *See also, In re Ridgley*, Del. Supr., 106 A.2d 527 (1954) (representation of private client before a State Board which the State employee also represented created "an unseemly appearance").

The Commission has held that private contracts with the State to provide services constitutes a "private enterprise." *Commission Op. No. 94-11*. In two of those instances, the employees planned to directly contract, in their private capacity, with their own agency. Therefore, they would be representing a private enterprise before the agency which employs them, which is prohibited. In the other instance, the employee's relative would own the business and she would be his consultant. As a consultant, she would be prohibited from representing or assisting his firm before her agency.

**(c) Contract with the State for contracts of more than \$2,000 unless there is public notice and bidding. 29 Del. C. § 5805(c).** None of the contracts would be publicly noticed and bid because the price paid to contractors was established by formula. Thus, under this Code provision, the employees would clearly be prohibited from seeking the private contracts, absent a waiver.

**(d) Accept outside employment or compensation if acceptance may result in: (1) impaired judgment in performing 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).**

First, as a minimum, it could appear that their judgment would be impaired because they must make official decisions regarding the same subject matter for which they wished to privately contract. The Commission previously ruled that where State employees wanted to represent and assist private enterprises in areas where they are officially responsible, that such conduct would violate the Code. *See, e.g., Commission Op. Nos. 94-13 and 96-66.*

Second, the clients may assume: (1) the State employee's private services are better than the same services offered by other providers; (2) the agency more carefully scrutinizes them; or (3) the agency endorses the employees' private services. Thus, clients may feel pressured to select the State employee's private services; may think they will obtain preferential treatment if they enter a private contract with an agency employee; or may think they should contract with the agency's employee's private services if they want approval for other State services from the same agency.

Third, it may appear to the public that the employees: (1) are using their public office to secure unwarranted privileges, private advancement or gain because, among other things, the private contracts would not be subject to public scrutiny as the contracts are not publicly noticed and bid; (2) using public office and/or using confidential information for private gain because they have access to the clients and information on the clients that may benefit their private enterprise; (3) will receive preferential treatment when selected for the private contracts; or (4) will receive preferential treatment when the same agency which employs them inspects them. See, 29 Del. C. § 5806(e), (f) and (g).

Fourth, the employees could find themselves in an adversarial relationship with their own agency if their private services do not meet State standards, or if a client filed a complaint. They also could find themselves in an adversarial relationship with the agency's clients if those clients became unhappy with the private services. The Commission has held that where outside employment could result in an adversarial relationship between State employees and their agency, the outside employment would be improper because, as a minimum, it could adversely affect the public's confidence in its government because the public could assume the employee might receive preferential treatment from colleagues who inspect or regulate the private enterprise. See, e.g., *Commission Op. No. 96-41*; *Commission Op. No. 96-66*; See also, *In re Ridgley*, Del. Supr., 106 A.2d 527 (1954) (Court found that State employee's outside employment placed him in an adversarial role which resulted in "the unseemly appearance" of one State employee trying to uphold the State's position, while another State employee was opposing it in his private capacity).

For all the reasons above, the Commission concluded that the employees should not privately contract with their own agency, unless there was a basis for a waiver. The Commission may grant waivers "if the literal application of the provision is not necessary to achieve the public purpose" or would result in "an undue hardship" for the employee or the agency. 29 Del. C. § 5807(a).

The statute's purpose is to instill public respect and confidence in its government through employee conduct which does not violate the public trust or create among the public a justifiable impression that the public trust is being violated. 29 Del. C. § 5802. The Commission addressed the issues which could leave the public with a justifiable impression that its trust was being violated--e.g., preferential treatment, using public office for private gain, etc. To grant a waiver on the basis that the literal application would not serve the public purpose would be contrary to the facts and law.

Regarding any "undue hardship," we previously ruled that "undue" means "more than required" or is "excessive." See, e.g., *Commission Op. No. 97-18*. The agency said that if its employees could not provide the private services, the clients would still have access to the same services through other approved providers. As to the employees, no facts were presented to indicate that they would suffer any hardship if they could not enter private contracts with their own agency. Accordingly, the Commission found the proposed activity would violate

the Code and that the facts did not warrant a waiver.

**97-17 – State Employee’s Company Seeks Contract with State Agency:** A State agency and a State employee jointly requested an advisory opinion on whether the agency could contract with the State employee who worked for another State agency. Accordingly, the State employee was not representing or assisting his private enterprise before the agency that employed him, as such activity may be prohibited by 29 Del. C. § 5805(b)(1). Additionally, the State employee was not reviewing or disposing of a contract decision in which he had a personal interest, in his official capacity, which may be prohibited. See, 29 Del. C. § 5805(a).

The agency wanted to contract with the State employee’s private business which provided certain services for the physically disabled. The agency said it expected to contract for less than \$2,000, but it was possible that a contract might be for more than \$2,000. It gave the Commission a breakdown of its past and anticipated contracts for the services. The list reflected the vendor selected; work site location; amount of each contract; whether each contract needed public notice and bidding; the Fiscal Year in which the work was completed or needed to be completed; and a brief description of the type of work.

When the State contracts with a State employee, the Code of Conduct requires “arm’s length negotiations” for contracts of less than \$2,000. For contracts of more than \$2,000, the Code requires public notice and bidding. 29 Del. C. § 5805(c).

Arm’s length transactions are those negotiated by unrelated parties, each acting in his or her own self-interest; the basis for a fair market value determination. *Black’s Law Dictionary*, p. 100 (5th ed. 1979). To test if there is “arm’s length” negotiation, it must be ascertained how much the agency would have spent to contract with a disinterested third party in a bargained-for transaction. See, e.g., *Oberly v. Kirby*, Del. Supr., 592 A.2d 445 (1991) (in finding arms’ length negotiations, court noted that “the most economically meaningful way to judge fairness is to compare the price paid with the price likely to be available in alternative transactions”). Here, the agency followed the procurement law regarding obtaining bids for small contracts. For example, in the past, it had contacted three providers for bids and sometimes the State employee was the only contractor who responded. The agency was working with a State Board and with a private Association of providers of such services to try to insure that contract opportunities were provided to competitors, and to try to find a larger pool of providers. Under those circumstances, and if the non-bid contract reflected the going rate for the services, the requirements for arm’s length negotiations had been met.

The agency said contracts of more than \$2,000 rarely occurred and it could comply with the Code of Conduct public notice and bidding requirement if it decided to offer the State employee, or other State employees, an opportunity to bid on such contracts. Thus, the public notice and bidding requirement of 29 Del. C. § 5805(c) could be met.

The agency said that occasionally situations arose where the physically disabled required a more immediate response to their needs. In such instances, there may not be enough time to wait for public notice and bidding. However, no specific facts were pending before the Commission regarding such situations. Therefore, the Commission did not rule on whether such situations were a basis for a waiver. If such a situation arose, the agency had the option under the procurement law of using any contractor, other than a State employee, to fulfill the obligation without notice and public bidding on such small contracts. Alternatively, if the agency experienced an undue hardship and needed this State employee to perform the work,

the agency could seek a waiver from the Commission, to be considered on an expedited basis.

Beyond the contract requirements cited above, the Code of Conduct requires State employees with a financial interest in a private enterprise which is subject to the regulatory jurisdiction of, or does business with, any State agency to file with the Commission a written statement fully disclosing the same. See, 29 Del. C. § 5806(d). Such disclosure is confidential and is not released, except as may be necessary to enforce the Code of Conduct. *Id.* The filing of such disclosure statement is a condition of commencing and continuing employment or appointed status with the State. *Id.*

Because the State employee had a financial interest in a private enterprise which was doing business with a State agency, the Commission accepted this request for an advisory opinion, which was co-signed by the State employee, as a disclosure of his financial interest. However, if there was additional information, such as contracts with other State agencies, the State employee should fully disclose that to the Commission.

**91-08, 91-08A, 91-08B – Transportation Contract:** The Code of Conduct prohibits State employees, officers and private enterprises in which the employee or officer has a legal or equitable ownership of more than 10% from contracting with the State (except employment contracts) unless there is public notice and competitive bidding. The Code, in 1991, permitted two exceptions to public bidding: (1) contracts for not more than \$2,000 per year if there were arms' length negotiations; and (2) contracts with a public school district and/or the State Board of Education for transporting school children for the period of July 1, 1990 through June 30, 1991. 29 Del. C. § 5805(c).

The Department of Public Instruction (DPI) and two State employees, sought waivers to permit contracts for transporting school children beyond June 30, 1991, without public bidding. Waivers are permitted if the literal application of the statutory provision in a particular case is not necessary to achieve the public purposes of the ethics law or would result in an undue hardship to any State employee, officer or agency. 29 Del. C. § 5807(a). The Commission granted waivers through June 30, 1992, because: (1) under a separate statute, 29 Del. C. § 6916, such contracts were allowed and there were no complaints about the system; (2) DPI did not realize there was a restriction after June 1991; (3) the Commission was not operative until July 1991, and could not grant relief prior to that date; and (4) the 1991-1992 school year contracts were awaiting approval by DPI and there would be a hardship on the school districts, the public and the students if a waiver were denied.

**NOTE:** After this 1991 decision, the legislature amended the Code of Conduct to resolve the apparent contradictions in the two statutes, 29 Del. C. § 5805(c) and 29 Del. C. § 6916. The Code of Conduct now permits transportation contracts with school districts by employees, their spouse or children as provided for by 29 Del. C. § 6916. However, the exception does not apply to school district transportation supervisors. See, 29 Del. C. § 5805(h).

**91-07 – Contracting for Professional Services:** A State agency requested a waiver of the Code of Conduct which prohibits State employees from contracting with the State without notice and public bidding on contracts exceeding \$2,000 per year. 29 Del. C. § 5805(c). The agency, pursuant to Departmental policy, had contracted for professional services on contracts of less than \$5,000 per year, without competitive bids, before learning of the \$2,000 limit in the Code of Conduct, enacted in January 1991. It then publicly solicited bids for the professional services and sought a waiver to permit a State employee to fulfill the contract until April 30, 1991, when

the public bidding process would culminate in newly contracted services. The Commission rendered no decision on the matter because the contract was entered before the Commission members were appointed in April 1991. The contract with the State employee expired on April 19, 1991. Thus, the matter was moot by the time the Commission held its first meeting.

**91-05 - Contract Bidding by State Employee:** A State employee intended to propose that a certain aspect of work performed by his State agency be placed in the private domain and be subject to the bidding process. The employee anticipated that if the agency placed this work within the private domain, he would want to leave State employment and bid on the work. The Commission heard testimony that the agency was not contemplating placing the work referred to in the private domain. The Commission may issue advisory opinions as to the applicability of the Code of Conduct based on a "particular fact situation." 29 Del. C. § 5807(c). The Commission concluded that because no specific facts were given to the Commission it could not make any findings of fact or conclusions of law. The employee was advised to seek an opinion once he had a firm proposal, but before he resigned his State position.

**91-01 - Contract with State by Spouse:** The Commission was notified by a State employee that the employee's spouse occasionally contracted to perform repair work on State equipment. The Code requires disclosure of a financial interest in any private enterprise which does business with a State agency. 29 Del. C. § 5806(d). Such disclosure is a condition of commencing and continuing employment. *Id.* The employee disclosed that in the previous year, spousal income from State work was less than \$1,000 and during the year of the submission the spouse received no income from State work. The Commission acknowledged the disclosure and advised the employee to make an annual disclosure if the spouse's firm did business with the State.